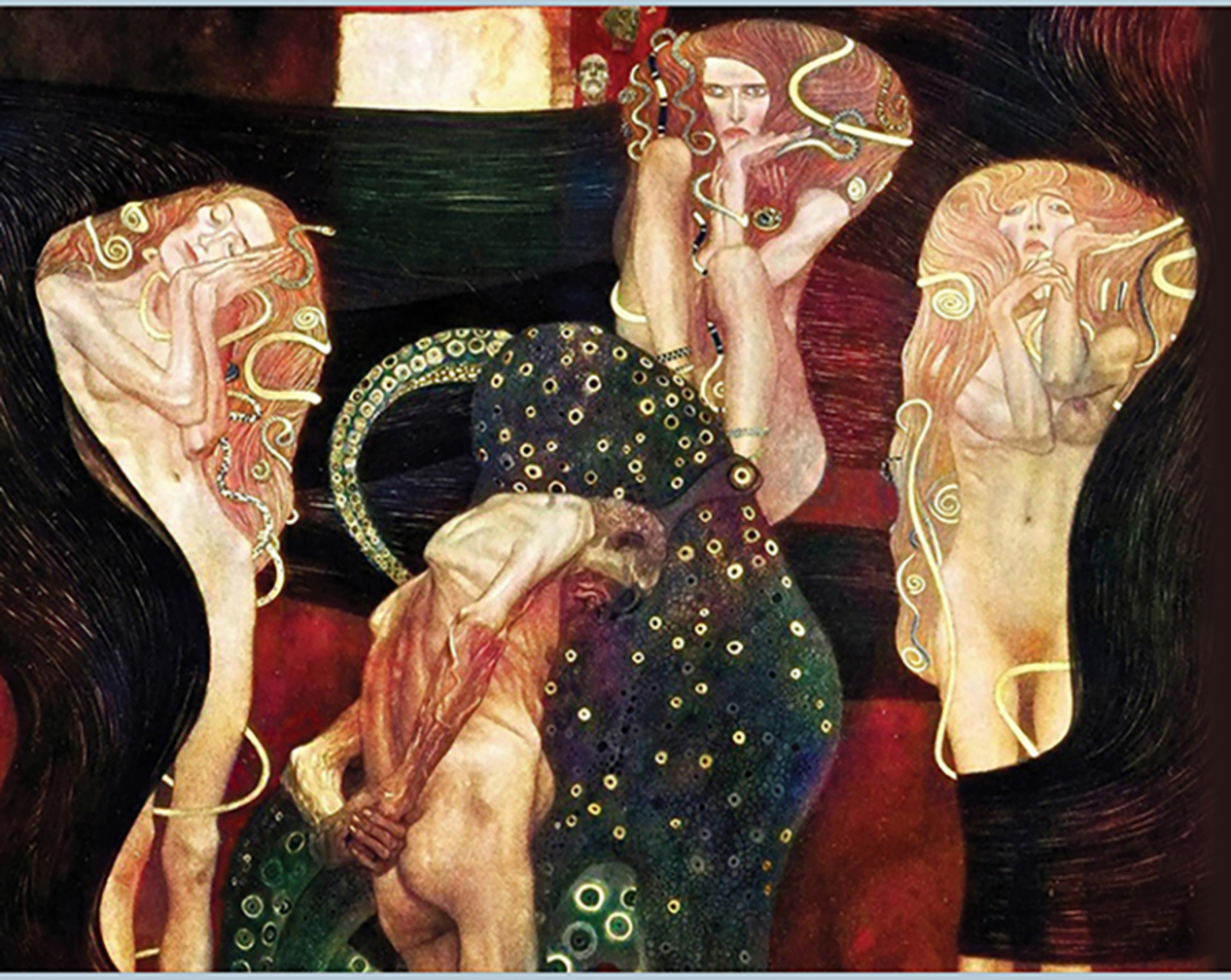
RESEARCH HANDBOOK ON

Law and Utilitarianism

Edited by

Guillaume Tusseau



RESEARCH HANDBOOKS IN LEGAL THEORY

RESEARCH HANDBOOK ON LAW AND UTILITARIANISM

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Research Handbook on Law and Utilitarianism

Edited by

Guillaume Tusseau

Professor of Public Law, Sciences Po Law School, Member of the Institut Universitaire de France and of the Centre Bentham, France

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1. Introduction: putting critical jurisprudence to task

Guillaume Tusseau

1. MAPPING OUT UTILITARIANISM

Utilitarianism is simultaneously extremely appealing – who could object to the ambition to increase the greatest happiness of the greatest number? – and extremely repulsive – who could accept reducing morality to the mere maximisation of pleasure, and thus propose 'the shallowest of all conceivable philosophies of life'?[1] More fundamentally, utilitarianism is at the same time astonishingly simple, straightforward and familiar, on the one hand, and difficult to know, expose – let alone understand – on the other. As Hanna Pitkin tellingly remarks, 'That is the secret of both the infuriating quality and the longevity of [this] theory: capable of being (almost) all things to (almost) all people, it emerges unscathed from ordinary criticism, ever ready to be "applied" anew'.[2]

There is a canon of classical exponents of utilitarian thought – Jeremy Bentham, John Stuart Mill, Henry Sidgwick – confronting an equally classical counter-canon of critiques – Karl Marx, Friedrich Nietzsche, John Rawls, Robert Nozick, Bernard Williams, Ronald Dworkin, or the MAUSS (Mouvement anti-utilitariste dans les sciences sociales). *Ex ante*, a line of anticipatiors ordinarily includes Epicure, Hobbes, Hutcheson, Hume and Helvétius. *Ex post*, a line of continuators ordinarily includes authors such as John C Harsanyi, Richard M. Hare, Peter Singer, Julia Driver, Jonathan Glover, Robert E. Goodin, Brad Hooker, Roger Crisp and Tim Mulgan.[3]

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[1] J Schumpeter, *History of Economic Analysis* (London, George Allen & Unwin, 1954) 133.

[2] H Pitkin, 'Slippery Bentham: Some Neglected Cracks in the Foundation of Utilitarianism' (1990) 18 *Political Theory*, 104–31, 127.

[3] On the history of utilitarianism, see eg L Stephen, *The English Utilitarians*, 3 Vol (London, Duckworth, 1900); B Schultz, *The Happiness Philosophers: The Lives and Works of the Great Utilitarians* (Princeton, Oxford, Princeton University Press, 2017); F Rosen, *Classical Utilitarianism from Hume to Mill* (London, New York, Routledge, 2003); J Driver, 'The History of Utilitarianism', in EN Zalta, U Nodelman (eds), *The Stanford Encyclopedia of Philosophy*, 2022, https://plato.stanford.edu/archives/win2022/entries/utilitarianism-history/; C Heydt, 'Utilitarianism Before Bentham', in B Eggleston, DE Miller (eds), *The Cambridge Companion to Utilitarianism* (Cambridge, Cambridge University Press, 2014) 16–37; JE Crimmins, 'Bentham and Utilitarianism in the Early Nineteenth Century', in B Eggleston, DE Miller (eds), *The Cambridge Companion to Utilitarianism* (Cambridge, Cambridge University Press, 2014) 38–60; R Crisp, 'Sidgwick and Utilitarianism in the Late Nineteenth Century', in B Eggleston, DE Miller (eds), *The Cambridge Companion to Utilitarianism* (Cambridge, Cambridge University Press, 2014) 82–102; K Bykvist, 'Utilitarianism in the Twentieth Century', in B Eggleston, DE Miller (eds), *The Cambridge Companion to Utilitarianism* (Cambridge, Cambridge University Press, 2014) 103–24; C Audard

Perusing the aforementioned *loci classici* offers evidence of the many ways in which utilitarianism has evolved. It has branched out in many, frequently unsuspected, directions.[4] Despite its rather monolithic image, it has been in constant evolution, has undergone changes, and has been refined or adapted in reaction to the – frequently radical – objections it has faced. Being understood for decades as the dominant moral theory naturally imposed a dynamic interaction with competing doctrines. But as the cases of John Austin and John Stuart Mill prove, authors who commonly qualify as utilitarians have also distanced themselves from other representatives of this line of thought. Austin for example gave utilitarianism a conservative orientation and connected the principle of utility with religious commands in ways that were alien to Bentham.[5] John Stuart Mill famously offered a more spiritual and idealist version of utilitarianism than the one proposed by his mentor.[6] Criticism thus came from inside as well as from outside utilitarianism.

This is the reason why defining utilitarianism proves complex. A promising starting point could be Bentham's own effort at identifying the pillars of the doctrine he is frequently credited for inventing or, at least, giving mature form to. Although his 'Article on Utilitarianism'[7] offers more a genealogy of the principle of utility than a full-blown definition, the building blocks of the doctrine are laid down in *An Introduction to the Principles of Morals and Legislation*:

> By 'the principle of utility' is meant the principle that approves or disapproves of every action according to the tendency it appears to have to increase or lessen – i.e. to promote or oppose – the

(ed), *Anthologie historique et critique de l'utilitarisme*, 3 Vol (Paris, PUF, 1999); M Bozzo-Rey, E Dardenne (dir), *Deux siècles d'utilitarisme* (Rennes, Presses universitaires de Rennes, 2011).

4 For general presentations and discussions, see eg G Scarre, *Utilitarianism* (London, Routledge, 1996); R Barrow, *Utilitarianism* (London, Routledge, 2015); JE Crimmins (ed), *The Bloomsbury Encyclopedia of Utilitarianism* (London, New York, Bloomsbury, 2017); K Bykvist, *Utilitarianism: A Guide for the Perplexed* (London, Continuum, 2009); T Mulgan, *Understanding Utilitarianism* (Durham, Acumen, 2007); WH Shaw, *Contemporary Ethics: Taking Account of Utilitarianism* (Malden, Blackwell, 1999); B Eggleston, DE Miller (eds), *The Cambridge Companion to Utilitarianism* (Cambridge, Cambridge University Press, 2014); B Schultz, *The Happiness Philosophers: The Lives and Works of the Great Utilitarians* (Princeton, Oxford, Princeton University Press, 2017); K de Lazari-Radek, P Singer, *Utilitarianism: A Very Short Introduction* (Oxford, Oxford University Press, 2017); AT Forcehimes, L Semrau, *Thinking Through Utilitarianism: A Guide to Contemporary Arguments* (Indianapolis, Hackett Publishing Company, 2019), examining challenges to and defense of utilitarianism with respect to its 'normative principles' ((1) maximising is sufficient; (2) maximising is necessary; (3) objectivism; (4) actualism; and (5) individualism) and 'evaluative principles' ((1) quantitative hedonism; (2) welfarism; (3) proportionalism; and (4) additive aggregation).

5 J Austin, *The Province of Jurisprudence Determined; and The Uses of the Study of Jurisprudence*, ed HLA Hart (London, Weidenfeld and Nicolson, 1954).

6 JS Mill, *Utilitarianism*, 1863, www.earlymoderntexts.com/assets/pdfs/mill1863.pdf.

7 J Bentham, 'Article on Utilitarianism', in *Deontology Together with a Table of the Springs of Action and the Article on Utilitarianism*, ed A Goldworth (Oxford, Clarendon Press, 1983) 283–328.

> happiness of the person or group whose interest is in question. I say 'of every action', not only of private individuals but also of governments.[8]

Testifying to the tensions inside utilitarianism, another major exponent of this current offers another approximation of the doctrine. In his seminal book *Utilitarianism*, published in 1863, John Stuart Mill offers the following definition:

> The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure. To give a clear view of the moral standard set up by the theory, much more is required to be said; in particular, what things it includes in the ideas of pain and pleasure; and to what extent this is left an open question. But these supplementary explanations do not affect the theory of life on which this theory of morality is grounded – namely, that pleasure, and freedom from pain, are the only things desirable as ends; and that all desirable things (which are as numerous in the utilitarian as in any other scheme) are desirable either for the pleasure inherent in themselves, or as means to the promotion of pleasure and the prevention of pain.[9]

Last but not least, in what is frequently presented as the definitive exposition of classical utilitarianism and a basis for the teaching of ethics in the Anglo-speaking world for decades, Henry Sidgwick proposes the following analysis: 'By Utilitarianism is here meant the ethical theory, that the conduct which, under any given circumstances, is objectively right, is that which will produce the greatest happiness on the whole; that is, taking into account all whose happiness is affected by the conduct.'[10]

Confronted with such a blurry moving target, one might very well refrain from asking 'What is utilitarianism?' In any case, anticipating one of Ludwig Wittgenstein's most important teachings,[11] Bentham cautiously warned against the illusion according to which each noun corresponds to a thing.[12] Instead of pretending to offer a clear-cut answer in the form of a definitive definition, one may fruitfully prefer to adopt a paradigmatic approach.[13] This kind of strategy owes much to Eleanor Rosch's theory of concepts.[14] This perspective is based on

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[8] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 11–12.

[9] JS Mill, *Utilitarianism*, 1863, www.earlymoderntexts.com/assets/pdfs/mill1863.pdf, Chapter II.

[10] H Sidgwick, *The Methods of Ethics*, 7th ed (London, MacMillan & Co Ltd, 1963) 411. For an analysis, see eg D Philips, *Sidgwickian Ethics* (Oxford, Oxford University Press, 2011).

[11] See eg L Wittgenstein, *The Blue Book*, www .wittgensteinproject .org/ w/ index .php/ Blue _Book, Ts-309, 1.

[12] J Bentham, *Logical Arrangements*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol VIII, 287; J Bentham, *Essay on Language*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol VIII, 327–9; J Bentham, *De l'ontologie et autres textes sur les fictions*, ed P Schofield, J-P Cléro, C Laval (Paris, Le Seuil, 1997) 86.

[13] See similarly H-J Glock, *What is Analytic Philosophy?* (Cambridge, Cambridge University Press, 2008) 9–16.

[14] E Rosch, 'Natural Categories' (1973) 4 *Cognitive Psychology* 328–50; 'Principles of Categorization', in E Margolis, S Laurence (eds), *Concepts: Core Readings* (Cambridge, London, The MIT Press, 1999) 189–206.

the idea of 'family likeness',[15] which is consubstantial with fuzzy logic. The methodological proposal is to qualify the ambition to establish clearly defined and perfectly watertight categories. These are defined more in terms of clear examples condensing an intuitive and shared *hic et nunc* representation than in terms of boundaries between them. None of the characteristic features of the schematic representation offered by the prototype is necessary or sufficient for the inclusion of an exemplar within a category. As a result, the category may be more or less convincing or more or less doubtful, and several categories may sometimes partially overlap. The identification of one of its members is made by reference to a form of average type which groups together several characteristics considered *hic et nunc* sufficiently numerous in quantitative terms, on the one hand, and sufficiently important in qualitative terms, on the other.[16] The same is valid for other major moral doctrines. Whereas utilitarianism proposes to maximise the value of the consequences of an action, deontologism prescribes any agent to comply with predetermined moral principles indicating what is right and what is wrong, disregarding the consequences, and virtue ethics recommends the agent to choose the action that satisfies a set of values. Starting from a common, widely shared understanding of a core definition of utilitarianism allows identifying clear cases as well as outliers. The latter are more or less far away from the core, so that one has to choose whether they meet the conditions to be considered as utilitarians or rather belong to other currents. These borderline cases are extremely interesting as they represent contact points with other theses and methodologies. They may especially help to identify emerging trends or adaptations and refinements, based on cross-fertilisation between utilitarianism and other doctrines.

Such an approach is especially promising for this collection of chapters, which is bound to be relatively agnostic regarding the exact definition of utilitarianism. No unique definition of utilitarianism has been imposed as a starting point for this *Handbook*'s contributors. Each one has offered their own explicit or implicit, strict or wide, flexible or rigid, generic or technical definitions of utilitarianism. In itself, this plurality is informative, as it testifies to the current plurality of understandings of utilitarianism when it addresses legal issues. Consequently, the book is open to various, multipolar understandings of utilitarianism, based on each one's disciplines, backgrounds, perspectives, projects, interests, purposes or topics.

One has to admit that 'In contemporary ethics, a large number of distinct views fly under Utilitarianism's banner'.[17] Characterising what utilitarianism is, what utilitarians do, what utilitarians claim, what their opponents claim utilitarianism is or what utilitarians do or claim

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[15] L Wittgenstein, *The Blue Book*, www .wittgensteinproject .org/ w/ index .php/ Blue _Book, Ts-309, 27.

[16] See eg R Needham, 'Polythetic Classification: Convergence and Consequences' (1975) 10 *Man* 349–69; T Brennan, 'Classification: An Overview of Selected Methodological Issues' (1987) 9 *Crime and Justice* 201–48; W Ramsey, 'Prototypes and Conceptual Analysis' (1992) 11 *Topoi* 59–70.

[17] AT Forcehimes, L Semrau, *Thinking Through Utilitarianism: A Guide to Contemporary Arguments* (Indianapolis, Hackett Publishing Company, 2019) ix. Sharing this appreciation, see eg C Woodard, *Taking Utilitarianism Seriously* (Oxford, Oxford University Press, 2019) 13, 211; B Eggleston, DE Miller, 'Introduction', in B Eggleston, DE Miller (eds), *The Cambridge Companion to Utilitarianism* (Cambridge, Cambridge University Press, 2014) 1–15, 8; A Baujard, 'Utilitarianism and Anti-Utilitarianism', in G Faccarello, HD Kurz (eds) *Handbook of the History of Economic Analysis* (Cheltenham, Northampton, Edward Elgar Publishing, 2016) Vol 3, 576–88,

according to this widely shared understanding can lead to several approximations. James Wood Bailey, for example, explains that 'Much of the confusion about utilitarianism stems from the fact that it is not a single doctrine but a family of doctrines defined by the following four characteristics: (1) evaluative consequentialism, (2) a theory of the personal good, (3) interpersonal comparability, and (4) redistributive indifference about the good'.[18] According to Krister Bykvist, 'the whole family of utilitarian theories is captured by the equation: 'Utilitarianism = Consequentialism (nothing but the values of outcomes matter for the rightness of actions) + Welfarism (nothing but well-being matters for the value of outcomes).'[19] Christophe Salvat alternatively considers that

> Classical utilitarian philosophy is based on four founding principles: consequentialism, according to which an action is morally good (right) if its consequences are advantageous for the community as a whole; hedonism, according to which an action is considered advantageous if it increases the pleasure (net of pain) of individuals; impartiality, according to which all the interests of individuals must be treated equally; maximalism, i.e. the idea that, once the moral evaluation criterion is known (ie utility), agents are obliged to act in such a way as to maximise the quantity of it.[20]

Although these theses can be regarded as characteristic of a more or less commonly received view regarding the core of the prototype of utilitarianism, Salvat immediately warns: 'However, these principles are not always characteristic of contemporary utilitarianism.'[21]

From a diachronic as well as from a synchronic perspective, thinkers who have an inclination for some of the major tenets of utilitarianism can decide to minimise the relevance of one of these principles or give it up altogether, or alternatively add new ones to the list that tend to modify the equilibrium between these various components. This may be due to their being convinced by one objection to utilitarianism or, in the process of reaching what John Rawls famously described as a reflective equilibrium,[22] by confronting their utilitarian intuitions to new objects or new ethical discussions. This is why it is not exceptional for specialists to refer to a 'utilitarian "spirit"'[23] rather than to utilitarianism as a monolithic philosophy.[24]

576; J Wood Bailey, *Utilitarianism, Institutions, and Justice* (New York, Oxford University Press, 1997) 3, 9; C Salvat, *L'utilitarisme* (Paris, La Découverte, 2020) 30.

[18] J Wood Bailey, *Utilitarianism, Institutions, and Justice* (New York, Oxford University Press, 1997) 3.

[19] K Bykvist, *Utilitarianism: A Guide for the Perplexed* (London, Continuum, 2009) 19.

[20] C Salvat, *L'utilitarisme* (Paris, La Découverte, 2020) 3.

[21] C Salvat, *L'utilitarisme* (Paris, La Découverte, 2020) 3. For other approaches at the list of defining elements, see eg C Audard, 'Introduction', in C Audard (ed) *Anthologie historique et critique de l'utilitarisme* (Paris, PUF, 1999) Vol 3, 1; C Audard, 'Utilitarisme', in M Canto-Sperber (ed), *Dictionnaire d'éthique et de philosophie morale* (Paris, Presses universitaires de France, 2004), 2001–9, 2001–2; T Mulgan, *Utilitarianism* (Cambridge, Cambridge University Press, 2020) 2–4.

[22] J Rawls, *A Theory of Justice* (Cambridge, The Belknap Press of Harvard University Press, 1971) 20–1, 46–53.

[23] C Salvat, *L'utilitarisme* (Paris, La Découverte, 2020) 30.

[24] See eg J Wood Bailey, *Utilitarianism, Institutions, and Justice* (New York, Oxford University Press, 1997) 3, 9; K Bykvist, *Utilitarianism: A Guide for the Perplexed* (London, Continuum, 2009) 2; A Baujard, 'Utilitarianism and Anti-Utilitarianism', in G Faccarello, HD Kurz (eds) *Handbook of the History of Economic Analysis* (Cheltenham, Northampton, Edward Elgar Publishing, 2016)

This family of doctrines has been intensely discussed and debated. Among the classical criticisms raised against utilitarianism are the following, which can only be presented here in outline.[25]

First and foremost, it relies on a clumsy and reductionist analysis of human psychology, portraying individuals as mere selfish calculating organisms.

Second, utilitarianism raises more questions than it provides concrete answers. The nature of the well-being on which utilitarianism insists is an open question.[26] Whereas classical utilitarians proposed to maximise happiness or pleasure, understood as psychological or emotional states of affairs, contemporary utilitarians propose to maximise desires or preferences, which lend themselves more easily to empirical observation. Others distance themselves even from Bentham to the point that they imagine that pleasure is not the only intrinsic good and that values like knowledge or beauty also exist.[27]

Whether individual acts or larger patterns of conduct are assessed is uncertain. A classical distinction that originates in an article by Roy F Harrod opposes act-utilitarianism or direct utilitarianism and rule-utilitarianism or indirect utilitarianism.[28] According to JJC Smart:

> Act-utilitarianism is the view that the rightness or wrongness of an action is to be judged by the consequences, good or bad, of the action itself. Rule-utilitarianism is the view that the rightness or wrongness of an action is to be judged by the goodness and badness of the consequences of a rule that everyone should perform the action in like circumstances.[29]

But Smart adds that several categories of rule-utilitarianism must be distinguished depending on whether the rule in question is the rule that is currently accepted or internalised by the

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Vol 3, 576–88, 576; K de Lazari-Radek, P Singer, *Utilitarianism: A Very Short Introduction* (Oxford, Oxford University Press, 2017) xix; C Woodard, *Taking Utilitarianism Seriously* (Oxford, Oxford University Press, 2019) 13, 211.

[25] For a discussion, see eg O Neurath, 'The Problem of the Pleasure Maximum', in *Empiricism and Sociology* (Dordrecht, Boston, D Reidel, 1973) 113–22; S Harwood, 'Eleven Objections to Utilitarianism', in LP Pojman, P Tramel (eds), *Moral Philosophy: A Reader*, 4th ed (Hackett Publishing Co, 2009), 186–99; J Glover (ed), *Utilitarianism and Its Critics* (New York, Macmillan, London, Collier Macmillan, 1990); K Bykvist, *Utilitarianism: A Guide for the Perplexed* (London, Continuum, 2009) 57–77; C Woodard, *Taking Utilitarianism Seriously* (Oxford, Oxford University Press, 2019).

[26] See eg G Fletcher (ed), *The Routledge Handbook of Philosophy of Well-Being* (Abingdon, Routledge, 2016); G Fletcher, *The Philosophy of Well-Being: An Introduction* (Abingdon, Routledge, 2016).

[27] See eg D Parfit, *Reasons and Persons* (Oxford, Oxford University Press, 1984) 4.

[28] RF Harrod, 'Utilitarianism Revisited', (1936) 45 (178) *Mind* 137–56. See also RB Brandt, *Ethical Theory: The Problems of Normative and Critical Ethics* (Englewood Cliffs, Prentice-Hall, 1959); D Lyons, *Forms and Limits of Utilitarianism* (Oxford, Clarendon Press, 1965); B Eggleston, 'Act Utilitarianism', in B Eggleston, DE Miller (eds) *The Cambridge Companion to Utilitarianism* (Cambridge, Cambridge University Press, 2014) 125–45; DE Miller, 'Rule Utilitarianism', in B Eggleston, DE Miller (eds) *The Cambridge Companion to Utilitarianism* (Cambridge, Cambridge University Press, 2014) 146–65.

[29] JJC Smart, 'An Outline of a System of Utilitarian Ethics', in JJC Smart, B Williams, *Utilitarianism: For and Against* (Cambridge, Cambridge University Press, 1973), www .utilitarianism.com/utilitarianism-for-and-against.pdf, 5-66, 11

population or the majority of the population, on the one hand, or whether the rule is an ideal one.[30] Depending on which is the case, utilitarianism can be more or less intuitive and more or less demanding.

The practicability of measuring utility, or justice more generally,[31] as proposed by Bentham's felicific calculus as well as through Francis Ysidro Edgeworth's 'hedonimetry',[32] has aroused scepticism. Cardinal as well as ordinal measures of utility raise considerable difficulties. As Otto Neurath, for example, wrote, 'We see immediately that we cannot measure human happiness, perhaps only rank it. Even if we should adopt a saying, "Somebody is happier when he has a good meal than when he expects starvation", we should not say that he is, for example, $5^{3/4}$ times happier.'[33] At the collective level, the comparison and aggregation of individual utilities is by no means evident in itself. Moreover, it raises concern as to who might be sacrificed – and to what extent – for the sake of whose greater welfare.[34]

From the viewpoint of political philosophy, despite Bentham's contribution to democratic theory[35] and John Stuart Mill's reflections on representative government,[36] utilitarianism lends itself to technocratic, antidemocratic or authoritarian interpretations. Known as 'government house utilitarianism',[37] these readings of utilitarianism justify the empowerment of a paternalist elite of 'ruling few' who gather information to impose on the 'subject many' their vision of welfare maximisation.

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[30] See eg B Hooker, 'Rule-Consequentialism' (1990) 99(393) *Mind* 67–77; B Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality* (Oxford, Oxford University Press, 2000); T Mulgan, *The Demands of Consequentialism* (Oxford, Clarendon Press, 2001); RB Miller, 'Actual Rule Utilitarianism' (2009) 106 *The Journal of Philosophy* 5–28; S Wolf, 'Two Concepts of Rule Utilitarianism', in M Timmons (ed), *Oxford Studies in Normative Ethics: Volume 6* (Oxford, Oxford University Press, 2016) 123–44; HM Smith, 'Measuring the Consequence of Rules' (2010) 22 *Utilitas* 413–33.

[31] See eg Sujian Guo, Xi Lin, J-M Coicaud, Su Gu, Yanfeng Gu, Qingping Liu, Xuan Qin, Guodong Sun, Zhongyuan Wang, Chunman Zhang, 'Conceptualizing and Measuring Global Justice: Theories, Concepts, Principles and Indicators' (2019) 12 *Fudan Journal of the Humanities and Social Sciences* 511–46.

[32] FY Edgeworth, *Mathematical Psychics: An Essay on the Application of Mathematics to the Moral Sciences* (London, C Kegan Paul & Co, 1881) 98–102. See also K Menger, *Moral, Wille und Weltgestaltung: Grundlegung zur Logik der Sitten* (Wien, J Springer, 1934).

[33] O Neurath, *Foundations of the Social Sciences* (Chicago, The University of Chicago Press, 1944) 35–6. For other discussions, see eg J-P Cléro, *Calcul moral. Comment raisonner en éthique?* (Paris, Armand Colin, 2011); J-P Cléro, 'Le calcul benthamien des plaisirs et des peines. Calcul introuvable ou seulement indéfiniment différé ?' (2015) 78 *Archives de philosophie* 229–58; M Quinn, 'Bentham on Mensuration: Calculation and Moral Reasoning' (2014) 26 *Utilitas* 61–104.

[34] See eg J Elster, JE Roemer (eds), *Interpersonal Comparisons of Well-Being* (Cambridge, Cambridge University Press, 1991); PE Frankel, FD Miller, J Paul (eds), *Utilitarianism: The Aggregation Question* (Cambridge, Cambridge University Press, 2008).

[35] F Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* (Oxford, Clarendon Press, 1983); B Pendás García, *Jeremy Bentham: Política y derecho en los orígenes del Estado constitucional* (Madrid, CEC, 1988).

[36] JS Mill, *Considerations on Representative Government*, [1861] 2013, www.gutenberg.org/files/5669/5669-h/5669-h.htm.

[37] B Williams, *Ethics and the Limits of Philosophy* (Cambridge, Harvard University Press, 1985) 108–10.

Whether utilitarianism proposes to maximise average utility or global utility is not always clear. The last possibility may lead to unjust consequences, especially when maximising global happiness proves compatible with shocking inequalities or with tendentially decreasing individual happiness provided that the population gets larger.[38] Whether only the action that maximises happiness to the highest is morally acceptable or whether an action that is simply better than another in this respect is acceptable – which would make utilitarianism less compelling – is also open to question, which leads to a dilemma between too demanding and too permissive utilitarianisms.[39]

Finally, one wonders about utilitarianism's real impact on moral reasoning. Opposing lines of criticism have on the one hand underlined the fact that utilitarianism is not 'aspirational' enough to qualify as a moral theory, and on the other criticised the too demanding moral perfectionism it promotes.[40] For the former, utilitarianism in its Benthamite version relies on a disappointing levelling contention. Everything is good provided it entails more pleasure than pain. Disregarding any qualitative perspective, and ignoring any distinction between lower and higher pleasures, amounts to denying that 'It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied'.[41] One essential aspect of utilitarianism's permissiveness depends on its consequentialist stance.[42] Its outspoken disregard for absolute values or intrinsic goods; the notion of inherent rightness, especially in the legal form of fundamental rights;[43] or the 'separateness of persons'[44] leads to morally unacceptable consequences, including great social inequalities, discrimination or even the sacrifice of human lives for the sake of a majority's greatest happiness. This is why some authors prefer to limit consequentialism to a universe of decisions where fundamental rights are secured and beyond the scope of the discussion.[45]

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[38] See D Parfit's 'repugnant conclusion' in *Reasons and Persons* (Oxford, Oxford University Press, 1984) 381–90; G Arrhenius, J Ryberg, T Tännsjö, 'The Repugnant Conclusion', in EN Zalta, U Nodelman (eds), *The Stanford Encyclopedia of Philosophy*, 2022, https://plato.stanford.edu/archives/win2022/entries/repugnant-conclusion/.

[39] See esp MA Slote, *Common-Sense Morality and Consequentialism* (London, Routledge, Kegan Paul, 1985); MA Slote, P Pettit, 'Satisficing Consequentialism' (1984) 58 *Proceedings of the Aristotelian Society*, Supplementary Volume 139–76.

[40] See eg T Chappel (ed), *The Problem of Moral Demandingness: New Philosophical Essays* (London, Palgrave Macmillan, 2009); K Bykvist, *Utilitarianism: A Guide for the Perplexed* (London, Continuum, 2009) 98–127.

[41] JS Mill, *Utilitarianism*, 1863, www.earlymoderntexts.com/assets/pdfs/mill1863.pdf, Chapter II.

[42] S Scheffler (ed), *Consequentialism and its Critics* (Oxford, Oxford University Press, 1988); S Scheffler, *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions* (Oxford, Clarendon Press, 1994); M Peterson, *The Dimensions of Consequentialism: Ethics, Equality and Risk* (Cambridge, Cambridge University Press, 2013).

[43] R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) 90–100.

[44] J Rawls, *A Theory of Justice* (Cambridge, The Belknap Press of Harvard University Press, 1971) 26–7.

[45] See eg A Sen, 'Rights and Agency' (1982) 11 *Philosophy & Public Affairs* 3–39; P Pettit, 'The Consequentialist Can Recognise Rights' (1998) 38 *The Philosophical Quarterly* 2–55.

For the latter, utilitarianism is on the contrary morally too constraining as it imposes maximising the happiness of even unknown or unborn persons,[46] or, more largely, sentient beings, or even more largely, extra-terrestrial creatures or digital beings.[47] Can one be properly responsible for the consequences that will very remotely and unforeseeably follow from one's actions or abstentions in centuries to come for people one will never meet?

Despite these contentious issues, utilitarianism remains central in contemporary moral debates. Even though it 'elicits such vehement rejection', it remains 'tenacious'.[48]

2. THE AFFINITY BETWEEN UTILITARIANISM AND LAW

What appears rather uncontroversial for its promoters as well as for its foes is that utilitarianism presents itself at the same time as a moral philosophy, a political philosophy and a philosophy of action, both for the individual and for the whole society. It is a fundamentally practical and applied ethics, deeply connected to action rather than pure speculation.[49] As Katarzyna de Lazari-Radek and Peter Singer notice, 'A key feature of utilitarianism is that its proponents have not limited themselves to developing the theoretical basis of their views but instead have strived to bring about practical changes to promote happiness and relieve suffering'.[50] This is why, according to a received view, 'Utilitarianism can be understood as a movement for legal, political and social reform that flourished in the first half of the nineteenth century, or, again, as the ideology of that movement'.[51] For Gerald J Postema, 'Bentham conceived of his utilitarian creed as a public philosophy – a rational guide for managing public affairs'.[52]

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[46] See esp T Mulgan, 'Utilitarianism for a Broken World' (2015) 27 *Utilitas* 92–114; T Mulgan, 'How Should Utilitarians Think about the Future?' (2017) 47 *Canadian Journal of Philosophy* 290–312; T Mulgan, *Future People* (Oxford, Oxford University Press, 2006); T Mulgan, 'Utilitarianism and our Obligations to Future People', in B Eggleston, DE Miller (eds) *The Cambridge Companion to Utilitarianism* (Cambridge, Cambridge University Press, 2014) 325–47; T Mulgan, 'Answering to Future People' (2018) 35 *Journal of Applied Philosophy* 532–48.

[47] See eg T Mulgan, *The Demands of Consequentialism* (Oxford, Oxford University Press, 2001); B Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality* (Oxford, Oxford University Press, 2000) 159–74.

[48] H Pitkin, 'Slippery Bentham: Some Neglected Cracks in the Foundation of Utilitarianism' (1990) 18 *Political Theory*, 104–31, 104.

[49] See for a general presentation K Lippert-Rasmussen, K Brownlee, D Coady (eds), *A Companion to Applied Philosophy* (Chichester, Wiley-Blackwell, 2017). See eg, on this aspect of utilitarianism, M Hoesch, 'From Theory to Practice: Bentham's Reception of Helvétius' (2018) 30 *Utilitas* 294–316.

[50] K de Lazari-Radek, P Singer, *Utilitarianism: A Very Short Introduction* (Oxford, Oxford University Press, 2017) xviii.

[51] A Quinton, *Utilitarian Ethics*, 2nd ed (London, Duckworth, 1989) 1.

[52] GJ Postema, *Utility, Publicity, and Law. Essays on Bentham's Moral and Legal Philosophy* (Oxford, Oxford University Press, 2019) 92. See similarly B Williams, 'A Critique of Utilitarianism', in JJC Smart, B Williams, *Utilitarianism: For and Against* (Cambridge, Cambridge University Press, 1973), www.utilitarianism.com/utilitarianism-for-and-against.pdf, 67–131, 117; IV Kolosov, KE Sigalov, 'Was J Bentham the First Legal Utilitarian?' (2020) 24 *Rudn Journal of Law* 438–71,

At the core of the prototype of utilitarianism, then, is the idea that it is a deeply transformative doctrine. In this respect, even if this is not a book about him, it may be appropriate and quite revealing in seeking to understand (at least part of) the utilitarian imagination to refer to Jeremy Bentham, who laid the foundations for modern utilitarianism. His seminal *An Introduction to the Principles of Morals and Legislation* famously opens with the following paragraph:

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain. Subject to it all the while. The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law.[53]

The concluding words of this passage leave no doubt as to the intimate connection between utilitarian reform and law. As Joseph Schumpeter put it, 'Utilitarianism was a normative system with a strong legal slant'.[54] This association is twofold.

First, 'Utilitarianism is a general discourse of efficient instruments, a way of thinking about the instruments that man gives himself to achieve his ends'.[55] The most salient of these instruments is none other than the law. According to Bentham, for example,

> the art of legislation (which may be considered as one branch of the science of jurisprudence) teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is the most conducive to the happiness of the whole community, by means of motives to be applied by the legislator.[56]

He 'became a jurist because he believed […] that law and jurisprudence provided the key to politics and social relations and the solution of their problems'.[57] As a consequence, 'Utilitarianism in its full classical maturity does indeed appear as the doctrine of governmental action and the legislation of a modern State, when utility becomes the dominant principle of the State'.[58]

450; C Audard, 'Utilitarisme', in M Canto-Sperber (ed), *Dictionnaire d'éthique et de philosophie morale* (Paris, Presses universitaires de France, 2004), 2001–9, 2002, 2004.

[53] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 11.

[54] J Schumpeter, *History of Economic Analysis* (London, George Allen & Unwin, 1954) 133.

[55] C Laval, *L'homme économique. Essai sur les racines du néolibéralisme* (Paris, Gallimard, 2007) 262.

[56] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 293.

[57] LJ Hume, *Bentham and Bureaucracy* (Cambridge, Cambridge University Press, 1981) 57.

[58] C Laval, *L'homme économique. Essai sur les racines du néolibéralisme* (Paris, Gallimard, 2007) 289–90.

As an illustration, based on his self-proclaimed 'genius for legislation',[59] Bentham devoted all of his life to the designing of means of legal regulation to achieve the greatest happiness of the greatest number. He offered his services to various political leaders of his times, from Catherine the Second of Russia or the French revolutionaries, to James Madison or Simón Bolivar, proposing to codify this or that part of their legal systems. He did write several codes – or at least parts of them – ranging from a penal code and a civil code to his famous *Constitutional Code*,[60] which he prepared for the Portuguese *Cortes*, or an embryonic code of international law.[61] Most of his efforts were disregarded in his day. But his later influence, thanks to the people who surrounded him and later had major positions in the British administration, was extreme. The great historian Henry Sumner Maine even reckons not to 'know a single law-reform effected since Bentham's day which cannot be traced to his influence'.[62]

As this book proposes to make clear, civil law, penal law, election law, administrative law, evidence law, law of procedure, local self-government law, parliamentary law, constitutional law and international law have all undergone many changes, in the United Kingdom as well as across the globe, that are undoubtedly in line with the basic orientations of Bentham's major proposals. To take just a few examples, not to say anything of his efforts to have his plans for a panopticon penitentiary executed,[63] a recent publication shed light on how Bentham actively helped draft two bills regarding preventive police.[64] One was relative to the policing of the River Thames, while the other regarded the establishment of a Board of Police to administer a licensing system for dealers in second-hand goods. Even if only the first project led to the

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[59] J Bentham, *Memoirs and Correspondence*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol X, 27. See eg on this topic D Baranger, *Penser la loi. Essai sur le législateur des temps modernes* (Paris, Gallimard, 2018); F Ferraro, 'A Genius for Legislation: Bentham's 'Art and Science' of Legislation and Modern Legisprudence', in P Schofield, X Zhai (eds), *Bentham on Democracy, Courts, and Codification* (Cambridge, Cambridge University Press, 2022) 214–36.

[60] See J Bentham, *Emancipate your Colonies! Addressed to the National Convention of France, A° 1793, Shewing the Uselessness and Mischievousness of Distant Dependencies to an European State* (London, Robert Heward, 1830); J Bentham, *Colonies, Commerce, and Constitutional Law: Rid Yourselves of Ultramaria and Other Writings on Spain and Spanish America*, ed P Schofield (Oxford, Clarendon Press, 1995). For analysis, see B Schultz, G. Varouxakis (eds), *Utilitarianism and Empire* (Lexington Books, Lanham, 2005); J Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton, Princeton Unversity Press, 2005); B Arneil, 'Jeremy Bentham: Pauperism, Colonialism, and Imperialism' (2021) 115 *American Political Science Review* 1147–58; 'International Thought of the British Empire', *Revue d'études benthamiennes*, no 24, 2023, https://journals.openedition.org/etudes-benthamiennes/.

[61] See E Nys, 'Notes inédites de Bentham sur le droit international' (1885) 1 *The Law Quarterly Review* 225–31. See also his correspondence, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol XI, 34.

[62] Sir HS Maine, *Lectures on the Early History of Institutions*, 7th ed (London, John Murray, 1914) 397.

[63] See J Semple, *Bentham's Prison: A Study of the Panopticon Penitentiary* (Oxford, Clarendon Press, 1993); R Bartlett, *The Bentham Brothers and Russia: The Imperial Russian Constitution and the St Petersburg Panopticon* (London, UCL Press, 2022).

[64] S Jacques, P Schofield (eds), *Jeremy Bentham on Police: The Unknown Story and What It Means for Criminology* (London, UCL Press, 2021).

adoption of the Depredations on the Thames Act 1800,[65] these writings testify to Bentham's efforts to actively promote utilitarian reform in practice. After his Plan of Parliamentary Reform, which appeared in 1817,[66] he published a Radical Reform Bill.[67] There, he offered the full draft of a 'Parliamentary Reform Act: being an Act for the more adequate Representation of the People in the Commons'.[68] At the end of his life, based on the reflections of his friend Thomas Southwood Smith *On the Use of the Dead to the Living*,[69] Bentham's own eccentric Auto-Icon[70] paved the way for the evolution of the applicable legislation regarding the dissection of donated bodies.[71] Through the actions of his disciple Edwin Chadwick, the influence of Bentham's reflections on poor relief[72] was also deeply felt in England with the adoption of the Poor Law Amendment Act 1834.[73] In 1866, during the debates regarding the Representation of the People Act 1867[74] and in line with his essay on 'The Subjection of Women' published in 1869,[75] John Stuart Mill similarly proposed – unsuccessfully – to extend the franchise to women.[76] Despite Bentham's reservations about colonies,[77] the British colonial administration drew inspiration from the utilitarian school to experiment new modes of governance

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[65] 39 & 40 Geo. 3. c. 87.

[66] J Bentham, *Plan of Parliamentary Reform: in the Form of a Catechism: with Reasons for each Article: with an Introduction: Shewing the Necessity of Radical: and the Inadequacy of Moderate Reform* (London, R. Hunter, 1817).

[67] J Bentham, *Bentham's Radical Reform Bill, with Extracts from the Reasons* (London, E Wilson, 1819).

[68] On the impact of Bentham's proposals regarding parliamentary reform, see P Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford, Oxford University Press, 2006) 137–70.

[69] T Southwood Smith, 'On the Use of the Dead to the Living' (1824) 2 *Westminster Review* 59–97.

[70] JE Crimmins (ed), *Bentham's Auto-Icon and Related Writings* (Bristol, Thoemmes Press, 2002); C Welzbacher, *Der radikale Narr des Kapitals: Jeremy Bentham, das 'Panoptikum' und die 'Auto-Ikone'* (Berlin, Matthes & Seitz, 2011).

[71] *Anatomy Act 1832*, 2 & 3 Will. IV, c. 75.

[72] See J Bentham, *Writings on the Poor Laws*, Vol 1, ed M Quinn (Oxford, Clarendon Press, 2001); J Bentham, *Writings on the Poor Laws*, Vol 2, ed M Quinn (Oxford, Clarendon Press, 2010). On this topic, see eg A Brunon-Ernst, *Le panoptique des pauvres. Jeremy Bentham et la réforme de l'assistance en Angleterre* (Paris, Presses Sorbonne nouvelle, 2007).

[73] See eg A Capet, 'Le passage à l'acte: Chadwick, la Loi sur les pauvres de 1834 et l'"utilitarisme appliqué"', in M Bozzo-Rey, G Tusseau (dir), *Bentham juriste: l'utilitarisme juridique en question* (Paris, Economica, 2011) 289–306.

[74] 30 & 31 Vict. c. 102.

[75] JS Mill, *The Subjection of Women* (London, Longmans, Green, Reader, and Dyer, 1869).

[76] 20 May 1867, Parliamentary Archives, HC Hansard, Vol 187, cc. 1343–6, www.parliament.uk/about/living-heritage/evolutionofparliament/houseofcommons/reformacts/from-the-parliamentary-collections/collections-reform-acts/great-reform-act112/.

[77] See J Bentham, *Emancipate your Colonies! Addressed to the National Convention of France, A° 1793, Shewing the Uselessness and Mischievousness of Distant Dependencies to an European State* (London, Robert Heward, 1830); J Bentham, *Colonies, Commerce, and Constitutional Law: Rid Yourselves of Ultramaria and Other Writings on Spain and Spanish America*, ed P Schofield (Oxford, Clarendon Press, 1995).

and legislative drafting, for example in India.[78] The development of international courts echoes Bentham's advocacy for a worldwide 'Tribunal of peace'.[79] Following the American Declaration of Independence of 1776, which proclaimed 'the pursuit of Happiness' as an unalienable right, contemporary constitutions increasingly protect happiness or well-being as general national objectives, as policy paradigms to be developed through more concrete subordinate objectives, structures and actions or, finally, as human rights on their own account.[80]

Second, beyond specific legal topics, the utilitarian contribution to the legal conceptual apparatus is far from negligible. Roger Cotterrell[81] and Wayne Morrison[82] for example exposed how John Austin's legal theory, which was portrayed during the majority of the twentieth century as dry and rather unimaginative, had to be understood as an effort to create the conceptual instruments for an efficient and modern State. As far as legal reasoning is concerned, the way Bentham shed light on judicial decision-making is now widely admitted, contemporary constitutionalists frequently assessing the influence of constitutional jurisdictions in terms of a 'judicialisation' of politics.[83] Aside from the controversial use of Law & Economics in constitutional law,[84] one fundamental tool of legal reasoning to balance com-

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[78] E Stokes, *The English Utilitarians and India* (Oxford, Clarendon Press, 1959) 140–233.

[79] J Bentham, *Principles of International Law*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol II, 535–60, 544–5, 547, 554.

[80] TTW Wan, 'Constitutionalization of Happiness: A Global and Comparative Enquiry' (2023) 24 *German Law Journal* 1209–36. See also DC Bok, *The Politics of Happiness: What Government can Learn from the New Research on Well-being* (Princeton, Princeton University Press, 2010); *La Revue juridique du Bonheur / The Happiness Law Review / La revista jurídica de la felicidad*, https://happinesslawreview.wordpress.com/.

[81] R Cotterrell, 'Sovereign and Subject: Bentham and Austin', in *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, 2nd ed (Oxford, Oxford University Press, 2003) 49–77.

[82] W Morrison, 'John Austin and the Misunderstood Birth of Legal Positivism', *in Jurisprudence: From The Greeks To Post-Modernity* (London, New York, Routledge, 2015) 213–45.

[83] See eg T Vallinder, 'The Judicialization of Politics – A World-wide Phenomenon: Introduction' (1994) 15 *International Political Science Review* 91–9; CN Tate, T Vallinder (eds), *The Global Expansion of Judicial Power* (New York, New York University Press, 1995); R Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* 721–54; RL Vigo, *Constitucionalización y judicialización del derecho. Del Estado de derecho legal al Estado de derecho constitucional* (México, Porrúa, 2013); R Sieder, L Schjolden, A Angell (eds), *The Judicialization of Politics in Latin America* (New York, Palgrave MacMillan, 2005); J Couso, A Huneeus, R Sieder (eds), *Cultures of Legality. Judicialization and Political Activism in Latin America* (Cambridge, New York, Cambridge University Press, 2010); B Dressel (ed), *The Judicialization of Politics in Asia* (London, New York, Routledge, 2012); G Tusseau, *Contentieux constitutionnel comparé. Une introduction critique au droit processuel constitutionnel* (Paris La Défense, Lextenso, 2021).

[84] See eg the debate between Frank H Easterbrook and Lawrence H Tribe: FH Easterbrook, 'The Supreme Court 1983 Term Foreword: The Court and the Economic System' (1984) 98 *Harvard Law Review* 1–85; LH Tribe, 'Constitutional Calculus: Equal Justice or Economic Efficiency?' (1985) 98 *Harvard Law Review* 592–621; FH Easterbrook, 'Method, Result, and Authority: A Reply' (1985) 98 *Harvard Law Review* 622–9.

peting principles or competing claims is none other than the principle of proportionality.[85] As a legal version of risk–cost–benefit analysis, it is part of the universal toolkit of contemporary jurists, and bears striking resemblance to Bentham's methodology to assess the respective utility of competing courses of conduct, especially as far as penal punishment is concerned.[86]

The connection between theory and practice is not fortuitous. It appears for example in the link Bentham more generally establishes between art and science in his *Chrestomatia*,[87] and was intrinsic to the utilitarian reformatory project. His practical work was to be established on firm theoretical ground, which appeared to be lacking at Bentham's time. This is why, having to draw the proper limits of the penal branch of law, he was led to wonder about what the law was composed of, and what *a* law was. At the end of the original work, he wrote:

> What is a penal code of laws? What a civil code? Of what nature are their contents? Is it that there are two sorts of laws, the one penal the other civil, so that the laws in a penal code are all penal laws, while the laws in a civil code are all civil laws? Or is it, that in every law there is some matter which is of a penal nature, and which therefore belongs to the penal code; and at the same time other matter which is of a civil nature, and which therefore belongs to the civil code? Or is it, that some laws belong to one code or the other exclusively, while others are divided between the two? To answer these questions in any manner that shall be tolerably satisfactory, it will be necessary to ascertain what *a law* is; meaning one entire but single law: and what are the parts into which a law, as such, is capable of being distinguished: or, in other words, to ascertain what the properties are that are to be found in every object which can with propriety receive the appellation of *a* law.[88]

Bentham wondered about a law understood as 'the *logical,* the *ideal,* the *intellectual* whole not the *physical* one: the *law,* and not the *statute*',[89] thus offering what is to date one of the most fascinating enquiries in legal theory ever written.[90]

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[85] C Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales. El principio de proporcionalidad como criterio para determinar el contenido de los derechos fundamentales vinculante para el legislador*, 4th ed (Bogotá, Universidad Externado de Colombia, 2014); J Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge, Cambridge University Press, 2013); VC Kackson, M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge, Cambridge University Press, 2017); A Marketou, *Local Meanings of Proportionality* (Cambridge, Cambridge University Press, 2021); A Stone Sweet, J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72–164.

[86] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 175–86.

[87] J Bentham, *Chrestomatia*, ed MJ Smith, WH Burston (Oxford, Clarendon Press, 1993) 61, 206–7.

[88] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 299–300.

[89] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 301.

[90] J Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed P Schofield (Oxford, Oxford University Press, 2010). For a similar appreciation, see J de Sousa E Brito, 'Relire Bentham. A propos de l'édition de 'Of Laws in General' par Hart' (1972) 17 *Archives de philosophie du droit* 451–72; HLA Hart, 'Bentham's "Of Laws in General"', in HLA Hart, *Essays on Bentham. Studies in Jurisprudence and Political Theory* (Oxford, Clarendon Press, 1982) 105–26, 108. For an analy-

His decisive and invaluable contribution to analytical jurisprudence must be understood as part of a very practical enterprise. What is at stake is nothing other than the devising of tools that would be appropriate to guide the behaviours of human beings so that they are led to adopt conducts that, once coordinated with others' conducts, result in the maximisation of happiness. As Bentham himself makes clear in a manuscript:

> Legislation contributes to Happiness by securing men – in their possession, directing them in their use and disposing them to the accumulation of the instruments of enjoyment, fruits of all other arts, as well as of those which lie so near at hand as not to stand in need of it. – And this is done by bringing men to concur in conformity to these purposes by means of specific allotments of pain and pleasure (of pain to those who impede the above purposes or of pleasure to those who forward them) to accrue in virtue of the will of particular persons appropriated or suffered for the purpose.[91]

This is why considering, as Antoinette Baujard puts it, that utilitarianism 'was conceived as a way to think about the legal system and to improve it, on the basis of a single coherent rational and acceptable principle, that of the utility principle',[92] is only part of the story. It neglects the properly intellectual, conceptual or spiritual enterprise that is related to what is commonly known as Bentham's theory of fictions.[93]

The utilitarian philosopher offered a long-lasting contribution to legal terminology. He is credited with inventing words like 'international', 'bicameralism', and 'codification'. Less known is his contribution to the identification of the topic of 'legal transplants',[94] which has led to a resounding controversy in the methodology of comparative law.[95] At a deeper conceptual level, he was the first author to consistently write about 'constitutional law' instead of 'fundamental laws', 'constitutions' in plural or 'constitution' in singular, thus adopting a broader concept of law than his disciple John Austin,[96] and thus improving the explanatory and technological power of legal vocabulary. In the same vein, he singled out the notion of

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sis, see G Tusseau (ed), *The Legal Philosophy and Influence of Jeremy Bentham. Essays on 'Of the Limits of the Penal Branch of Jurisprudence'* (London, New York, Routledge, 2014).

[91] UCL, xxvii, 16.

[92] A Baujard, 'Utilitarianism and Anti-Utilitarianism', in G Faccarello, HD Kurz (eds) *Handbook of the History of Economic Analysis* (Cheltenham, Northampton, Edward Elgar Publishing, 2016) Vol 3, 576–88, 576.

[93] *Bentham's Theory of Fictions*, ed CK Ogden (London, Kegan Paul, Tranch, Trubner & Co, 1932); J Bentham, *De l'ontologie et autres textes sur les fictions*, ed P Schofield, J-P Cléro, C Laval (Paris, Le Seuil, 1997).

[94] See A Huxley, 'Jeremy Bentham on Legal Transplants' (2007) 2 *Journal of Comparative Law* 177–88; Michihiro Kaino, 'Bentham's Universal Jurisprudence and Theory of Legal Transplant' (2023) 24 Revue d'études benthamiennes, https://journals.openedition.org/etudes-benthamiennes/10870.

[95] See esp A Watson, *Legal Transplants. An Approach to Comparative Law*, 2nd ed (Athens, London, The University of Georgia Press, 1993); P Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111–24.

[96] G Tusseau, 'La constitution "face à face": quel droit constitutionnel du bonheur pour Jeremy Bentham?', in F Lemaire, S Blondel (dir), *Doctrines et réalité(s) du Bonheur* (Paris, Mare & Martin, 2019) 79–126; G Tusseau, 'Between Constructivism and Immanentism: Bentham's Unsettled Conception of Constitutional Law', in P Schofield, X Zhaï (eds), *Bentham on Democracy, Courts, and Codification* (Cambridge, Cambridge University Press, 2022) 195–213.

the law of procedure. He distinguished between the rule which proscribes a behaviour to an individual ('If you steal, you will be punished by three years in prison'), on the one hand, and the rule which orders the judge to punish a possible offender of the first rule ('If an individual steals, you must punish him by three years in prison'), on the other.[97] Based on this theory he identified two types of rules, and consequently two main branches of law: principal and subsidiary, or substantive and adjective.[98] But he conceded that the judge cannot fulfil his duty alone. He must be assisted by other actors, who are the addressees of so many other subsidiary rules, which are grouped under the collective name of 'procedure'.[99] In his *Principles of Judicial Procedure*, Bentham wrote:

> By procedure, is meant the course taken for the execution of the laws, viz. for the accomplishment of the will declared, or supposed to be declared, by them in each instance. Laws prescribing the course of procedure have on a former occasion been characterized by the term adjective laws, in contradistinction to those other laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, substantive laws. For in jurisprudence, the laws termed adjective, can no more exist without the laws termed substantive, than in grammar a noun termed adjective, can present a distinct idea without the help of a noun of the substantive class, conjoined with it.[100]

According to legal historians, the proposed distinction was unprecedented in terminological terms.[101] It has had a curious destiny. It was used in the English-speaking world during the nineteenth century. But it then disappeared, with the expression 'law of procedure' replacing 'adjective law'.[102] However, it has undergone something of a renaissance in other parts of the world. The distinction between 'derecho substantivo' and 'derecho adjetivo' is commonly

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[97] J Bentham, *A Comment on the Commentaries* and *A Fragment on Government*, ed JH Burns, HLA Hart (London, The Athlone Press, 1977) 72; J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 302–3; J Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed P Schofield (Oxford, Oxford University Press, 2010) 146–50, 153, 180; J Bentham, *Pannomial Fragments*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol III, 216.

[98] G Tusseau, 'An Old English Tale? Bentham's Theory of The Force of a Law', in G Tusseau (ed), *The Legal Philosophy and Influence of Jeremy Bentham. Essays on 'Of the Limits of the Penal Branch of Jurisprudence'* (London, New York, Routledge, 2014) 80–133.

[99] G Tusseau, 'An Old English Tale? Bentham's Theory of The Force of a Law', in G Tusseau (ed), *The Legal Philosophy and Influence of Jeremy Bentham. Essays on 'Of the Limits of the Penal Branch of Jurisprudence'* (London, New York, Routledge, 2014) 150–3.

[100] J Bentham, *Principles of Judicial Procedure*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol II, 5–6. See also J Bentham, *Traité des preuves judiciaires*, ed Etienne Dumont, 2 Vol (Paris, Bossange, 1823) Vol 1, 1–2; J Bentham, *Constitutional Code for the Use of all Nations and all Governments Professing Liberal Opinions*, Vol 1 ed F Rosen, JH Burns (Oxford, Clarendon Press, 1991) 38.

[101] DM Risinger, '"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebutable Presumptions"' (1982) 30 *UCLA Law Review* 189–216; TO Main, 'The Procedural Foundation of Substantive Law' (2010) 87 *Washington University Law Review* 801–41.

[102] See eg AJ Rodenbeck, *The Anatomy of the Law: A Logical Presentation of the Parts of the Body of the Law* (Boston, Little, Brown and Co, 1925); ER Sunderland, 'The English Struggle for Procedural Reform' (1925–6) 34 *Harvard Law Review* 725–48; J Michael, *The Elements of Legal*

used in Latin American legal doctrine, to the point of becoming the natural and undisputed vocabulary of current legal thinking and structuring the study of numerous branches of law.[103] How did the dichotomy travel to another continent, another language, and a legal culture of continental law, even though it had been abandoned in its culture of origin? Once transplanted, how did it spread and take root in local legal thought to the point of providing the vocabulary for the spontaneous perception of the structure of the various branches of the legal system? The Centre Bentham's PROCBENTHAM Project has provided the beginnings of an explanation, based on the influence of the great Chilean codifier Andrés Bello, and the wide circulation of the Spanish translation of Dumont's *Traités* in newly independent countries that had new legal systems to devise.[104] These examples testify to the deep – and unsuspected – influence utilitarian legal thought had not only on the substance of law, but on legal culture itself. Bentham and his followers truly contributed to the creation of the new legal grammar which they felt was needed to promote the greatest happiness of the greatest number.

Among Bentham's efforts to discipline what appeared to him as a rather 'shapeless expanse',[105] one needs in addition to mention the thorough cartography of legal discourses that he offered as a background to his project.

3. THE UTILITARIAN CARTOGRAPHY OF LEGAL DISCOURSES

Bentham's elaboration of a concept of jurisprudence and his distinctions of various sorts and branches of jurisprudence derive from the elaboration of the project of a penal code, and from his will to delimit the respective fields of civil law and penal law. Adopting a systematic methodology that leads from one bifurcation to another, he first considered that

> A book of jurisprudence can have but one or the other of two objects: 1. To ascertain what the *law* is: 2. to ascertain what it ought to be. In the former case it may be styled a book of *expository* jurisprudence; in the latter, a book of *censorial* jurisprudence: or, in other words, a book on the *art of legislation*.[106]

Controversy: An Introduction to the Study of Adjective Law (Brooklyn, Foundation Press, 1948); KN Llewellyn, *The Bramble Bush: Our Law and Its Study* (New Orleans, Quid Pro, 2012) 16, 18.

[103] See eg D García Belaúnde, *El derecho procesal constitucional en perspectiva*, 2nd ed (Lima, Idemsa, 2009) 89–90; JA Robles Garzón (dir-coord), *Conceptos básicos de derecho procesal civil*, 5th ed (Madrid, Tecnos, 2015) 154; JC Hitters, 'El derecho procesal constitucional' (1993) 21–2 *Ius & Praxis* 115–36; I Escobar Fornos, *Introducción al derecho procesal constitucional* (México, Porrúa, 2005) 5.

[104] See esp A Vergara Blanco, 'La circulation des idées de Jeremy Bentham au Chili pendant la première moitié du XIXème siècle et Andrés Bello, leur divulgateur' (2020) 17 Revue d'études benthamiennes, http:// journals .openedition .org/ etudes -benthamiennes/ 7142; A Kemelmajer de Carlucci, 'Jeremy Bentham y su Influencia en el Derecho Privado de Algunos Países de América del Sur' (2020) 17 Revue d'études benthamiennes, http://journals.openedition.org/etudes-benthamiennes/7292.

[105] J Bentham, *Of Law in General*, ed HLA Hart (London, The Athlone Press, 1970) 246.

[106] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 293–4.

He continued by noting that 'A book of expository jurisprudence, is either *authoritative* or *unauthoritative*. It is styled authoritative, when it is composed by him who, by representing the state of the law to be so and so, causeth it so to be; that is, of the legislator himself: unauthoritative, when it is the work of any other person at large.'[107] Five additional distinctions followed. First,

> in point of extent, what is delivered concerning the laws in question, may have reference either to the laws of such or such a nation or nations in particular, or to the laws of all nations whatsoever: in the first case, the book may be said to relate to local, in the other, to *universal jurisprudence*.[108]

Combining this distinction with the preceding ones, Bentham noticed that various legal systems show many differences in substance as well as in form. Nevertheless,

> among the words that are appropriated to the subject of law, there are some that in all languages are pretty exactly correspondent to one another: which comes to the same thing nearly as if they were the same. Of this stamp, for example, are those which correspond to the words *power*, *right*, *obligation*, *liberty*, and many others. It follows, that if there are any books which can, properly speaking, be styled books of universal jurisprudence, they must be looked for within very narrow limits. Among such as are expository, there can be none that are authoritative: nor even, as far as the *substance* of the laws is concerned, any that are unauthoritative. To be susceptible of an universal application, all that a book of the expository kind can have to treat of, is the import of words: to be, strictly speaking, universal, it must confine itself to terminology.[109]

Second, considering 'the *political quality* of the persons whose conduct is the object of the law', Bentham explained that 'These may, on any given occasion, be considered either as members of the same state, or as members of different states: in the first case, the law may be referred to the head of *internal*, in the second case, to that of *international* jurisprudence'.[110] Combining this new distinction with the others, 'international jurisprudence may, as well as internal, be censorial as well as expository, unauthoritative as well as authoritative'.[111] Third, concerning time, Bentham distinguished the laws that are still in force from those which have ceased to be in force, thus opposing present or living jurisprudence, on the one hand, and ancient jurisprudence, on the other. 'Fourthly, in point of expression, the laws in question may subsist either in the form of statute or in that of customary law.'[112] The last distinction he proposed was between the civil and the penal branches of jurisprudence, which was to be

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[107] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 294.

[108] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 294.

[109] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 295.

[110] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 296.

[111] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 297.

[112] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 298.

the object of several refinements and redefinitions in his career, based on the identification of other branches such as the constitutional, the international and the procedural ones.[113]

In Bentham's vocabulary, 'jurisprudence' consequently appears as shorthand for any type of legal discourse. He included for example under it the language of the legislator himself, the language of the science of law, the language of legal politics and the language of legal theory. Despite the distinctions he subsequently drew, such a linguistic choice was not very accurate. As an illustration, an authoritative book of expository jurisprudence and an unauthoritative one can hardly be presented on the same footing. The first is by no means descriptive, but rather strictly prescriptive: this is the language of the law itself. As Bentham implied, this book is that of the person who, by so presenting the law, causes it to be so. This nearly suggests a performative use of the legal language, which is nothing other than the linguistic acts through which the legislator emanates prescriptions. Thus, it might be suggested that there is nothing strictly 'expository' in this discourse. On the contrary, it is prescriptive. An unauthoritative book of expository jurisprudence, that is, nothing other than a book on the science of law, first is readily descriptive, and not prescriptive. Second, it does not belong to the same linguistic level as an authoritative one. It bears upon a book of so-called authoritative 'expository' jurisprudence, and belongs to a metalanguage relative to it. A book of censorial jurisprudence, whether approving or criticising a given legislation, belongs to that same metalinguistic level, and bears upon a given book of authoritative 'expository' jurisprudence. Nevertheless, the type of this discourse is not the same as the unauthoritative expository's. It is prescriptive and not descriptive, like the discourse of a legislator.

Despite the shortcomings of his distinctions, which are, as may be clear, quite easily removed, Bentham provides a very precise characterisation of universal expository jurisprudence. This definition belongs to a metalanguage relative to the linguistic level at which Bentham is to develop his own legal theory. Universal expository jurisprudence consists of a formal enquiry, aiming at elucidating the concepts that are common to any possible legal system. These are so many fictitious entities that Bentham offers to trace back to empirical data. To this field belongs for example the reconstruction – or paraphrasis – of the notion of obligation. Bentham first places the fictitious entity in the subject position in the sentence, adding the predicate 'imposed on a man' and the copula 'is'. Using this 'phraseoplerosis' operation, he obtains the fictional proposition 'an obligation is imposed on a man'. Then, through the operation of 'archetypation', he replaces this sentence with another in which a real entity, the real source or material archetype of the fictional entity, is the subject. In this case, the emblematic image of the obligation is that of a person oppressed by a weight[114] or tied by

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[113] E de Champs, 'Constitution and the Code: Jeremy Bentham on the Limits of the Constitutional Branch of Jurisprudence' (2011) 32 *The Tocqueville Review / La Revue Tocqueville* 21–42; A Brunon-Ernst, 'Of the Limits of the Civil Branch of Jurisprudence: Background, Definitions and Limits of Bentham's Discussion on Civil Law in "Limits"', in G Tusseau (ed), *The Legal Philosophy and Influence of Jeremy Bentham. Essays on 'Of the Limits of the Penal Branch of Jurisprudence'* (London, New York, Routledge, 2014) 134–46; G Tusseau, 'An Old English Tale? Bentham's Theory of The Force of a Law', in G Tusseau (ed), *The Legal Philosophy and Influence of Jeremy Bentham. Essays on 'Of the Limits of the Penal Branch of Jurisprudence'* (London, New York, Routledge, 2014) 80–133.

[114] J Bentham, *Essay on Logic*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43), Vol VIII, 247–8.

a rope.[115] The source of the explanation of the fictitious entity 'obligation' provided by the paraphrasis is therefore the idea of a possible sensation of pain. An individual has an obligation only if there is a probability that he will experience pain if he fails to adopt a certain course of action. This is the clear, rational and explicit way in which utilitarianism allows individuals to understand the idea that they 'have' obligations, even though obligation itself is nothing more than a fiction. Because '*Obligation* is the root out of which all these other fictitious entities spring',[116] it allows the elucidation of other fictions such as right[117] or power.[118]

In addition to their interest from the point of view of analytical legal theory,[119] both Bentham's theory of fictions and its potential application in the field of legal language are intended to provide the intellectual tools for political and social reform.[120] Theoretical refoundation is therefore only a prerequisite for practical refoundation. As the final section of *Of the Limits of the penal Branch of Jurisprudence*, devoted to the 'Uses of this chapter',[121] proves, the utilitarian conception of jurisprudence is radically instrumental.

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[115] J Bentham, *Chrestomatia*, ed MJ Smith, WH Burston (Oxford, Clarendon Press, 1993) 271–3 fn a; J Bentham, *Deontology Together with A Table of the Springs of Action and the Article on Utilitarianism*, ed A Goldworth (Oxford, Clarendon Press, 1983) 206–7.

[116] J Bentham, *De l'ontologie et autres textes sur les fictions*, ed P Schofield, J-P Cléro, C Laval (Paris, Le Seuil, 1997) 158. See also J Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed P Schofield (Oxford, Oxford University Press, 2010) 316; J Bentham, *Pannomial Fragments*, *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol III, 217.

[117] J Bentham, *Pannomial Fragments*, *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol III, 217–18, 221; J Bentham, *A Comment on the Commentaries*, in J Bentham, *A Comment on the Commentaries* and *A Fragment on Government*, ed JH Burns, HLA Hart (London, The Athlone Press, 1977) 87–8.

[118] J Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed P Schofield (Oxford, Oxford University Press, 2010) 295–300. See also J Bentham, *Manual of Political Economy*, in *Jeremy Bentham's Economic Writings*, ed W Stark, Vol I (London, George Allen & Unwin, 1952) Vol 1, 232. See G Tusseau, 'Positivist Jurisprudents Confronted: Jeremy Bentham and John Austin on the Concept of a Legal Power' (2007) 2 *Revue d'études benthamiennes* 23–37; G Tusseau, 'Jeremy Bentham on Power-Conferring Laws' (2007) 3 *Revue d'études benthamiennes* 48–77; G Tusseau, 'Les contraintes intellectuelles de la construction des notions juridiques. L'exemple du concept de pouvoir chez Jeremy Bentham et John Austin', in G Tusseau (dir), *Les notions juridiques* (Paris, Economica, 2009) 57–79; G Tusseau, 'De Bentham à Kelsen en passant par Merkl, une trame conceptuelle récurrente de la théorie juridique', in P Brunet, FJ Arena (dir), *Questions contemporaines de théorie analytique du droit / Cuestiones contemporáneas de teoría analítica del derecho / Problemi attuali della teoria analitica del diritto* (Madrid, Barcelona, Buenos Aires, Marcial Pons, 2011) 167–97; G Tusseau, 'Bentham et le normativisme viennois. Impressions de lecture', in M Bozzo-Rey, G Tusseau (dir), *Bentham juriste: l'utilitarisme juridique en question* (Paris, Economica, 2011) 43–105.

[119] See eg P Chiassoni, *L'indirizzo analitico nella filosofia del diritto. 1. da Bentham a Kelsen* (Torino, G Giappichelli, 2009).

[120] See C Laval, *Jeremy Bentham. Le pouvoir des fictions* (Paris, Presses universitaires de France, 1994) 37–8, 114; E de Champs, *La déontologie politique ou La pensée constitutionnelle de Jeremy Bentham* (Genève, Droz, 2008) 35–97.

[121] J Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed P Schofield (Oxford, Oxford University Press, 2010) 219-233.

To Bentham's mind, this cartography of the legal landscape offers an all-encompassing and multi-layered map to confront legal regulation, both for the legislator and for the law's addressees. Moreover, it offers a wide array of pairs of perspectives that lend themselves to a multiplicity of combinations depending on one's purpose. It delineates the following levels, each corresponding to one possible understanding of 'law', to which utilitarianism has a contribution to offer. The first is law as a set of norms that regulate the behaviour of human beings. From a slightly different viewpoint, more connected to a social perspective, law can second be perceived as a technique of social engineering based on an empirical assessment of human nature. Third, law can be understood as a science, that is, as a metalinguistic discourse that exposes and describes the legal regulation that exists *hic et nunc*. Finally, from a conceptual perspective, universal expository jurisprudence, which is related to the elaboration and discussion of legal notions, has much to do with the elucidation of the building blocks of a specific culture. In this respect, beyond his contribution to the analytical theory of legal concepts, Bentham and utilitarianism partake of an ideological critique of the conscience of what he ironically called the 'Lawyer's tribe'.[122]

Among the distinctions proposed by Bentham, one of the most relevant to characterise the architecture of utilitarianism is that between expository and censorial jurisprudence. It tends to account for the way utilitarianism, as suggested in the first paragraph of the *Introduction*, intends to combine an empirical analysis of human psychology and a normative orientation for human behaviour. It is reminiscent of that introduced in Bentham's *Fragment on Government*. In this book, which was published anonymously in 1776, he wrote:

> There are two characters, one or other of which every man who finds any thing to say on the subject of Law, may be said to take upon him; – that of the *Expositor*, and that of the *Censor*. To the province of the *Expositor* it belongs to explain to us what, as he supposes, the Law *is*: to that of the *Censor*, to observe to use what he thinks it *ought to be*. The former, therefore, is principally occupied in stating, or in enquiring after *facts*: the latter, in discussing *reasons*. […] To the *Expositor* it belongs to shew what the *Legislator* and his underworkman the *Judge* have done already: to the *Censor* it belongs to suggest what the *Legislator ought* to do *in future*.[123]

The distinction seems to be in line with David Hume's distinction between two types of discourses separated by a logical gap.[124] It was later echoed in John Austin's motto that 'The existence of law is one thing; its merit or demerit is another'.[125] It stands at the forefront of any positivist legal doctrine. Nevertheless, the relations between these two figures of legal thinking have led to an important controversy as to the nature of Bentham's project and more

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[122] J Bentham, *A Fragment on Government*, in J Bentham, *A Comment on the Commentaries* and *A Fragment on Government*, ed JH Burns, HLA Hart (London, The Athlone Press, 1977) 513.

[123] J Bentham, *A Fragment on Government*, in J Bentham, *A Comment on the Commentaries* and *A Fragment on Government*, ed JH Burns, HLA Hart (London, The Athlone Press, 1977) 397–8.

[124] D Hume, *A Treatise of Human Nature*, 1739, https://oll.libertyfund.org/title/bigge-a-treatise-of-human-nature, Book III, Chapter III, Section I.

[125] J Austin, *The Province of Jurisprudence Determined; and The Uses of the Study of Jurisprudence*, ed HLA Hart (London, Weidenfeld and Nicolson, 1954) 184.

specifically of his legal positivism. Several authors have doubted that his pervasive utilitarianism could allow for a value-free creation of legal concepts or description of the law as it is.[126]

One possible strategy to confront what appears in Bentham's work as 'a tension between his utilitarian account of practical reasoning and his insistence on the neutrality of analysis'[127] might start from his own proposition of a 'critical jurisprudence'.[128] This expression appears in some early manuscripts in the 1770s.[129] In a text most probably written in 1775, he is looking for a name for 'A Science which might be conceived [but does not exist yet], the art of knowing what ought to [be] done in the way of internal Government'.[130]

> What name shall we find for it? Shall we call it the *Art of Legislation*? Shall we call it *Critical Jurisprudence*? Shall we call it the Science of Internal Politics? Shall we call it the science of Legal Politics? Shall we call it the science of Jurisprudential Politics? All these names lie open to objections: to discuss all these objections would take no little time without much fruit. That of Critical Jurisprudence seemed to answer best upon the whole.[131]

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[126] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593–629; HLA Hart, *The Concept of Law*, 2nd ed (Oxford, Clarendon Press, 1994); HLA Hart, *Essays on Bentham. Studies in Jurisprudence and Political Theory* (Oxford, Clarendon Press, 1982); D Lyons, 'Founders and Foundations of Legal Positivism' (1984) 82 *Michigan Law Review* 722–39, 729–30; P Schofield, 'Jeremy Bentham, The Principle of Utility, and Legal Positivism' (2003) 56 *Current Legal Problems* 1–39; P Schofield, 'Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"' (2010) 1 *Jurisprudence* 147–67; GJ Postema, 'The Expositor, the Censor, and the Common Law' (1979) 9 *Canadian Journal of Philosophy* 643–70; GJ Postema, *Bentham and the Common Law Tradition*, 2nd ed (Oxford, Clarendon Press, 2019) 295–327, 456–97; A Perreau-Saussine, 'Bentham and the Boot-Strappers of Jurisprudence: The Moral Commitments of a Rationalist Legal Positivist' (2004) 63 *Cambridge Law Journal* 346–83; X Zhai, 'Bentham's Natural Arrangement and the Collapse of the Expositor-Censor Distinction in the General Theory of Law', in X Zhai, M Quinn (eds), *Bentham's Theory of Law and Public Opinion* (Cambridge, Cambridge University Press, 2014) 143–83; A Molines, *La complétude des normes juridiques. Contribution à l'analyse du problème de l'individuation en droit* (PhD in Public Law, Université Panthéon-Sorbonne [Paris I], 2022) 98–102, 106–17.

[127] A Perreau-Saussine, 'Bentham and the Boot-Strappers of Jurisprudence: The Moral Commitments of a Rationalist Legal Positivist' (2004) 63 *Cambridge Law Journal* 346–83, 350.

[128] Other uses of such a denomination for example include the whole Critical Legal Studies movement, as well as C Douzinas, A Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing, 2005).

[129] The most thorough analysis of the relevant manuscripts is offered by D Long, 'Bentham as Revolutionary Social Scientist' (1987) 6 *Man and Nature* 115–45; D Long, 'Censorial Jurisprudence and Political Radicalism: A Reconsideration of the Early Bentham' (1988) 12 *The Bentham Newsletter* 4–23; D Long, 'Jurisprudence and the Art of Government: Justice and Public Utility in Jeremy Bentham's *Elements of Critical Jurisprudence*', 2008, www.cpsa-acsp.ca/papers-2008/Long.pdf; D Long, 'Political and Philosophical Radicalism: The Place of the Utility Principle in Jeremy Bentham's Early Writings on Critical Jurisprudence', 2008, https://escholarship.org/content/qt3q11q6vr/qt3q11q6vr_noSplash_21266ef8108148638f05d91b7783283e.pdf?t=krnp56.

[130] J Bentham, *Preparatory Principles*, ed DG Long, P Schofield (Oxford, Clarendon Press, 2016) 321.

[131] J Bentham, *Preparatory Principles*, ed DG Long, P Schofield (Oxford, Clarendon Press, 2016) 322.

In a letter to his father dated 1 October 1776, Bentham announced: 'I am now at work upon my capital work: I mean the Critical Elements of Jurisprudence.'[132] Tellingly, he never published the book, although the manuscripts were used by Dumont to prepare his own French editions of Bentham's works and some of its content can be identified in published works such as *A Comment on the Commentaries*,[133] *A Fragment on Government*,[134] *An Introduction to the Principles of Morals and Legislation*,[135] *Of the Limits of the Penal Branch of Jurisprudence*,[136] *Indirect Legislation*[137] and *The Influence of Time and Place in Matters of Legislation*.[138] But this unsurprising feature does not impede Bentham, under the expression 'critical jurisprudence', which also appears in a satire of William Blackstone's legal thought in *A Comment on the Commentaries*,[139] to deliver several seminal tools for jurists.

This specific jurisprudence may be reconstructed as Bentham's effort to capture the connection that needs to be established between a scientific knowledge of the law – that is, of existing rules as well as of the conceptual framework that is used to express and organise them – and the use of this expertise to promote the utilitarian end, the greatest happiness of the greatest number. In this respect, there is a charitable reading of Bentham that may help articulate his various attempts at clarifying the nature of his enterprise. Expository jurisprudence has to do with the elaboration of a conceptual apparatus and the value-free, morally neutral description of existing law thanks to this conceptual lens. This conceptual lens is to be associated with what Bentham called the 'form' of the law. According to him,

> Under the head of matter are comprehended the ideas to which expression is designed to be given, – the ideas, or say the things that require to be signified:– by the form, understand the signs using which these same things are signified – the words, and combinations of words, by which expression is given to those same ideas.[140]

This conceptual apparatus is devised, of course according to utilitarian criteria, to offer the best apprehension of the raw legal material and to organise it properly, both to descriptive and to prescriptive ends. Ordering, describing, prescribing or advice-giving are distinct activities.

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[132] J Bentham, Letter to Jeremiah Bentham, 1 October 1776 (Aet 28), in *The Correspondence of Jeremy Bentham*, Vol 1: 1752–1776, ed TLS Sprigge (London, The Athlone Press, 1968) 358–9.

[133] J Bentham, *A Comment on the Commentaries*, in J Bentham, *A Comment on the Commentaries* and *A Fragment on Government*, ed JH Burns, HLA Hart (London, The Athlone Press, 1977).

[134] J Bentham, *A Fragment on Government*, in J Bentham, *A Comment on the Commentaries* and *A Fragment on Government*, ed JH Burns, HLA Hart (London, The Athlone Press, 1977).

[135] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996).

[136] J Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed P Schofield (Oxford, Oxford University Press, 2010).

[137] J Bentham, *Des moyens indirects de prévenir les délits*, in J Bentham, *Traités de législation civile et pénale*, [1802], ed E Dumont (Paris, Dalloz, 2010) 331–405.

[138] J Bentham, *De l'influence des tems et des lieux en matière de législation*, in J Bentham, *Traités de législation civile et pénale*, [1802], ed E Dumont (Paris, Dalloz, 2010) 448–74.

[139] J Bentham, *A Comment on the Commentaries*, in J Bentham, *A Comment on the Commentaries* and *A Fragment on Government*, ed JH Burns, HLA Hart (London, The Athlone Press, 1977) 20.

[140] J Bentham, *Nomography; or the Art of Inditing Laws*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol III, 234.

Depending on the purpose of each, the utilitarian assessment of the value of the designed concepts varies. However, the fact that a concept can be normatively appreciated as useful for a descriptive project does not deprive this activity of its descriptive dimension. Censorial jurisprudence has to do with the expression of Bentham's political preferences, based on his utilitarianism. Critical jurisprudence has to do with the connection between the two, that is, with the formulation of recipes that indicate what to do *if* one adheres to utilitarianism. Under such a reading, critical jurisprudence would remain on the side of descriptive science, but it would consist of sentences expressing technical rules to achieve a specific goal, while being indifferent to whether one should adopt utilitarianism as one's moral and political credo.

The concept of a technical rule originated in the philosophy of science. Causal relationships are identified at the level of natural objects. The natural sciences describe these relationships using so-called 'anankastic' propositions. These are of the type 'if *a* is, then *b* is'. They establish a conditional relationship between two phenomena. Based on these propositions, it is possible to develop practical applications of scientific knowledge. If an individual sets *b* as his goal, he knows that he must provoke *a*. It is possible to formulate a technical rule of the form 'if you want to achieve the goal *a*, you must use means *b*'. Freedom in the choice of the goal is linked to the need to use certain means. A technical rule therefore indicates a behaviour to be performed, not in itself, but as a necessary, sufficient, or necessary and sufficient condition for achieving a contingent end.[141] In a technical rule, the concept of condition appears twice. The behaviour to be followed is indicated *on the subjective condition* that the addressee of the rule is pursuing a certain end, and *as an objective condition* for that end to be achieved.[142] The 'duty' of the technical rule is not deontic but causal, or anankastic. In fact, this rule does not 'prescribe' anything. It merely indicates information in the form of a programme of action to be followed if an individual intends to obtain a result.[143] If the anankastic proposition and the technical rule are to be distinguished,[144] they are not independent: the technical rule presup-

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[141] GM Azzoni, *Cognitivo e normativo: il paradosso delle regole tecniche* (Milano, Franco Angeli, 1991) 13–14; AG Conte, 'Eidetic-Constitutive Rules', in A Pintore, M Jori (eds), *Law and Language. The Italian Analytical School* (Liverpool, Deborah Charles Publications, 1997) 133–46, 140; AG Conte, 'Materiali per una tipologia delle regole' 15 (1985) *Materiali per una storia della cultura giuridica* 345–68, 357.

[142] AG Conte, 'Eidetic-Constitutive Rules', in A Pintore, M Jori (eds), *Law and Language. The Italian Analytical School* (Liverpool, Deborah Charles Publications, 1997) 133–46, 141; AG Conte, 'Materiali per una tipologia delle regole' 15 (1985) *Materiali per una storia della cultura giuridica* 345–68, 357.

[143] O Weinberger, 'The Role of Rules' (1988) 1 *Ratio Juris* 224–40, 226–8; O Weinberger, *Alternative Action Theory*: *Simultaneously a Critique of Georg Henrik von Wright's Practical Philosophy* (Dordrecht, Boston, London, Kluwer Academic Publishers, 1998) 51; O Weinberger, *Law, Institution and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (Dordrecht, Boston, London, Kluwer Academic Publishers, 1991) 49–50; O Weinberger, 'The Logic of Norms Founded on Descriptive Language' (1991) 4 *Ratio Juris* 284–307, 301–2; D González Lagier, 'Algunas cuestiones sobre las reglas técnicas' (1993) 14 *Doxa* 473–96, 483–4.

[144] G Kalinowski, *Querelle de la science normative (Une contribution à la théorie de la science)* (Paris, LGDJ, 1969) 40–1; A Mela, 'Regole tecniche e presupposizioni' (1992) *Analisi e diritto* 225–38.

poses the anankastic proposition.[145] What is more, both are at the same level of language, and both are capable of truth and falsity.[146]

The preceding reconstruction tries to make sense of the idea of a logical separation between expository and censorial jurisprudence. It seems to be consistent, for example, with Bentham's presentation of the fundamental principles of his constitutional politics. A first principle exposes what ought to be, that is, the greatest happiness of the greatest number. A second one exposes what is the case, that is, the self-preference of any individual, among whom are the ruling few. The last, 'Junction-of-interests prescribing' principle 'declares the means of bringing what is into accordance with what ought to be'.[147] This connection is akin to the formulation of technical rules. It may nevertheless be reproached as artificially forcing Bentham's thought in a traditional positivist understanding and downplaying the genuine originality of his utilitarian jurisprudence. In this respect, one of the most explicit manuscripts precisely puts the connection between theory and practice at the heart of the purpose of critical jurisprudence. There, he tries to clarify the intellectual location of the new 'important but hitherto nameless […] master – science which [he has] here ventured to speak of under the new appellation of Critical Jurisprudence'. According to Bentham:

> The field of it lies on the declivity of a mountain between the two busy spots, both in a high state of population if not of culture, that of Moral Philosophy above and that of Practical Law beneath. Between these two lies a trackless dreary waste: trackless except where marked by the transient short and irregular excursions of the inhabitants of those two bounding regions. It is this waste I propose to put in a course of culture.[148]

The ambition of the critical elements of jurisprudence or of critical jurisprudence[149] seems to be to build a bridge between theoretical reflection and practical implementation. Bentham's ambition is to allow for the emergence of a new political figure, which would be neither the 'philosophers' nor the 'Lawyers', but the 'Statesmen'.[150] Whereas the philosophers 'make imaginary laws for imaginary commonwealths, and their discourses are as the stars, which give little light because they are so high', the lawyers 'write according to the states where they live, what is received law, and not what ought to be law'. In contradistinction with both

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[145] GH von Wright, *Norm and Action: A Logical Enquiry* (London, Routledge and Kegan Paul, 1963) 9–11.

[146] See eg O Weinberger, *Alternative Action Theory*: *Simultaneously a Critique of Georg Henrik von Wright's Practical Philosophy* (Dordrecht, Boston, London, Kluwer Academic Publishers, 1998) 51. The last aspect is however more controversial, see GM Azzoni, *Cognitivo e normativo: il paradosso delle regole tecniche* (Milano, Franco Angeli, 1991); A Mela, 'Regole tecniche e presupposizioni' (1992) *Analisi e diritto* 225–38; D González Lagier, 'Algunas cuestiones sobre las reglas técnicas' (1993) 14 *Doxa* 473–96, 474.

[147] J Bentham, *Constitutional Code Rationale*, in J Bentham, *First Principles Preparatory to Constitutional Code*, ed P Schofield (Oxford, Clarendon Press, 1989) 235.

[148] UCL, xxvii, 12.

[149] The hesitation between 'critical elements' and 'critical jurisprudence' is also visible in UCL, xxviii, 114, where the manuscript exhibits the following, partially deleted, expression: '~~Critical~~ Elements of Critical Jurisprudence'.

[150] UCL, xxvii, 12.

roles, Bentham offers that of the 'law-maker'.[151] He has constantly expressed his scepticism regarding the distinction between theory and practice. According to him, 'There exists no good foundation for the opposition betwixt Theory and Practise, or for the common saying such a Proposition has been said to be good in Theory but bad in practise'.[152] This is consistent with Bentham's will to propose as empirical a theory of justice as possible. As he himself wrote:

> The present work as well as every other work of mine that has been or will be published on the subject of legislation or any other branch of moral science is an attempt to extend the experimental method of reasoning from the physical branch to the moral. What Bacon was to the physical world, Helvetius was to the moral. The moral world has therefore had its Bacon, but its Newton is yet to come.[153]

This is why 'The science of Jurisprudence (and the same may be said of Morality) as treated upon this plan, is as strictly and properly a science founded upon experiment, as any branch of Natural Philosophy'.[154] As it is designed, critical jurisprudence fully embodies the radically activist and reformatory ambitions of utilitarian legal thought. The legislator, for whom Bentham designs a totally new discipline from which the categories of a new political language and a new grammar of governance result, is at the same time the addressee of the new science of legislation or the 'principles of public policy', as critical jurisprudence was alternatively called, and, once it has gained sufficient mastery of its instruments, the greatest practitioner. 'Bentham was very conscious of the fact that he was engaged in an attempt to shift the paradigm conception of law'[155] and lay the foundation for a new political and legal culture. Critical jurisprudence thus implies various dimensions of law and legal thought: ontology, axiology and methodology. The purpose of this *Research Handbook* is precisely to put (not strictly Benthamian but utilitarian in general) Critical Jurisprudence to task and see what it can contribute to major legal debates, at the disciplinary as well as at the conceptual and practical levels.

4. PURPOSE OF THE BOOK

This *Research Handbook* aims to assess what Critical Jurisprudence has to teach us. Without claiming, like James Barr Ames, that 'The law is utilitarian',[156] it seeks precisely to see what utilitarianism, as it has developed and diversified, can contribute to legal issues, law being understood in this respect not only as a set of norms (normative object-language), a science (descriptive metalanguage) or a policy-oriented discourse (normative metalanguage), but also as a specific culture or mindset that offers a specific legibility to social phenomena.

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[151] UCL, xxvii, 12.

[152] UCL xcvii, 5. See also J Bentham, *The Book of Fallacies*, ed P Schofield (Oxford, Clarendon Press, 2015) 226–8.

[153] J Bentham, 'The Philosophy of Economic Science', in *Jeremy Bentham's Economic Writings*, ed W Stark, Vol I (London, George Allen & Unwin, 1952) Vol 1, 100–1.

[154] UCL lxx(a), 22.

[155] GJ Postema, *Bentham and the Common Law Tradition*, 2nd ed (Oxford, Clarendon Press, 2019) 305.

[156] J Barr Ames, 'Law and Morals' (1908) 22 *Harvard Law Review* 97–113, 110.

With the ambition to provide a broad overview of research in the field while at the same time creating a forum for more challenging, critical examination of complex and often under-explored issues within that field, this *Research Handbook* consequently exposes various ways to understand the association between law and utilitarianism. This is all the more natural as, in contradistinction to other topics that have made their way into this series, such as Comparative Constitutional Law,[157] Intellectual Property Rights and Inclusivity,[158] Family Property and the Law,[159] International Procedural Law,[160] Feminist Political Thought,[161] NATO[162] or Legal Semiotics,[163] there is no academic field properly dedicated to utilitarian legal studies, utilitarian legal theory or legal utilitarians. In the absence of a solidified academic tradition, this *Research Handbook* also aims to connect, based on the broad definitions of law on the one hand and of utilitarianism on the other, several types of academic interests, perspectives and methodologies. As one of the first attempts of its kind,[164] it consequently presents an avowedly tentative and exploratory character, and cannot pretend to any exhaustivity.

Some chapters take the writings of utilitarian authors as the starting point of their analysis and try to identify, reconstruct or expose a specifically utilitarian doctrine about the law in general or a given legal debate in particular. They directly tackle an aspect of classical or contemporary utilitarianisms' outspoken and explicit policy-making ambitions, and assess their credibility, feasibility, suitability and coherence, from an internal and an external viewpoint in contemporary contexts. Other, more exploratory, chapters propose to assess how utilitarianism, or some variant of it, contributes to a specific legal debate, which it has not specifically or thoroughly addressed, and to confront it with competing analysis. The legal issue at stake can be for example a specific legislation or a specific judicial ruling, an object of legislative decision-making, a legal reasoning, a legal doctrine, a whole sector of a legal system or a general conception of legal governance. Others understand utilitarianism less as a substantive doctrine that allows, among others, to assess the merits or demerits of a specific legal situation or proposal than as a possible mindset that allows making sense of a specific legal regime. Even though there is no explicit utilitarian inspiration in this regime, it appears

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[157] T Ginsburg, R Dixon (eds), *Comparative Constitutional Law* (Cheltenham, Edward Elgar Publishing, 2011).

[158] C Sappa (ed), *Research Handbook on Intellectual Property Rights and Inclusivity* (Cheltenham, Edward Elgar Publishing, 2024).

[159] M Briggs, A Hayward (eds), *Research Handbook on Family Property and the Law* (Cheltenham, Edward Elgar Publishing, 2024).

[160] J Gomula, S Wittich (eds), *Research Handbook on International Procedural Law* (Cheltenham, Edward Elgar Publishing, 2024).

[161] M Caputi, P Moynagh (eds), *Research Handbook on Feminist Political Thought* (Cheltenham, Edward Elgar Publishing, 2024).

[162] S Mayer (ed), *Research Handbook on NATO* (Cheltenham, Edward Elgar Publishing, 2023).

[163] A Wagner, S Marusek (eds), *Research Handbook on Legal Semiotics* (Cheltenham, Edward Elgar Publishing, 2023).

[164] Previously, with differing perspectives, see GW Keeton, G Schwarzenberger (eds), *Jeremy Bentham and the Law: A Symposium* (London, Stevens & Sons, 1948); P Gérard, F Ost, M Van de Kerchove (dir), *Actualité de la pensée juridique de Jeremy Bentham* (Bruxelles, Publications des Facultés universitaires Saint-Louis, 1987); M Bozzo-Rey, G Tusseau (dir), *Bentham juriste: l'utilitarisme juridique en question* (Paris, Economica, 2011).

possible to rationalise the global conformation of the raw legal materials through this lens, thus highlighting legal actors' sometimes implicit utilitarianism.

The purposeful heterogeneity of the contributions, both in terms of the background of authors, area of specialisation, choice of topics and methodologies, aims at offering an overall picture of what it is like to put utilitarianism and law in contact, and what results this encounter produces. The resulting tentative landscape is a series of 'perspectives' that can be broadly and schematically understood in two ways.

The first main axis can be called 'Utilitarianism *on* the law'. It aims at clarifying the utilitarian standpoint on legal issues. Following Bentham's cartography of legal discourses, this implies again two perspectives. One is conceptual, in that it deals with the utilitarian conception(s) of what the law is. It may be called 'legal utilitarianism'. The other is normative, in that it deals with utilitarian or utilitarianism-based proposals for law reform. It can be called 'utilitarian law'.

The second main axis regards 'Utilitarianism *in* law'. It addresses how utilitarian arguments, theses and reasonings, as they appear in writings that may not be strictly legal but may relate to political philosophy, moral theory or ethics, bear upon social choices that are achieved through legal means (for example, LGBT rights, abortion, free speech, and so on). Some of these topics have been directly addressed by utilitarian authors (for example, free speech by John Stuart Mill, animals' rights by Jeremy Bentham or Peter Singer). But others have not, so that the contributions have to explain how a utilitarian perspective contributes to important debates. In this respect, one of the objectives of the *Research Handbook* is to offer some hints as to how utilitarianism can contribute to framing specific issues of collective choice, clarifying what is at stake and offering specific suggestions for solutions. This is why, as well as classical topics that have been dealt with by utilitarian authors, a presentation of current social problems and more exploratory attempts at presenting utilitarian reflections on them needed to be proposed. A series of concrete and 'operational' exemplifications of how utilitarianism can contribute to legal debates is consequently offered. One word of caution is appropriate in this regard. This *Research Handbook* is by no means an apologia, nor does it adopt a proselytising tone. This is why the contributions that follow truly intend to highlight utilitarianism's contribution to controversies of which it may be part, for better or worse.

5. OUTLINE OF THE BOOK

The book consists of two parts. The first is entitled 'Mapping the legal landscape and structuring legal governance'. It is dedicated to the way utilitarian authors have addressed legal problematics and conceived of the law. This part of the book tends to adopt a state-of-the-art perspective, including a historical perspective. The other part tends to adopt a more tentative, problem-focused, suggestive perspective. This first part is nonetheless quite original as it proposes to highlight how utilitarian legal theory, starting from Bentham, sets out to cut into the magma of raw legal materials specific units that will be handled more conveniently by utilitarian reformers. It deals with the ways in which utilitarianism has conceived of the legal landscape, that is, how it has actively and creatively conceptualised the law in a constructivist and artificialist perspective, sometimes deeply impacting contemporary legal conscience. It developed a (set of) specific perspective(s) or standpoint(s) regarding that object, and has defined it in a specific way that is quite distinct from former legal theories (especially natural

law theory) and from later ones (normativism, American legal realism, Scandinavian legal realism, critical legal studies, social perspective on law, and so on). The aim of this part is thus to highlight the specific utilitarian legal lens or mindset (basically the law as a self-contained and all-encompassing human artifact devoted to the promotion of the greatest happiness of the greatest number), and to identify its specific intellectual locus when compared with other perspectives which it may oppose or foreshadow or with which it may share some common assumptions. This part thus highlights utilitarianism's main ambitions and its possible fruitfulness by analysing the main conceptual tools it offers to deal with legal topics.

As a consequence, one early chapter needs to be devoted to utilitarianism's main contribution to legal theory, that is, Bentham and his followers' theory of general jurisprudence. This chapter, which will be of specific interest to the cultivators of jurisprudence and legal theory, highlights the creation and developments of the tradition of analytical jurisprudence, based on a very specific theory of legal language and legal concepts. It allows identifying the locus of utilitarian jurisprudence within the general landscape of legal theory. Pierluigi Chiassoni claims that analytic(al) jurisprudence is a utilitarian invention. His chapter purports to present it as a full-fledged variety of legal philosophy, bringing to the fore not only its tools but also its overall ambition to play a leading role in the development of law and legal thinking. The presentation proceeds in four steps. Step one sets forth the ten basic principles of the analytic approach to legal philosophising. Step two draws a charter of analytic jurisprudence, distinguishing, along Benthamite lines, between a descriptive (expository) and a normative (censorial) branch thereof. Step three reviews some of the main tools the mastery of which fares as a necessary condition for fruitful analytic enquiries. Step four, finally, outlines the sort of conceptual analysis that is in tune with the principles and charter of analytic jurisprudence.

Chapters 2 to 11 address the utilitarian views on the major branches of the law that are commonly identified. This structure will help each category of specialist to look for the utilitarian aspect of her main area of interest. Each chapter alternatively addresses (i) the theoretical conception utilitarian authors developed regarding all these branches and the recommendations they made for law reform; (ii) the practical contribution, if any, of utilitarian authors or utilitarian legislators to the evolution of positive law, or the influence of utilitarian politics in each legal branch; and (iii) the place and relevance of utilitarian arguments in the current debates of the discipline.

Private law is considered first. By discussing a utilitarian theory of private law, Craig Purshouse starts by highlighting that this sector or law covers a range of areas such as torts, contract law and property, and its focus is on the rights we have against one another. It is often contrasted with public law, which is concerned with our rights against the state. Attempts to theorise private law have elicited widespread criticism for failing to explain its doctrines. Using Richard M. Hare's two-level theory, this chapter sketches a utilitarian account of private law and then applies it to several areas of doctrine. It will be demonstrated that many areas of private law can be explained in utilitarian terms.

The next chapter, by Malcolm Thorburn, goes to the heart of Bentham's initial project and addresses the rise of utilitarianism in criminal justice. It surveys the birth, development and influence of utilitarianism in criminal justice thinking from the eighteenth century to the present, in three stages. Early utilitarian theorists such as Hume, Helvétius and Beccaria were writing in *Ancien Régime* Europe. They were mostly concerned with reconfiguring the foundations and limits of legitimate state power and the connection between the positive law and matters of morality and religion. Utilitarianism came into its own in the nineteenth century in

a second stage of development, with Beccaria as a transitional figure and Jeremy Bentham and John Stuart Mill as the central players. At this second stage, utilitarianism gave rise to a highly detailed set of principles for reforming virtually every aspect of human endeavour, including criminal justice: changes to the law of evidence, the law of criminal defences, sentencing regimes, prison design, policing practices and much more besides. Finally, at a third stage, in the twentieth and twenty-first centuries, utilitarianism became the standard framework for policy analysis in a wide variety of legal arenas, including criminal justice reform. At this third stage, utilitarian thinking has become so much a part of the standard picture among law reformers that it often goes unnoticed. At the end of this centuries-long development, the influence of utilitarianism on criminal justice is uneven. It dominates discussion on matters of criminal sentencing and it plays a key role in policy discussions concerning policing and public safety measures more broadly. On matters of criminalisation, by contrast, utilitarianism has had very little influence. In other areas, particularly the law of criminal evidence, the field has been transformed in very much the ways that Jeremy Bentham would have wished – even though these developments seem to have been advanced piecemeal, without any clear utilitarian agenda behind them.

In Chapter 5, Xiaobo Zhai addresses constitutional law. This area was a life-long preoccupation for Bentham and he dedicated the last decade of his life to it. By focusing on Jeremy Bentham, John Stuart Mill and the utilitarian constitution, this chapter offers an introductory account of Bentham's utilitarian constitutional theory and compares some aspects of Bentham's constitutional theory with those of Mill. First, it discusses Bentham's and Mill's theories of the nature and the ideal shape of a constitution. Second, it analyses the principles of Bentham's constitutional design, and investigates the differences between them and those of Mill. Third, it explores Bentham's and Mill's theories of the moral limits of the power of government. Fourth, it presents the system and the machinery of Benthamic representative government. Fifth, it examines Mill's discussion of the tyranny of the majority, the resources in Bentham's thought that can be deployed to tackle this danger and Bentham's attitude towards checks and balances.

The next chapter, by Thomas Perroud, continues exploring topics classically presented as belonging to public law by focusing on administrative law. It intends to give an overview of Bentham's ideas on public administration. His ideas seem extremely modern, emphasising accountability, transparency, contracting out and public procurement. His designs for public services in the field of education, poor relief and imprisonment are also interesting to analyse, as they undoubtedly shed light on major contemporary evolutions of governance systems.

Francesco Ferraro's contribution on the law of procedure once again addresses a topic to which Bentham devoted considerable efforts.[165] The problem of utilitarian legal procedures

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[165] See esp J Bentham, *De l'organisation judiciaire et de la codification: extraits de divers ouvrages*, ed E Dumont (Paris, Bossange, 1802); J Bentham, *Equity Dispatch Court Proposal; Containing a Plan for the Speedy and Unexpensive Termination of the Suits Now Depending in Equity Courts. With the Form of a Petition, and Some Account of a Proposed Bill for that Purpose*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol III, 297–431; J Bentham, *Draught of a Code for the Organization of the Judicial Establishment in France*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol IV, 285–406; J Bentham, *Scotch Reform*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol V, 1–54.

can be traced back to the alternative between direct- and indirect-utilitarian decision procedures: should judges decide by aiming directly at utility maximisation or rather by pursuing it indirectly, by sticking to fixed rules? Bentham tackled this problem and considered it as a separate issue from that of interpretative formalism. Moreover, while he mostly advocated indirect utilitarian decision-making as regards substantive law, he thought that the law of procedure requires flexibility and direct-utilitarian decisions. However, this could pose problems for criminal procedure, for instance regarding illegally obtained evidence. Fine-tuned exclusionary rules, with a ban on certain kinds of illegally obtained evidence, would seem more compatible with utilitarianism. Adversarial procedures should be preferred to inquisitorial ones, provided they are directed at accurate fact-finding. Lastly, it is argued that utilitarianism can provide a ground for the rationalisation of judicial balancing between conflicting principles and rights.

Not without connections with procedure, the utilitarian contribution to the law of evidence is explored next by Olivier Leclerc. His chapter exposes Bentham's systematic analysis of the law of evidence from the perspective of the principle of utility. A scathing critic of English common law, he considered in overwhelming detail how evidence, but also more generally procedure and substantive law, should be organised according to the utility principle. The aim of this chapter is threefold. It analyses the utilitarian critique of the law of evidence; attempts to reconstruct that law according to utilitarian principles; and assesses the influence of utilitarian conceptions on the theories of evidence developed by specialists in the law of evidence. Emphasis is placed on three instruments in particular: the critique of exclusionary rules, witness psychology and probabilistic reasoning. In these three fields, utilitarian approaches appear to have been pioneering. However, their influence on current theories of evidence has been challenged by a fundamental renewal and extension of forensic psychology and probabilistic theory since the later eighteenth century.

The following chapter focuses on company law. In this respect, it addresses a topic that has not so directly been the object of sustained attention by the founders of utilitarianism. For example, Bentham never proposed to write *ab ovo* a code of company law or a code of commercial law like he proposed to draft a penal code, a civil code, a code of procedure or a constitutional code. He was nevertheless interested in this sector of law from a very practical perspective, when he tried to design the National Charity Company[166] that would be decisive in his scheme of poor relief, and when he elaborated on the details of panopticon management.[167] James Mill[168] and his son,[169] as well as other utilitarians, were deeply involved in the concrete operations of the East India Company which was in charge of the colonial administration. Andrew Gustafson more precisely concentrates on utilitarian business ethics and company law. The purpose of his chapter is, first, to provide both some historical background on the reception and impact of utilitarianism on business ethics and also company law

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[166] J Bentham, *Writings on the Poor Laws*, Vol 2, ed M Quinn (Oxford, Clarendon Press, 2010).

[167] J Bentham, *Panopticon; or, the Inspection-House*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol IV, 37–172; J Bentham, *Panopticon versus New South Wales and Other Writings on Australia*, ed T Causer, P Schofield (London, UCL Press, 2022).

[168] A Bain, *James Mill: A Biography* (Longmans, Green, and Company, 1882).

[169] AL Harris, 'John Stuart Mill: Servant of the East India Company' (1964) 30 *The Canadian Journal of Economics and Political Science / Revue canadienne d'économique et de science politique* 185–202.

and legal rulings, especially in the United States. Second, it provides some overview of the contemporary utilitarian approaches to business ethics, and ways in which contemporary legal rulings and legislation have been framed and influenced by utilitarian thinking. Finally, some suggestions are provided for ways in which ongoing utilitarian research could intersect with current business ethics and management scholarship today.

Connecting the topic of business and company law with one of the most recent currents of legal thought that emerged in the second half of the twentieth century, Dina I. Waked's chapter ponders over the genealogy of the Law and Economics movement. Offering an alternative narrative from what is commonly contended, she claims that this movement, also known as the economic analysis of law, owes a great debt to Jeremy Bentham. This debt goes as far as to consider his work the genesis of their movement. Yet his role and influence are seldom acknowledged beyond his work on crime and punishment. She intends to shed some light on three Benthamite moves that position his work as a definite precursor to the law-and-economists' work of the 1960s and beyond. First, Bentham's pleasure and pain calculus is akin to the law-and-economists' cost–benefit analysis. Second, like the law-and-economists, Bentham proposed a felicific calculus using money and wealth to calculate pleasures and pains – an unknown fact to many (including the law-and-economists themselves). Third, this felicific calculus allowed Bentham to bring an economic analysis to measure desirability in non-economic legal fields – a characteristic the law-and-economists claim they invented. To substantiate these moves, her chapter looks closely into Bentham's influence upon Law and Economics to depict a much broader influence or debt. In recognising this influence, and also how it was cast outside the spotlight, the chapter narrates an alternative account of Law and Economics and greatly contributes to the genealogy of legal doctrines.

In a similar vein, Malik Bozzo-Rey's chapter on nudges and utilitarianism sets out to investigate the connections between Cass S. Sunstein and Richard H Thaler's recent theory of nudges and utilitarianism. Nudges are classically presented as techniques and devices aimed at influencing human choices in a way that will make choosers better off, as judged by themselves.[170] As such, they are not explicitly connected to utilitarianism by these authors, despite being largely anticipated by Bentham's theory of indirect legislation.[171] After first identifying the different elements that define nudges and the relationship between the latter and the law, the focus shifts to the expression 'as judged by themselves', which is presented as the 'lodestar' of nudge theory and actually serves a triple function. 'As judged by themselves' is simultaneously a standard for evaluating nudges, an expression of their purpose (to improve an individual's well-being), and a rationale for the use of paternalistic interference,

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[170] CR Sunstein, LA Reisch (eds), *Research Handbook on Nudges and Society* (Cheltenham, Edward Elgar Publishing, 2023). For recent applications and discussions, see also J-P López Pulido, *Perspectiva cognitiva y nudge público: la actuación conductal de los poderes públicos* (Cizur Menor, Aranzadi, 2023); 'Théorie et pratiques des nudges: Enjeux juridiques et politiques' (2023) 1 *Nomopolis: Revue internationale de droit et de science Politique*, https://nomopolis.org/nomopolis-1-nudges/.

[171] J Bentham, 'Des moyens indirects de prévenir les délits', in J Bentham, *Traités de législation civile et pénale*, [1802], ed E Dumont (Paris, Dalloz, 2010) 331–405. See M Bozzo-Rey, A Brunon-Ernst, A Van Waeyenberge (dir), 'Nudges: Better Choices?' (2016) 37 *The Tocqueville Review/La revue Tocqueville*; M Bozzo-Rey, A Brunon-Ernst, M Quinn (eds), 'Indirect Legislation: Jeremy Bentham's Regulatory Revolution' (2017) 43 *History of European Ideas*.

however libertarian it may be. This chapter attempts to show that in order to base a theory on a subjective conception of well-being, one must have at least a clear concept of preferences and a method or standard by which well-being can be measured, or at least a means by which well-being can be compared between individuals. One cannot ignore the temporality of the subjective judgment and the identity of the person making that judgment. Indeed, the author wonders whether a coherent argument in favour of nudges would not involve confronting and clarifying all these issues, which raise classical difficulties for utilitarianism and its ambition to influence human behaviour through what Bentham called 'direct legislation', as well as through milder, incitative, means.

The final chapter of the first part addresses the topic of human rights, which is one of the most controversial for utilitarians. Bentham is indeed famous for his criticism of 'anarchical fallacies',[172] by which he meant natural rights as they were proclaimed by the American and French declarations at the end of the eighteenth century. This hostility fed a classical criticism against utilitarianism's propensity, because it is only concerned with the maximisation of global welfare, to ignore individual natural rights and to be ready to sacrifice these fundamental values for the sake of general happiness.[173] Sterling Harwood and Don A Habibi more selectively explore the aftermath of Bentham's famously harsh criticism of extralegal rights: natural rights are 'nonsense on stilts'.[174] They discuss Rawls and Sen as Bentham's rivals who defend theories of justice mostly based on a vision of the right rather than a vision of the good. They show that Sen simultaneously fails to credit Bentham for correctly predicting the proliferation of questionable rights and neglects Rawls' Reflective Equilibrium. Calling into question the accuracy of a utilitarian approach to the issue, they argue that Bentham's attack on Sen's proliferating extralegal rights is self-contradictory: Bentham proliferates utilitarian duties to include maximising happiness for all sentient animals. But utilitarianism is not totally without merits. When criticising Bentham, it appears that Sen dodges fatal contradiction only at the cost of lacking a timetable and budget for reducing injustice, and having only a modest aim of reducing injustice by an unspecified amount. Bentham and Sen emerge from their battle seriously wounded – yet new versions of utilitarianism and rights live to fight another day. In this respect, in a way that is not unsimilar to Bentham's Critical Jurisprudence, the authors finally recommend less abstract, pre-set theorising and more concrete, experimental action.

The second part of the book is entitled 'Unsettling the legal landscape and debating legal governance: utilitarianism in legal controversies'. It offers a more cross-cutting perspective than the first one, which mostly relied on a disciplinary perspective. It tends to highlight how utilitarianism conceived of the law as a tool for guiding, managing and monitoring human behaviour. Legal regulation appears there as an ongoing work from public authorities. This is why this part adopts a dynamic perspective, focusing on legal governance as a form of political activity. The basic purpose is to understand how utilitarianism, understood as an effort to lead

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[172] J Bentham, *Anarchical Fallacies; Being an Examination of the Declarations of Rights issued during the French Revolution*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol II, 489–534.

[173] J Rawls, *A Theory of Justice* (Cambridge, The Belknap Press of Harvard University Press, 1971) 30–2; R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) 90–100, 172, 231–8.

[174] See also AF Gibbard, 'Utilitarianism and Human Rights' (1984) 1 *Social Philosophy and Policy* 92–102; G Tusseau, 'Bentham contre les droits de l'homme: un réexamen' (2002) 13 *Revue trimestrielle des droits de l'homme* 407–31.

to the greatest happiness of the greatest number, set out to motivate human behaviour and organise the human environment. Chapters 13 to 26 both offer a presentation of utilitarian theses as they are commonly expressed and understood, when utilitarianism is portrayed as the usual suspect for several positions. But they also call into question these received views, in light of the most recent developments of this doctrine, and pave the way for new developments in legal scholarship. To this end, they offer a series of case studies. Some of the topics have directly been confronted by classical or contemporary utilitarianism (religion, international relations, homosexuality, and so on), whereas others have not to such an extent. The contributions deal with a wide array of important social topics which contemporary legal systems have to face in order to assess how a utilitarian perspective tackles them. This part exposes so many examples of applied or operationalised utilitarianism, giving flesh to the perspective of Critical Jurisprudence. Two dimensions need to be studied. The first is mostly methodological, and has to do with the way a specifically utilitarian perspective frames the legal discussion. The second is mostly substantive, and considers how utilitarianism contributes to offering solutions to specific problems. By addressing so many issues, the reader realises how rich utilitarianism is and how fruitful it is to have in mind (which is different from adopting its conclusions) the reflections it can provide. She is simultaneously presented with the limits and defects of injecting utilitarianism into legal controversies.

Chapter 13, by Benoît Basse, addresses LGBT rights. They remain a controversial issue in several legal systems,[175] whereas the enfranchisement of sexual minorities was a preoccupation during Bentham's life. He more generally adopted an anti-elitist standpoint, and favoured counter-cultures and tolerance in matters of taste.[176] This is why, historically, utilitarianism played a prominent role in challenging the dominant disapproving point of view on homosexuality. Bentham's theses on this matter were not only progressive and far ahead of their time. They already contained what seems to be the key ideas of a consistent utilitarian approach to sexual morality. However, it must paradoxically be noted that utilitarianism does not seem to have had a major influence on the theorists involved in the LGBT movement since the late 1960s. Instead, LGBT theorists and activists tend to adopt a liberal perspective based on every individual's fundamental rights. Does this mean that utilitarianism fails to capture some crucial aspirations among LGBT people? Though it might be the case, one may argue that John Stuart Mill's version of utilitarianism should also be taken into consideration to support their legitimate claims more appropriately.

In the history of law, and as feminist jurisprudence has made clear, women also appear as a disfavoured, oppressed minority. Paola Rudan appositely offers a combined feminist reading of Jeremy Bentham, William Thompson and Anna Wheeler. Beginning with the 1975–80 debate on Jeremy Bentham's 'feminism', her chapter considers the place of women in his overall theory of society, government and the law, and then follows his legacy through the

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[175] See eg RB Baker, KJ Wininger (eds), *Philosophy and Sex: Adultery, Monogamy, Feminism, Rape, Same-Sex Marriage, Abortion, Promiscuity, Perversion*, 4th ed (Amherst, Prometheus Books, 2009).

[176] M Quinn, 'Jeremy Bentham on Liberty of Taste' (2017) 43 *History of European Ideas* 614–27; M Quinn, *Utilitarianism and the Art School in Nineteenth-Century Britain* (London, Pickering & Chatto, 2013); A Julius, M Quinn, P Schofield (eds), *Bentham and the Arts* (London, UCL Press, 2020); CD Shanafelt, *Uncommon Sense. Jeremy Bentham, Queer Aesthetics, and the Politics of Taste* (Charlottesville, London, University of Virginia Press, 2022).

perspectives on women's emancipation provided by William Thompson and Anna Wheeler. The main *loci* of Bentham's discourse on women are analysed, arguing that this discourse can be fully grasped under the light of his conception of society as an order arising from exchange, where equality is conceivable only in terms of equivalence and rights are thought as a form of compensation of existing hierarchies of power. Then, William Thompson's criticism of women's subjection and his support for emancipation are analysed in consideration of his different conception of society, where social cooperation takes the place of exchange as a dynamic source of order. Finally, the political difference of Anna Wheeler's contribution is emphasised, due to her shift from a discourse whose subject is the order of society to a perspective whose feminism relies on a conception of women as the antagonistic, collective subject of social change.

One of the most relevant issues of legal feminism is that of reproductive rights. In her chapter, Sarah Conly examines utilitarianism's contribution to this discussion. She addresses the policies that act-utilitarianism would recommend concerning three central areas of reproduction: first, whether state limits on reproduction are permissible; second, whether abortion should be allowed; and third, whether the state should fund reproductive technology so that it is accessible for all. She argues that utilitarian policies always depend on the particular circumstances in which the policy is to be applied, since what maximises utility will be different in different situations. However, at present it seems likely that an act-utilitarian would allow limits on reproduction for the sake of avoiding overpopulation, would allow abortion and would allow public funding of reproductive technologies in those circumstances where that would not result in under-funding more significant medical care.

By focusing on killing, Tatjana Višak's chapter addresses another heated moral and legal topic.[177] The utilitarian stance on killing seems simple and straightforward. Killing is right whenever it maximises well-being; otherwise, it is wrong. This chapter departs from this simple position and then introduces three considerations within utilitarianism that make it more complex. These are (i) different theories about the harm of death, (ii) disagreement about whether to promote well-being as an impersonal or a personal value and (iii) acceptance of different evaluative focal points. It turns out that there is not such a thing as the utilitarian stance on killing in terms of legal policy-making. How utilitarians view instances of killing depends on the exact version of utilitarianism that they accept.

Drawing on the experience of the COVID-19 pandemic as well as on more fundamental and structural issues ultimately involving the question of the price of life,[178] Xavier Bioy then analyses health crises from a utilitarian perspective. Rather than providing a global description of utilitarian analyses of health, this chapter tests whether it is possible to rely on them in the cases of crises that make good use of their adaptability. Bentham's felicific calculus, which revolves around a conception of the useful reduced to pleasure, or its overcoming by the moral value of acts, relies on several criteria which combine and may oppose or reinforce one another. Access to care, especially to vaccines, easily lends itself to utilitarian calculation. Indeed, health is a superior good, not least because it is the indirect condition of a lucid and

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[177] See J Glover, *Causing Death and Saving Lives* (London, New York, Penguin Books, 1977).

[178] J Broome, *Weighing Lives* (Oxford, Oxford University Press, 2004); A Colonomos, 'Donner un prix à la vie au temps du Covid-19', 15 April 2020, www.sciencespo.fr/ceri/fr/content/donner-un-prix-la-vie-au-temps-du-covid-19-0; A Colonomos, *Un prix à la vie: le défi politique de la juste mesure* (Paris, Presses universitaires de France, Humensis, 2020).

autonomous will exercised by fighting illness. As a public good, as well as an objective of public health policies, the calculation imagines a 'collective health' which is not only a cost but also the production of wealth. When the resource is scarce, the usual rules are replaced by a cost–benefit analysis which tries to 'save' the greatest number of years of life by allocating the resources first to the patients for whom the intervention is the most likely to succeed and who consequently have the highest number of years of good health to save. Utilitarianism, however, even when reduced to economic calculation, could not be content with a short-term calculation that would only take into consideration the cost of healthcare and the life expectancy of the patient. In practice, a more moderate approach is adopted, which includes what the patient brings to others. Conciliating utilities, as an objective need, is more than conciliating utilities that are felt and expressed by everyone.

The following chapter more generally addresses medical ethics and utilitarianism. Alicia Dorothy Mornington and David Smadja expose utilitarian arguments used by philosophers, lawyers and physicians in the field of medical ethics and bioethics. Their aim is to clarify the growing debate since the end of the Second World War on medical decisions, research on human subjects (or embryos) or organ transplants. By emphasising the political dimension of decision and the centrality of legislation, the chapter tackles each particular debate concerning medical ethics and puts under scrutiny the theoretical and practical uses of the utilitarian framework by asking which individual or collective decision may comply with the principle of utility. After focusing on the utilitarian approach used in medical ethics in order to highlight the diversity of arguments involved, they discuss two specific cases that reveal unexpected views on the use of utilitarianism in bioethics and that establish the role of solidarity and security.

The fifth and final chapter devoted to bioethics addresses the issue of transhumanism.[179] It has taken a seemingly legal form with the adoption of a 'Transhumanist Declaration' that proclaims 'the moral right for those who so wish to use technology to extend their mental and physical (including reproductive) capacities and to improve their control over their own lives. We seek personal growth beyond our current biological limitations.'[180] Jean-Yves Goffi defines transhumanism as a programme of radical reconstruction of human beings by technological means. By itself, transhumanism is a neutral stance on the different versions of utilitarianism. Nevertheless, some transhumanists are close to the utilitarian approach of bypassing classical political and legal issues, such as the issues of sovereignty or individual

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[179] See eg G Hottois, J-N Missa, L Perbal (eds), *Encyclopédie du transhumanisme et du posthumanisme. L'humain et ses préfixes* (Paris, Vrin, 2015); A Buchanan, *Beyond Humanity* (Oxford, Oxford University Press, 2001); A Buchanan, *Better than Human* (Oxford, Oxford University Press, 2001); N Le Dévédec, *La société de l'amélioration. La perfectibilité humaine des Lumières au transhumanisme* (Montréal, Liber, 2015); S Clarke, J Savulescu, T Coady, A Giubilini, S Sanyal (eds), *The Ethics of Human Enhancement: Understanding the Debate* (Oxford, Oxford University Press, 2016); R Manzocco, *Transhumanism: Engineering the Human Condition: History, Philosophy and Current Status* (Cham, Springer, 2019); D Pearce, *The Hedonistic Imperative*, www.hedweb.com/hedab.htm; F Damour, S Deprez, D Doat (eds), *Généalogies et nature du transhumanisme. État actuel du débat* (Montréal, Liber, 2018); P Egloff, *L'homme augmenté, l'homme diminué: le grand retour* (Paris, L'Harmattan, 2019); M Hauskeller, *Better Humans: Understanding the Enhancement Project* (Durham, Acumen, 2013).

[180] See https://itp.uni-frankfurt.de/~gros/Mind2010/transhumanDeclaration.pdf.

rights. But as they flirt with utopia, they rather see themselves as transcending these issues rather than simply bypassing them. The genuine contribution of utilitarianism to what appears to be an ongoing debate is duly explored, as it may also shed light on the apparition of radically 'novel beings'.[181]

The next chapter is also related to the most recent evolutions of technology. Ryan Abbott and Elizabeth Rothman offer a utilitarian approach to copyright law and generative artificial intelligence. Artificial Intelligence's increasing involvement in the creation of new content raises considerable legal difficulties. The Supreme Court of the United Kingdom has for example recently decided that AI cannot qualify as an inventor under the Patents Act 1977.[182] Because it is based on a utilitarian rationale, US copyright law generally allows the general interest to prevail over direct author benefits. As this chapter argues, this rationale could very well be extended to allow copyright protection encompassing AI-generated works. It would operate as an incentive for innovation, and promote more diverse content for the public. Although it is somehow counterintuitive and challenges the received view on copyright, admitting that an AI qualifies as a full-blown author increases transparency and protects human creators, thus contributing to what utilitarians regard as the greatest happiness of the greatest number. Utilitarianism appears to offer a relevant contribution to a rather technical legal discussion that is bound to go on in various countries as well as at the international level.

In her chapter on panopticism, Anne Brunon-Ernst connects one of the most widely known projects of Bentham, frequently to his disrepute, at the end of the eighteenth century, and the most recent technological developments that surveillance studies address. If the Panopticon is only a building, it is nonetheless the starting point for a whole vision of political governance.[183] Panopticism is a concept marked by successive reappropriations. First, Samuel, Jeremy Bentham's brother, devised a system named Panopticon to improve productivity in factories in Russia (1786). Second, Bentham used it to solve the problem of prison overcrowding (1787–91) and then provide wide-scale poor relief (1797–8). Later in his career, the Panopticon was adapted to a project of schools for the children of the trading middle classes (1816–17), and again he suggested the panoptic layout for government offices (1832). Third, it was only in the early 1970s that Michel Foucault's engagement with the Panopticon started. He coined the concept of panopticism as that of a circular building from which inmates in cells can be watched by the overseers positioned in a central tower, making possible an asymmetric panoptic power gaze that can be applied to many different users (workers, convicts, paupers, students, civil servants, and so on). From then on, panopticism has been seized as an interpretative tool in different fields. Unsurprisingly, it is used as a disquieting synonym for surveillance and is still adapted to describe the digital age. Panoptic characterisation can also be found to describe pieces of legislation, ranging from the fields of criminal law, the fight against terrorism, health protection in the age of COVID-19 and privacy issues. However, panopticism has spread beyond surveillance studies and small archipelagos of penal law to branch

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[181] See esp DR Lawrence, S Morley (eds), *Novel Beings: Regulatory Approaches for a Future of New Intelligent Life* (Cheltenham, Edward Elgar Publishing, 2022). See also B Bourcier, 'La politique transhumaniste: pari utilitariste et politique du futur ?', in F Damour, S Deprez, D Doat (eds), *Généalogies et nature du transhumanisme. État actuel du débat* (Montréal, Liber, 2018), 179–93.

[182] Thaler v Comptroller-General of Patents, Designs and Trade Marks [2023] UKSC 49.

[183] See also A Brunon-Ernst (ed), *Beyond Foucault: New Perspectives on Bentham's Panopticon* (Farnham, Burlington, Ashgate, 2012).

out into the world of critical theory and fiction. When it comes to panoptic fiction, panopticism influenced artists. It is also a concept that has been fleshed out as a very fertile critical tool. The chapter outlines that, in the fields of surveillance and critical studies, law and fiction, there is still room for panopticism as a methodological and substantive tool.

Although religious issues are a growing preoccupation of contemporary legal systems, the next chapter, authored by Jean-Pierre Cléro, nevertheless at first sight seems to make a counterintuitive suggestion by setting out to discuss utilitarianism and religion. Nothing is more distant at first from Christianity than utilitarianism, because of its hedonism and eudemonism. However, the ideas the two 'doctrines' share are not insignificant as they both have to do with some practical knowledge rather than some ontology. There is some doctrinal uncertainty on both sides: Christianity is not necessarily a form of asceticism – was Christ an ascetic? – and utilitarianism is not consistently a plea for happiness – utility does not coincide with happiness. Though the issue utilitarianism has with Christianity is about whether the latter can support a utilitarian policy and on which conditions, Cléro has tried to approach it from a new angle as the language theory, without which utilitarianism could not move forward, is especially suitable when studying the religious in terms of fictions, without the latter becoming an ideology.

Isabella Mariani then proposes to consider utilitarianism and migration. Migration is a highly politicised global issue. A significant portion of the world population are considered international migrants, most relocating for work opportunities or to reunite with family, while many are fleeing dire circumstances of war, persecution, civil unrest or poverty. In arguments both for and against more open migration, the economic and cultural effects of such movement of peoples are almost always considered. Thus, this chapter sets out to examine what a purely consequentialist approach to migration would entail. Utilitarianism, arguably the foremost consequentialist moral and political theory, has as core principles the promotion of the greatest happiness for the greatest number of people and the equal moral weight of all individuals. It is therefore a relevant yet relatively unexplored lens through which to explore migration. This chapter argues that what utilitarianism dictates regarding migration will depend first on how we understand utility, and second, on who is included in the utility calculus. The author focuses on the economic and cultural effects of migration as they are most prominent in the political discourse to determine what a consequentialist approach to migration theory entails, considering effects on the receiving country, the sending country and the migrants themselves.

Clément Lacombe then moves to analyse another topic of growing interest, that of environmental law, which connects with climate justice.[184] Courts such as the Colombian Supreme Court,[185] Australian Federal Court,[186] German Federal Constitutional Court[187] and French Constitutional Council[188] have recently insisted on the rights of future generations in this

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[184] J Broome, *Climate Matters. Ethics in a Warming World* (New York, London, WW Norton & Company, 2012); T Mulgan, *Ethics for a Broken World: Imagining Philosophy After Catastrophe* (Montreal, Kingston, Ithaca, McGill-Queen's University Press, 2011).

[185] Colombian Supreme Court, STC 4360-2018.

[186] Federal Court of Australia, Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560.

[187] German Federal Constitutional Court, 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (2021).

[188] French Constitutional Council, Decision no 2023-1066 QPC of 27 October 2023, Association Meuse nature environnement et autres [Stockage en couche géologique profonde des déchets radioactifs], § 6.

respect.[189] By considering for example that 'when adopting measures likely to have a serious and lasting effect on a balanced environment which respects health, the legislature must ensure that the choices made to meet the needs of the present do not compromise the ability of future generations and other peoples to meet their own needs, while preserving their freedom of choice in this respect', the French court echoed preoccupations that are at the heart of contemporary utilitarianism. They involve the protection of the environment in itself, on the one hand, and questions of intergenerational justice, on the other. Based on the principle of impartiality, famously presented by Sidgwick as 'the point of view of the universe',[190] which does not allow to discriminate *a priori* between present and future interests in the felicific calculus, utilitarianism figures among the rationales that can ground the development of environmental constitutionalism and environmental law more generally. The Well-being of Future Generations (Wales) Act 2015 adopted by the National Assembly for Wales also testifies to this logic. It

> make[s] provision requiring public bodies to do things in pursuit of the economic, social, environmental and cultural well-being of Wales in a way that accords with the sustainable development principle; […] require[s] public bodies to report on such action; […] establish[es] a Commissioner for Future Generations to advise and assist public bodies in doing things in accordance with this Act; […] establish[es] public services boards in local authority areas; […] make[s] provision requiring those boards to plan and take action in pursuit of economic, social, environmental and cultural well-being in their area; and for connected purposes.

Nevertheless, few environmentalists claim to be utilitarians. Yet there is much criticism of the alleged legal utilitarianism that permeates environmental law. If one disentangles the arguments, it seems that the criticism is in fact directed at the legal application of economic theories with a view to sustainable development – and thus at the balancing of economic and environmental interests – rather than environmental interests alone. The first criticism is that the legal instruments derived from economic theories are effective in meeting the objective of environmental protection. A second criticism is that legal utilitarianism in environmental law cannot be reduced solely to the application of economic theories, since there is a genuine utilitarian ethic in environmental law.[191] An overall reassessment of utilitarian environment law may be in order.

In 2022, Italy amended Article 9 of its constitution to provide that 'The Republic […] shall safeguard the environment, biodiversity and ecosystems, also in the interest of future generations. State law shall regulate the methods and means of safeguarding animals.'[192] The

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[189] From the viewpoint of moral theory, see eg G Arrhenius, *Future Generations: A Challenge for Moral Theory* (Dissertation for the Degree of Doctor of Philosophy in Practical Philosophy presented at Uppsala University, 2000), www.diva-portal.org/smash/get/diva2:170236/FULLTEXT01.pdf; A Gosseries, K Meyer (eds), *Intergenerational Justice* (Oxford, Oxford University Press, 2009).

[190] H Sidgwick, *The Methods of Ethics*, 7th ed (London, MacMillan & Co Ltd, 1963) 420. See K de Lazari-Radek, P Singer, *The Point of View of the Universe: Sidgwick and Contemporary Ethics* (Oxford, Oxford University Press, 2014).

[191] See more generally CJ Baird, R Frodeman (eds) *Encyclopedia of Environmental Ethics and Philosophy* (Farmington Hills, Cengage Gale, 2008).

[192] See eg G Palombino, *Il principio di equità generazionale: La tutela costituzionale del futuro* (Firenze, Le Monnier Università, 2022).

question of animals' rights, addressed by Régis Bismuth in his chapter, also epitomises the issue of the scope of interests that have to be taken into account when regulating behaviours through law. Bentham was the first to suggest that

> The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. […] It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate? […] the question is not Can they *reason*? nor Can they *talk*? but Can they *suffer*?[193]

This seminal reflection laid the foundation for antispecist movements and inspired several legal changes. Régis Bismuth examines whether utilitarianism offers an interesting framework for understanding and deciphering animal law and its various developments. Utilitarian thought, particularly as articulated in Peter Singer's writings, has had a significant impact on the ethical discourse regarding animal treatment. Utilitarians indeed advocate for the inclusion of animals as sentient beings within the sphere of moral consideration. This philosophical shift has laid the foundation for legal and societal changes aimed at improving animal welfare. It is within this context that Bismuth examines the application of utilitarian principles in various aspects of animal law, including scientific research, food and goods production, and recreational activities. He highlights the weaknesses and inconsistencies in animal law, exacerbated by an approach to animal welfare driven by economic considerations and facing resistance in the presence of cultural specificities. Nonetheless, this chapter eventually reveals a more nuanced and complex interplay between utilitarian philosophy and the development of animal law in a wider context.

Following these discussions about the environment and animals, which tend to debase several well-settled building blocks of the contemporary Western paradigm of legal thinking, is a final chapter on fictions and legal ideology. This chapter is path-breaking, as Bentham's (and others') efforts to demystify the law[194] have rarely been understood as a general critique of legal ideology, in a Marxist or Gramscian vein.[195] According to Claire Wrobel, interest in legal fictions seems to have revived after several decades of 'jurisprudential dormancy', drawing renewed attention to Bentham's contribution to the discussion. After offering an overview of the scope of legal fiction and of the scholarship on the topic, her chapter focuses more narrowly on the historical debate on legal fictions, starting by locating Bentham's attack on procedural legal fictions within the broader context of his critique of Blackstone's *Commentaries* and, through them, the common law system, before sketching out points of convergence or dissonance with later thinkers (Maine, Vaihinger, Fuller). She highlights the centrality of language in Bentham's attack on legal fictions and fallacies, and beyond them the legal hegemony they buttressed, before questioning whether Bentham ever succeeded in

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[193] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 282–3 fn b.

[194] HLA Hart, 'Bentham and the Demystification of the Law' (1973) 36 *The Modern Law Review* 2–17.

[195] Adopting such an orientation, see G Tusseau, 'Towards a Linguistic Criticism of Legal Hegemony. Some Remarks on Bentham v Judges and Co.' (2019) 32 *Canadian Journal of Law & Jurisprudence: An International Journal of Legal Thought* 173–94.

escaping the legal mindset he exposed. The chapter concludes with an exploration of what a Benthamite critique of fictions might look like in contemporary times.

This final chapter sheds light on what may be a fundamental tension in the project of a utilitarian Critical Jurisprudence. Based on the exploration of law and utilitarianism conducted in this *Research Handbook*, one may wonder whether Bentham was not in fact himself a victim of the hegemony he depicted and criticised, as he appeared unable to reach outside what can be understood as a form of epistemic panlegalism. Indeed, what Bentham provided the reader and the reformer with was nothing other than legal concepts. Even if they appeared more precise and more consistent than those which English legal thought offered at his time, one can call into question the very possibility for his Critical Jurisprudence to overcome a hegemony that was precisely tied to legal language.[196] Because of the exclusivity he granted in his reformatory projects to the 'legibility'[197] – that is, the rationalisation, standardisation, modelisation of the social magma, with the aim of reading it but also of remaking it, reforming it and manipulating it – of any social intercourse in terms of purely legal relationships, he remained faithful to a specific standpoint which allowed for no escape from the legal vernacular and conceptual universe. In this respect, Critical Jurisprudence's main failure may be to target only what Karl Mannheim identified as 'particular ideology', that is, the distorted or malicious ideas and representations of one's opponent. But it tends to disregard 'the more inclusive total conception of ideology. Here we refer to the ideology of an age or of a concrete historico-social group, eg of a class, when we are concerned with the characteristics and composition of the total structure of the mind of this epoch or of this group.'[198] With the ideology in the total sense, 'We touch upon the theoretical or noological level whenever we consider not merely the content but also the form, and even the conceptual framework of a mode of thought as a function of the life situation, of a thinker'.[199] Despite the richness of Critical Jurisprudence's understanding of how legal language leads to the establishment of a self-contained sinister culture, on the one hand, and offers a fantastic tool for social reform, on the other, it falls short of seeing in a way that would be closer to Mannheim's total conception or ideology and is not able to perceive reflexively and critically its own embeddedness in the legal framework it calls into question.

6. LIMITS OF THE BOOK

Inevitably, many topics that would have been worth covering are not directly tackled in this *Research Handbook*. It would have been good, for example, to include a chapter on topics such

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[196] For complementary remarks, see G Tusseau, *Jeremy Bentham. La guerre des mots* (Paris, Dalloz, 2011); G Tusseau, 'An Old English Tale? Bentham's Theory of The Force of a Law', in G Tusseau (ed), *The Legal Philosophy and Influence of Jeremy Bentham. Essays on 'Of the Limits of the Penal Branch of Jurisprudence'* (London, New York, Routledge, 2014) 80–133.

[197] For an explanation of this concept, see especially JS Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, London, Yale University Press, 1998).

[198] K Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge* (New York, London, Harcourt, Brace, Routledge & Kegan Paul, 1954) 49–50.

[199] K Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge* (New York, London, Harcourt, Brace, Routledge & Kegan Paul, 1954) 51.

as global governance and cosmopolitanism,[200] colonialism,[201] education, social redistribution and assistance,[202] ethics of care,[203] digital law, artificial intelligence[204] and robot ethics, for which utilitarianism has been said to be 'particularly attractive',[205] deontic logic, legislative drafting or nomography,[206] terrorism, war and peace,[207] democracy and political representation, authoritarianism and populism, institutional design,[208] resistance to oppression, taxation or food and alimentation.[209] Some of these issues have already been addressed in other contexts by other works that, among others, explain the contribution of utilitarianism to a moral approach to the concern they raise. Envisioning them through the more strictly legal perspective offered by utilitarian Critical Jurisprudence would nevertheless add to our understanding

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[200] See eg C Jones, *Global Justice: Defending Cosmopolitanism* (Oxford, Oxford University Press, 1999); L Cabrera, *Political Theory of Global Justice: A Cosmopolitan Case for the World State* (London, Routledge, 2004); A Ellis, 'Utilitarianism and International Ethics', in T Nardin, DR Mapel (eds), *Traditions of International Ethics* (Cambridge, Cambridge University Press, 1992).

[201] See eg T Causer, M Finn, P Schofield (eds), *Jeremy Bentham and Australia. Convicts, Utility and Empire* (London, UCL Press, 2022); 'International Thought of the British Empire' (2023) 24 *Revue d'études benthamiennes*, https://journals.openedition.org/etudes-benthamiennes/.

[202] See eg DK Chatterjee (ed), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge, New York, Cambridge University Press, 2004).

[203] See S Bagni (a cura di), *Dallo Stato del bienestar allo Stato del buen vivir: Innovazione e tradizione nel costituzionalismo latino-americano* (Bologna, Filodiritto, 2013).

[204] J de Bruyne, C Vanleenhove (eds), *Artificial Intelligence and the Law* (Cambridge, Antwerp, Chicago, Intersentia, 2021); J van den Hoven, PE Vermaas, I van de Poel (eds), *Handbook of Ethics, Values, and Technological Design: Sources, Theory, Values and Application Domains* (Cham, Springer, 2015); C Véliz (ed), *Oxford Handbook of Digital Ethics* (Oxford, Oxford University Press, 2023); DJ Gunkel (ed), *Handbook on the Ethics of Artificial Intelligence* (Cheltenham, Edward Elgar, 2024).

[205] W Wallach, S Vallor, 'Moral Machines: From Value Alignment to Embodied Virtue', in SM Liao (ed), *Ethics of Artificial Intelligence* (Oxford, Oxford University Press, 2020) 383–412, 389–90. See also eg M Anderson, SL Anderson (eds), *Machine Ethics* (Cambridge, Cambridge University Press, 2011); J Gips, 'Towards the Ethical Robot', in KM Ford, C Glymour, P Hayes (eds), *Android Epistemology* (Cambridge, MIT Press, 1991) 243–52; C Grau, 'There is no "I" in "Robots": Robots and Utilitarianism' (2006) 21 *IEEE Intelligent Systems* 52–5; J-A Cervantes, S López, L-F Rodríguez, S Cervantes, F Cervantes, F Ramos, 'Artificial Moral Agents: A Survey of the Current Status' (2020) 26 *Science and Engineering Ethics* 501–32; N Nevejans, *Traité de droit et d'éthique de la robotique civile* (Bordeaux, LEH Édition, 2017).

[206] P di Lucia, *Nomografia: linguaggio e redazione delle leggi* (Milano, Giuffrè, 1995); LJ Wintgens, *Legisprudence: Practical Reason in Legislation* (London, New York, Routledge, 2016); L Wintgens, P Thion, M Carly (eds), *The Theory and Practice of Legislation: Essays in Legisprudence* (Aldershot, Burlington, Ashgate, 2005).

[207] See WH Shaw, *Utilitarianism and the Ethics of War* (London, Routledge, 2016); WH Shaw, 'Utilitarianism and the Ethics of War', in B Eggleston, DE Miller (eds) *The Cambridge Companion to Utilitarianism* (Cambridge, Cambridge University Press, 2014) 303–24.

[208] See esp, borrowing a Benthamite title, J Elster, *Securities Against Misrule: Juries, Assemblies, Elections* (Cambridge, Cambridge University Press, 2013).

[209] See eg P Singer, 'Famine, Affluence, and Morality' (1972) 1 *Philosophy & Public Affairs* 229–43.

of these controversial topics. This is why this *Research Handbook* is happy to foster future work on law and utilitarianism.

In spite of this limitation, the contributors to this *Research Handbook* deserve gratitude for accepting the call to join this enterprise. Each of their contributions and the collection thereof are evidence of what, to my mind, is utilitarianism's most valuable property: it never closes the discussion and is always welcoming to new arguments. The extent to which Bentham's work has been understood as proposing an ethics of public discussion has frequently been overlooked.[210] As George Edward Moore explained in the first chapter of his *Ethics*, which is dedicated to utilitarianism, 'One great difficulty which arises in ethical [and, may I add, legal] discussions is the difficulty of getting quite clear as to exactly what question it is that we want to answer'.[211] Even though it is of course not the only philosophy that allows it, utilitarianism more than others can be characterised by this effort to clarify ethical (and legal) discussions.

In this respect, Bentham's supposedly scientific and exclusive methodology of the felicific calculus, in its very conception as well as in the multiple applications he painstakingly imagined all his life, has frequently been ridiculed as dry, naïve, impracticable and coarse. But a 'weaker' reading of Bentham's doctrine is not necessarily incompatible with his writings. He did not ignore that his proposal was only an approximation. In the foundational paragraphs of *An Introduction to the Principles of Morals and Legislation*, for example, he explicitly wrote, after presenting his methodology to measure the value of a lot of pleasure or pain, that

> It is not to be expected that this process should be strictly pursued previously to every moral judgment, or every legislative or judicial operation. It may, however, be always kept in view: and as near as the process pursued on these occasions approaches to it, so near will such process approach to the character of an exact one.[212]

The felicific calculus only offers a kind of Kantian regulative idea[213] or Weberian *Idealtypen*[214] of a sound decision-making process. Because pains and pleasures, to whose throne 'On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened',[215] are understood as empirical facts, the process of deliberation tends to be presented as impartial and fact-regarding. It is moreover as intersubjective as possible, so that the discussion can be made fully public. Because the consequences that need to be assessed or foreseen are again understood as empirical, what is at stake can be envisioned dispassionately. As it is evidence-based and does not neglect the way evidence is an active intellectual and practical construction, as Bentham's *Rationale of Judicial Evidence* demonstrates,[216] utilitarianism is sensitive to conditions, contexts and changes. It represents an effort to collect all the relevant

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[210] See GJ Postema, *Bentham and the Common Law Tradition*, 2nd ed (Oxford, Clarendon Press, 2019); G Tusseau, *Jeremy Bentham. La guerre des mots* (Paris, Dalloz, 2011).

[211] GE Moore, *Ethics* (London, Williams and Norgate, New York, Henry Holt and Company, 1912), Chapter I, § 5, https://fair-use.org/g-e-moore/ethics/chapter-i.

[212] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 40.

[213] I Kant, *Critique of Pure Reason* (Cambridge, Cambridge University Press, 1998).

[214] M Weber, *Essais sur la théorie de la science* (Paris, Plon, 1965).

[215] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 11.

[216] J Bentham, *Rationale of Judicial Evidence*, 5 Vol (London, Hunt & Clarke, 1827).

information and offer a tendencially impartial assessment of it without concealing the conflicts between values and the cost of a decision,[217] based on criteria that are, contrary to fallacies,[218] intersubjectively accessible to any other stakeholder. As Bentham put it when he attacked the revolutionary declarations of human rights, which he despised, as 'Nonsense upon stilts',[219] a sound legal argumentation must be framed in terms of advantages and inconveniences, empirically measured thanks to the felicific calculus. This is why, in a typical passage, he considered that

> the production of inconvenience more than equivalent to any advantage that will ensue, presents itself to my conception in the character of a probable event. Now the question is put as every political and moral question ought to be, upon the issue of fact; and mankind are directed to the only true track of investigation which can afford instruction or hope of rational agreement, the track of experiment and observation.[220]

This is why the legislator at the same time issues commands and gives reason to justify its decisions in front of the law's addressees. As early as *An Introduction to the Principles of Morals and Legislation*, Bentham set out the following principle:

> a body of proposed law, how complete soever, would be comparatively useless and uninstructive, unless explained and justified, and that in every title, by a continued accompaniment, a perpetual commentary of *reasons* […] There must be therefore, not one system only, but two parallel and connected systems, running on together – one of legislative provisions, the other of political reasons, each affording to the other correction and support.[221]

Even though it sometimes offers solutions that are not totally convincing, conflict with our moral intuitions or prove radically unacceptable, utilitarianism can at least help clarify the problem, expose what is at stake and, based on this evidence, favour discussion and argumentation. It does not shy away from confronting difficult dilemmas, and offers a common language and an inclusive framework to discuss issues of individual and collective choice. As hostile a critic as Bernard Williams is perfectly accurate when he notes that 'The first question

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[217] J Wood Bailey, *Utilitarianism, Institutions, and Justice* (New York, Oxford University Press, 1997) 8–9.

[218] J Bentham, *The Book of Fallacies*, ed P Schofield (Oxford, Clarendon Press, 2015).

[219] J Bentham, *Nonsense Upon Stilts, or Pandora's Box Opened, on the French Declaration of Rights Prefixed to the Constitution of 1791 Laid Open and Exposed – With a Comparative Sketch of What has been done on the same Subject in the Constitution of 1795, and a Sample of Citizen Sieyès*, in J Bentham, *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*, ed P Schofield, C Pease-Watkin, C Blamires (Oxford, Clarendon Press, 2002) 317–401.

[220] J Bentham, *Observations on the Draughts of Declarations-of-Rights*, in J Bentham, *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*, ed P Schofield, C Pease-Watkin, C Blamires (Oxford, Clarendon Press, 2002) 189.

[221] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 9. See similarly J Bentham, *Codification Proposal, Addressed by Jeremy Bentham to All Nations Professing Liberal Opinions*, in J Bentham, *'Legislator of the World'. Writings on Codification, Law and Education*, ed P Schofield, J Harris (Oxford, Clarendon Press, 1998) 248–60.

for philosophy is not "do you agree with utilitarianism's answer?" but "do you really accept utilitarianism's way of looking at the question?"'[222] As Bentham put it:

> That, in many instances, it must be extremely difficult to ascertain, to which of these cases the expediency of a given law belongs, and that to arrive at entire certainty may be absolutely impossible, is not to be denied. But the use of breaking down the question into these subordinate questions, is not the less undeniable. It is always something to see where the difficulty lies, although it should be insuperable; and to point out the only means by which the best solution can be given, although that solution should not be so satisfactory as could be wished. It is something to get certain principles, leaving facts in the uncertainty that belongs to them. By showing the real uncertainty of the most conclusive arguments that can be offered on the subject, it will prevent us from giving to less conclusive arguments, more than their due weight: it will enable us to unravel the web of sophistry, and to humble the pride of declamation: it will be of service, in as far as the caution that accompanies a salutary doubt, is preferable to the rashness that may be the result of misconception. Such sort of instruction, indeed, brings little thanks to him who gives it: to be in doubt is to be unsatisfied; to be unsatisfied is to be uneasy. People in general had rather be decided, and in the wrong, than in the right and undecided. Declamation has here, then, as on many other topics, the advantage over argument; and a man's chance of persuasion will be in-proportion, rather to the energy of his expressions than to the justness of his views.[223]

In contradistinction to intuitionist or absolutist moral theories, utilitarianism is never closed to further arguments or further evidence, and allows for an ongoing discussion about what constitution to draft, what international treaty to sign, what legislation to enact or what judicial ruling to issue. As Robert E. Goodin aptly sums up:

> There will inevitably be some (perhaps substantial) imprecision in our public utility calculations. It follows that utilitarian policy recommendations will therefore still be somewhat indeterminate. That is not necessarily a telling criticism of utilitarianism, though. It merely amounts to saying that utilitarianism leaves some room for public debate and deliberation – in other words, for politics as it is ordinarily conceived. We would, I think, worry about any political theory that did not do that. Furthermore, even where utilitarianism proves indeterminate, it sets the terms of that public debate. It tells us what sorts of considerations ought to weigh with us, often while allowing that how heavily each of them actually weighs is legitimately open to dispute. Even where utilitarianism is indeterminate, it is not silent. To fill in those lacunae, we do not need to turn to some other principles altogether. Rather, in such cases, utilitarianism speaks with many voices, and political argument in such a setting can (utilitarian would say 'should') consist simply in a debate among them.[224]

Utilitarianism additionally lends itself to its own (meta-)discussion, and appears intrinsically self-reflexive and self-critical. Henry Sidgwick has long ago admitted this possibility of (meta-)self-exclusion, when utilitarianism itself recommends not being utilitarian: 'the principle of Egoistic Hedonism, when applied with a due knowledge of the laws of human nature, is practically self-limiting; *i.e.* that a rational method of attaining the end at which it

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[222] B Williams, 'A Critique of Utilitarianism', in JJC Smart, B Williams, *Utilitarianism: For and Against* (Cambridge, Cambridge University Press, 1973), www.utilitarianism.com/utilitarianism-for-and-against.pdf, 67-131, 69.

[223] J Bentham, *Essay on the Influence of Time and Place in Matters of Legislation*, in *The Works of Jeremy Bentham*, ed J Bowring (Edinburgh, W Tait, 1838–43) Vol I, 169–94, 178.

[224] RE Goodin, *Utilitarianism as a Public Philosophy* (Cambridge, Cambridge University Press, 1995) 21.

aims requires that we should to some extent put it out of sight and not directly aim at it.'[225] In this respect, the discursive dimension of utilitarianism, which encourages thinking of legal deliberation in terms of pragmatic 'inquiry',[226] undoubtedly enriches our social practices and, especially in the legal sphere that was originally one of its direct fields of application, makes it – to say the least – an 'interesting interlocutor'.[227]

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[225] H Sidgwick, *The Methods of Ethics*, 7th ed (London, MacMillan & Co Ltd, 1963) 136–7. See eg K Bykvist, *Utilitarianism: A Guide for the Perplexed* (London, Continuum, 2009) 93–6, 154.

[226] See CS Peirce, 'The Fixation of Belief' (November 1877) 12 *Popular Science Monthly* 1–15.

[227] P Rudan, 'Social Order, Cooperation, and the Way Out: A Feminist Reading of Jeremy Bentham, William Thompson and Anna Wheeler', in this volume.

PART I

MAPPING THE LEGAL LANDSCAPE AND STRUCTURING LEGAL GOVERNANCE

2. Analytic jurisprudence

Pierluigi Chiassoni

1. INTRODUCTION

Analytic(al) jurisprudence is a utilitarian invention. Its foundation stones are found in two of the earlier works of Jeremy Bentham: *A Fragment on Government*[1] and *An Introduction to the Principles of Morals and Legislation*.[2] Aiming at a thorough reformation of positive law that would make it fit the utility (greatest happiness) principle, possibly in every corner of the Earth, Bentham set forth a double proposal for legal studies. On the one hand, he conceived a tripartite map, where the provinces of universal expository (not authoritative) jurisprudence, local expository (not authoritative) jurisprudence and censorial jurisprudence were singled out. On the other hand, he thought it necessary to provide jurisprudents (particularly, those coping with universal expository matters) with an adequate method of inquiry.[3] That method of enquiry came to be known as the 'analytic method',[4] and is usually regarded as the method at work in John Austin's 'general jurisprudence'[5] as well as, later on and with further refinements, in Alf Ross's 'jurisprudence',[6] in Hans Kelsen's and Norberto Bobbio's 'general theory

[1] J Bentham, *A Fragment on Government* (1776), The new authoritative edition by JH Burns and HLA Hart, With an Introduction by R Harrison (Cambridge, Cambridge University Press, 1988), 3–32, 108–10 text and footnote b, 115–22 (belonging to an unpublished 1822 'Preface to the second edition'), 123–6 (belonging to a 'draft Preface').

[2] J Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), ed. by JH Burns and HLA Hart, With a New Introduction by F Rosen (Oxford, Clarendon Press, 1996), ch. XVII ('Of the Limits of the Penal Branch of Jurisprudence'), 293–300.

[3] P Chiassoni, *La tradición analítica en la filosofía del derecho. De Bentham a Kelsen* (Palestra, 2017) ch. I.

[4] Due to a synecdoche by which the name of a specific tool of Bentham's inquiries, the bifurcate method of classification-building or 'Porphyrian trees' is made to cover all of Bentham's tools (ibid., ch. I). On Bentham's method in general, I cannot help but quote a passage from John Stuart Mill, that would have served well as an epigraph to the present chapter: 'Bentham's method may be shortly described as the method of detail; of treating wholes by separating them into their parts, abstractions by resolving them into Things, – classes and generalities by distinguishing them into the individuals of which they are made up; and breaking every question into pieces before attempting to solve it' (JS Mill, 'Bentham' (1867), in JS Mill and J Bentham, *Utilitarianism and Other Essays*, Edited by A Ryan, London, Penguin Books, 1987).

[5] JL Austin, *The Province of Jurisprudence Determined* (1832), introduction by HLA Hart (New York, The Noonday Press, 1954); JL Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law*, 5th edition (London, Murray, 1885).

[6] A Ross, *On Law and Justice* (London, Stevens, 1958) ch. I.

of law'[7] and in Herbert Hart's 'legal theory'[8] – and this up to the point that expressions such as 'general jurisprudence' and 'analytic(al) jurisprudence' are often used as synonymous.

In this chapter, I purport to present analytic jurisprudence as a full-fledged variety of legal philosophy, bringing to the fore not only its tools (as they developed due to the influence of 20th-century analytic philosophy), but also its overall ambition to play a leading role in the development of law and legal thinking. My presentation will proceed in four steps. Step one sets forth the ten basic principles of the analytic approach to legal philosophizing (section 2 below). Step two draws up a charter of analytic jurisprudence, distinguishing, along Benthamite lines, between a descriptive (expository) and a normative (censorial) branch thereof (section 3 below). Step three reviews some of the main tools whose mastery is a necessary condition for fruitful analytic enquiries (section 4 below). Step four, finally, outlines the sort of conceptual analysis that is in tune with the principles and charter of analytic jurisprudence (section 5 below).

2. TEN ANALYTIC PRINCIPLES

Analytic jurisprudence, in its descriptive branch (see section 3 below), deals with explanatory problems concerning the law-world that are usually regarded as philosophical. These are typically about the law (in general), legal norms, legal systems, legal sources, legal interpretation, legal reasoning, legal science, sovereignty, validity, legal rights, legal duties and the connexion(s) between law and morals, law and justice, law and politics, law and coercion, law and state, law and logic, law and rhetorics, law and truth, law and social sciences, law and cognitive sciences, and so on. In its normative branch (see section 3 below), it pursues the constructive critique of existing laws and legal thinking.[9]

The line of analytic jurisprudents which encompasses Bentham, Austin, Kelsen, Ross, Bobbio and Hart, to quote the outstanding figures, is characterized by its allegiance to a set of investigation-instructions ('principles') that have been theorized, refined or adopted during the almost 250 years since Bentham's *A Fragment on Government* was published.[10]

By way of a tentative – and by no means exhaustive – reconstruction, analytic principles make up a set including ten items: the principle of ignorance, the principle of conversion, the principle of refinement, the principle of capture, the principle of empirical support, the princi-

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[7] H Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55/1 *Harvard Law Review* 44–70; H Kelsen, *General Theory of Law and State* (Cambridge, Mass., Harvard University Press, 1945); N Bobbio, *Giusnaturalismo e positivismo giuridico* (Milano, Comunità, 1965).

[8] HLA Hart, *The Concept of Law*, 3rd edition (Oxford, Oxford University Press, 1961) ch. I; HLA Hart, 'Problems of the Philosophy of Law' (1967) in *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983) 88–119.

[9] See, eg, J Bentham, *Constitutional Code*, vol. I, ed. FH Rosen and JH Burns (Oxford, Oxford University Press, 1983); HLA Hart, *Law, Liberty and Morality* (London, Oxford University Press, 1963); L Ferrajoli, *Una Costituzione per la Terra* [A Constitution for the Earth] (Milano, Feltrinelli, 2022).

[10] J Bentham, *A Fragment on Government*.

ple of contact, the principle of modesty, the principle of austerity, the principle of separation and, last but not least, the principle of commitment.[11]

1. The *principle of ignorance* requires jurisprudents to be methodically distrustful as regards what they assume to know about the law. In his inaugural Oxford lecture, Hart makes clear why this principle should be honoured when he warns that 'In law as elsewhere, we can know and yet not understand'.[12] The principle of ignorance is meant as a remedy to the received views ('tradition'), biases and false certainties jurisprudents fatally bring to bear in their investigations about law and legal experience. In a Benthamite-styled formulation, the principle requires turning jurisprudence into 'the art of being methodically ignorant of what everybody knows'.[13] Ignoring, notice, *must* be (made into) *an art*: it must become an action the legal philosopher performs by consciously applying a technique of philosophical enquiry.
2. The *principle of conversion* requires transforming metaphysical ('ontological') problems into conceptual ones: at least, as a fruitful preliminary step of jurisprudential inquiries. Metaphysically formulated problems (such as 'What is law?' 'What is justice?' 'What is legal interpretation?' 'What is a legal duty?' and so on) should be converted into as many conceptual problems of two sorts: on the one hand, detection conceptual problems ('What do "law", "justice", "interpretation", and so on mean in the here and now of extant legal culture?'); on the other, reconstruction conceptual problems ('What is theoretically or practically useful to understand by "law", "justice", "interpretation" and so on?).[14] Synthetically minded jurisprudents are used to regarding the principle of conversion as pushing legal philosophy towards pointless (and boring) lexicography, or pointless (and annoying) stipulations, or both. Analytic jurisprudents however take it as a safe-conduct against abstruseness, as well as a reliable starting point for working out terminological and conceptual apparatuses favouring an effective and deep mastery of legal reality.

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[11] I have identified some of these principles in various writings over the past ten years: P Chiassoni, *Interpretation without Truth. A Realistic Enquiry* (Cham, Springer, 2019) 9; P Chiassoni, *Da Bentham a Kelsen. Sei capitoli per una storia della filosofia analitica del diritto* (Torino, Giappichelli, 2016) 9–32, 118–31, 308–37, 387–96; P Chiassoni, *El discreto placer del positivismo jurídico* (Bogotá, Externado de Colombia, 2016) 384–409, 445–69; P Chiassoni, 'The Model of Ordinary Analysis', in D D'Almeida, J Edwards and A Dolcetti (eds) *Reading H.L.A. Hart's The Concept of Law* (Oxford and Portland, Hart, 2013) 247–58; P Chiassoni, 'Constitutionalism out of a Positivist Mind Cast: The Garantismo Way' (2011) 17/4 *Res Publica* 331–4.

[12] HLA Hart, 'Definition and Theory in Jurisprudence (1954)' in *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983) 21; see also JL Austin, 'The Province of Jurisprudence Determined', 370.

[13] P Chiassoni, 'Supporting The Force of Law: A Few Complementary Arguments against Essentialist Jurisprudence', in *C* Bezemek, N Ladavac (eds) *The Force of Law Reaffirmed. Frederick Schauer Meets the Critics* (Cham, Springer, 2016) 62–3.

[14] GE Moore, in his lecture 'What Is Analysis?' (GE Moore, *Lectures on Philosophy* (London and New York, Routledge, 1966) 153), presents (what I call) the principle of conversion as a matter of course for philosophical inquiry: 'You see the general question we've got to try to answer is one which it's most natural to put in the form: What *is* Philosophy? But this means the same as: How is the word philosophy in one of its senses used *now*? What is the modern English usage?'.

3. The *principle of refinement* requires jurisprudents to engage in a never-ending fatiguing process. Any knowledge lawyers have about the law, as well as their everyday practice as jurists, judges, attorneys, and so on inside some legal experience, necessarily depends on (is unavoidably mediated by) some terminological-conceptual apparatus (some scheme, framework or set of terms and corresponding meanings; hereinafter: TCA). The principle of refinement invites jurisprudents to be distrustful about the extant TCA their legal culture happens to (have inherited from previous generations and) make use of at any station in its temporal progression. It suggests that there is always room for moving from (fatally) less fine (poorer, obscurer, obsolete) TCAs to (ever) finer (richer, clearer, updated) ones, containing a larger set of more precise concepts tied to a more articulated set of terms. The principle requires jurisprudents helping their legal culture to enjoy, at any time, the finest possible TCA that can be worked out. This outcome they should achieve by the constant, relentless, carrying out of two synergetic jobs, that are often packed together under the uncertain label of 'conceptual analysis': conceptual precisification (clarification, elucidation) and terminological articulation.
4. The *principle of capture* follows in the previous principle's footprints. It sets the regulative ideal any refinement job should be aiming at: to wit, the working out of a terminological and conceptual net capable of capturing, by means of an adequately wide set of well-defined concepts, all the relevant phenomena in the relevant field of enquiry.[15]
5. The *principle of empirical support* requires TCAs to be worked out and evaluated in relation to legal reality conceived as a set of empirical events. The problems jurisprudents must cope with should be those that originate from everyday legal practice. The outputs of jurisprudential inquiries must be firmly grounded on experiential data. Jurisprudence must be, in sum, a bottom-up, experience-driven, philosophical investigation. Any belief in conceptual heavens (*conceptualism*), any belief in forms of respectable and fruitful knowledge that would be different from either empirical or formal ones (*anti-naturalism*), and the pursuit of unrealistic utopias so far as normative jurisprudence is concerned (*irrationalism*) must altogether be rejected. The principles of contact, modesty and austerity consist in as many complements to the principle of empirical support.
6. The *principle of contact* requires jurisprudents to avoid conceiving legal philosophy as a bookish enterprise. Books of jurisprudence should not deal solely, or primarily, with other jurisprudential books; they should not be solely, or primarily, 'upon other books'. On the contrary, jurisprudents should constantly cast their eyes on legal reality, as a (richer) world made of jurists, judges, legislators, administrative officials and, of course, also of ordinary people, with their material and spiritual interests. They should pay attention to the outputs of the doctrinal study of law and legal sociology. They should be alert to the reality of law in its conspicuous linguistic dimension: to the huge, nuanced, baffling, discursive stuff that is the main stuff of which the law is made. The principle of contact stands as a remedy against any dogmatic or 'theological' way of doing jurisprudence. It

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[15] Together, the principle of refinement and the principle of capture suggest an anti-reductionist approach to jurisprudence theory-and-concepts building, one that is not on the lookout for 'pleasing uniformity of pattern', striving instead to retain and display the complexity of legal systems by means of a network of adequately articulated concepts. As examples of anti-reductionist jurisprudence, see, eg, HLA Hart, *The Concept of Law*, 38 ; G Tarello, *Diritto, enunciati, usi. Studi di teoria e metateoria del diritto* (Bologna, Il Mulino, 1974) part II.

works as a check against jurisprudents' keenness on turning the discipline into a quotations game, where (often unfortunate) sentences are raised at the dignity of eternal statements of ('necessary') truths about the law, and are, accordingly, made the object of interpretations, qualifications, developments or refutations, roughly in the same way as religious dogmas are.

7. The *principle of modesty* urges jurisprudents to avoid any magniloquent phrase while pointing to the purpose of their investigations. It sees expressions like 'enquiring about the nature', 'the fundamental nature', 'the essence' or 'the character' of law, which are supposed to point to as many valuable matters of jurisprudential investigations, as being laden with unnecessary (and possibly obnoxious) ontological suggestions. It requires therefore such forms of words to be put down in favour of more modest, ontologically uncompromised ones (such as 'enquiring about the law'). The principle opposes any non-naturalistic, pre-analytic, 'metaphysical' conception of jurisprudence: any view that still entertains, perhaps unconsciously, the idea of legal philosophy as vested with the role of 'the first philosophy' (*philosophia prima*) about the law, as the only enterprise capable of disclosing those 'necessary truths' about the law-world, to which empirical legal science (and its narrow-minded servant, analytic jurisprudence) cannot even imagine coming close.
8. The *principle of austerity* sets a standard of no-exaggeration in the formulation of jurisprudential theses (such as those concerning the role that legal rules, interpretation, adjudication, and so on would play in the life of a legal system). If we read this principle together with the previously mentioned principles of empirical support and modesty, it appears to work as a gap-filling instruction, suggesting to jurisprudents the proper way of giving word to their discoveries. Such wording should not indulge either in metaphors or, even worse, in forms of expression where the informative content is overwhelmed, disguised or altogether dissipated by combinations of words meant to dazzle the audience. The principle of austerity admits of no *succès de scandale*. It tolerates no *pour épater les juristes.* Jurisprudence is no literary exercise. It is no words-magic for the amusement of jaded intellectuals and other leisured people. Its claims must be couched in the severe, tightly controlled language of conceptual precision and empirical reference.
9. The *principle of separation* requires jurisprudents to avoid any confusion between knowledge and practical action, between description (broadly conceived) on the one hand and ethical evaluation, prescription and justification on the other. In Benthamite terminology, the principle urges legal philosophers to keep expository (descriptive) and censorial (normative) jurisprudence rigorously apart. It is not to be meant, however, as arguing *for* descriptive jurisprudence, and *against* the normative variety thereof. It does not extoll ethical *Wertfreiheit* as the *sole* worthwhile posture for a jurisprudent to adopt. As we shall see (section 3 below), from an analytic standpoint, full-blown jurisprudents should do both – never, however, in such a way that pieces of normative jurisprudence are given cover as innocent 'discoveries' of the purest descriptive sort.[16]

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[16] Dickson doubts the genuinely descriptive character of 'descriptive legal theory' and argues for an 'indirectly evaluative legal philosophy' (IELP) (J Dickson, *Evaluation and Legal Theory* (Oxford and Portland, Hart, 2001); J Dickson, 'Descriptive Legal Theory' (2006) in *IVR Encyclopedia of Legal Philosophy and Jurisprudence* (available online); J Dickson, 'Ours is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry' (2015) 6 *Jurisprudence* 207–30, where the five 'tenets' of IELP are presented). Her preoccupa-

10. Finally, there comes the *principle of commitment*. Commitment – one may query – to *what*? The analytic approach to legal philosophizing arises and thrives down the ages in the works of its supporters out of the conscious pursuit of an overwhelming, never to be completely achieved goal (a 'regulative ideal'): out of the conscious pursuit of a realistic utopia. This is the utopia that requires establishing the rule of reason upon positive law and legal thinking. Jurisprudents should make their own contributions, tentative and passing as they are doomed to be, to that awesome aim. To be sure, a commitment to the rationality of the law-world can be understood differently according to the conception of reason, reasonableness and rationality that is being adopted. The analysts' choice, as we shall see in the next section, goes for a modest but sound variety. They look at reason as 'a small light'. But also assume, at the same time, it to be 'the only light' that can help turning the law into a better enterprise to human benefit.[17]

3. THE CHARTER OF ANALYTIC JURISPRUDENCE

A disciplinary charter is a set of sentences that establish the matter, purpose and tools of a line of enquiry.

The *principle of commitment*, as we have seen (section 2 above), requires analytic jurisprudents to contribute to the promotion of the rationality of positive law and legal thinking. In so doing, it sets up a very broad purpose for their enquiries. Such a broad purpose can be broken down into five purposes of detail, corresponding, respectively, to the *epistemic*, *conceptual*, *methodological*, *instrumental* and *substantive* dimensions of rationality.

1. Promoting the *rule of epistemic rationality* requires general jurisprudents to promote true and reliable knowledge about the law-world. To that end, they must carry out two tasks. First, they should provide true accounts ('descriptions') of the law-world (including of what jurists, legislators and judges do). This task has both a *constructive* and a *deconstructive* side. Providing realistic theories requires engaging in a relentless critical assessment of extant theories. It requires jurisprudents to detect mystifications and put them to pieces by means of demystification work. Second, jurisprudents should engage in legal epistemology. They should enquire about the better conceivable ways of making the law a matter

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tion is sound. It must be noticed however that 'descriptive', as applied to jurisprudence, may be understood in two different ways. In a narrow sense, 'descriptive jurisprudence' is an enterprise strictly devoted to providing (sociological, empirically grounded) narrations about aspects of the law-world. In a broad sense, 'descriptive jurisprudence' is an enterprise devoted to working out general theories of law, of descriptive and explanatory import, and deprived of any morally justificatory intent. Hart, for instance, when arguing for the 'descriptive' character of his legal theory, used the adjectival word in a broad sense. It must also be noticed, in passing, that Dickson's idea of an 'indirectly evaluative legal philosophy' looks troublesome. By it she wants to emphasize that also any genuine theoretical job necessarily involves 'evaluations'. This is true. These are *epistemic* evaluations, however. Any serious theoretical job is committed to values like empirical truth, clarity, non-contradiction, explanatory power, intellectual honesty, etc. Commitment to epistemic values can go along with *ethical Wertfreiheit*. Talking of 'indirect evaluation' appears, accordingly, un-precise and misleading.

[17] N Bobbio, *Elogio della mitezza e altri scritti morali* (Milano, Pratiche, 1998) 199.

of truly scientific investigations and put the outcomes of their enquiries in the form of prescriptive legal epistemologies.

2. Promoting the *rule of conceptual rationality* requires jurisprudents to further the conceptual precision and terminological articulation of legal thinking. To this purpose, jurisprudents should follow the principles of refinement and capture (section 2 above): extant TCAs must be subject to a relentless work of conceptual precisification and terminological articulation, aiming at providing legal thinking and legal practice with conceptual structures favouring, at the same time, a better grasp of legal phenomena and a conceptually conscious legal practice.
3. Promoting the *rule of methodological rationality* requires jurisprudents to further the accuracy and correctness of legal reasoning, as performed by jurists, judges, attorneys at law, and so on. These are to be measured by the rod of logic, rhetorics and sound theories about legal interpretation and legal argumentation. The rule of methodological rationality over legal reasoning requires, accordingly, the working out of realistic theories of adjudication and 'legal science' (doctrinal study of law) in their argumentative dimensions. Its pursuit turns jurisprudents into controllers and reformers of how jurists, judges and lawyers reason.
4. Promoting the *rule of instrumental rationality* requires jurisprudents to contribute to making law an instrumentally rational enterprise. To this end, jurisprudents should instruct jurists to perform a double task: checking whether extant sets of legal norms (at the national or international level) are instrumentally adequate to the goal(s) they are presumed to serve; and in the negative case, imagining which norms would be instrumentally (more) adequate to such goal(s).
5. Promoting the *rule of substantive rationality*, finally, requires jurisprudents to promote law's adequacy to a peculiar set of *ethical values*. These values represent the *ideal ethical setting* of humans as agents endowed with the capacities 'reason' stands for: namely, calculating causes and effects, means to ends, the consequences necessarily following from given sets of premises, the arguments most apt to persuade or convince an actual or ideal audience, the outputs of adding or subtracting items (be they numbers, physical data, data concerning the human condition and capabilities, data concerning human institutions, and so on). To this end, jurisprudents should perform a double task: seeing whether the content of extant laws (at the national or international level) is acceptable to *rational agents*, that is, from the standpoint of individuals that, due to their being provided with reason, are assumed to be conscious of their dignity as free and equal moral persons; and, in the negative case, setting forth reform proposals.[18]

After Bentham, it is commonplace to distinguish between expository (descriptive) and censorial (normative) jurisprudence. How do the several tasks above relate to the Benthamite distinction?

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[18] My main sources here include HLA Hart, *Problems of the Philosophy of Law*, 109–16; J Rawls, *A Theory of Justice* (1971) Revised Edition (Oxford, Oxford University Press, 1999); J Rawls, *Justice as Fairness. A Restatement*, ed. E Kelly (Cambridge, Mass., and London, England, The Belknap Press of Harvard University Press, 2001); R Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationale Diskurses als Theorie der juristischen Begründung* (Frankfurt a. Main, Suhrkamp, 1978).

The purpose of *epistemic rationality*, insofar as it requires jurisprudents to provide true descriptions of the law-world, and the purpose of *conceptual rationality*, also considering that refinement involves the *reconstruction* of extant TCAs, can be regarded as identifying as many purposes of an *expository*, (broadly) *descriptive* or *explanatory* variety of analytic jurisprudence. Contrariwise, the purpose of *epistemic rationality*, insofar as it requires jurisprudents to work out prescriptive legal epistemologies, and the purposes of *methodological rationality*, *instrumental rationality* and *substantive rationality* can be regarded as as many purposes of a *censorial*, *prescriptive* or *normative* branch of analytic jurisprudence, though with different, increasing degrees of ethical commitment on jurisprudents' part.

The *principles of commitment, refinement, empirical support* and *contact* conspire to identify the *matter* of analytic enquiries, expository and normative alike. These are legal materials and legal thinking. *Legal materials* are what make up 'positive law': municipal legal systems, primitive laws, international law, soft law, and so on. They are mostly linguistic materials: constitutional charters, statutes, executive orders, regulations, judicial opinions and decisions, administrative orders, best-practice statements, and so on. *Legal thinking* is likewise to be conceived broadly, to include, besides jurisprudential thinking, doctrinal thinking, sociological thinking, views about the law entertained outside of the (inner) legal culture, and so on. It is comprised, again, of linguistic materials in the forms of jurisprudence books, doctrinal essays, sociological, anthropological and historical legal studies, and so on.

So far, we have seen how several principles of analytic jurisprudence contribute to defining the *purposes*, the *branches* and the *matter* of analytic enquiries upon the law. A few words must be said, to conclude, as to their contribution to designing the *tools* which an analytic approach should make use of.

We can look at the *principles* of *ignorance*, *conversion*, *empirical support*, *contact*, *modesty*, *austerity* and *separation* as representing tools of properly carried out analytic enquiries, in particular of those belonging to the expository variety. They set out what sort of *attitude* (principle of ignorance) and by what sort of *questions* (principles of conversion and modesty) analytic investigations should start with. They rule upon the *proper direction* of analytic enquiries (principles of empirical support and contact) and the *proper way of formulating* the results thereof (principle of austerity). They warn against any undercover trespassing into the realm of normative jurisprudence: for instance, by working out value-laden pseudo-descriptions of the law-world or proposing value-laden conceptual reconstructions (principle of separation).

These are not the only tools an (expository) analytic jurisprudent should make use of, however. The two following sections will review some tools to be used in the operations of demystification of extant legal thinking, conceptual precisification and terminological articulation (section 4) and outline the sort of conceptual analysis that is mostly congenial to the principles and purposes of analytic jurisprudence (section 5).

4. TWO SETS OF ANALYTIC TOOLS

Analytic jurisprudence is usually presented as the sort of legal philosophy which is characterized as 'conceptual, 'linguistic' or 'philosophical analysis'.[19]

The identity of conceptual analysis, however, is far from established. Several forms – some richer, some poorer – inhabit the region of philosophical methodology,[20] and this has fuelled uncertainty also in the province of legal philosophy. The safer way to proceed seems to be, therefore, a bottom-up strategy of enquiry, identifying and bringing to the fore the tools analytic jurists in fact make use of when they perform operations of demystification, conceptual precision and terminological articulation. Along this path, two sets of instruments seem worth distinguishing, at least insofar as the expository branch is concerned. The first set includes tools for the *analysis of legal discourses*. The second set includes tools for the *refinement of extant terminological and conceptual apparatuses*. The two sets are not mutually exclusive. Some of the tools apt for the refinement task can, and do, also work as instruments for the analysis of legal discourses task, and vice versa.

4.1 Tools for the Analysis of Legal Discourses

Legal discourses are strings of (mostly written) sentences in a natural language, coming from such agents as constitutional assemblies (constitutional charters), parliaments (statutes), officials of the executive branch (executive orders, executive regulations), judges (judicial decisions, judicial opinions), independent administrative agencies (administrative regulations), city councils (local traffic regulations), academic jurists (essays, hornbooks, treatises, commentaries on some legal topic), attorneys at law (writs of summons, 'soft law' documents), jurisprudents (general theories of law, theories of justice, natural law theories), and the like.

The analysis of legal discourses is *a necessary step* in any analytic enquiry: both in view of refining the extant TCA (which presupposes its identification), and in the demystification task.

The tools for the analysis of legal discourses which analytic jurisprudents employ are varied. Two main subsets can be singled out: on the one hand, tools coming from the analytic theory of natural languages;[21] on the other hand, the tools of hermeneutic investigations coming from the social sciences.

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[19] See, eg, LJ Cohen, 'Theory and Definition in Jurisprudence' (1965) 29 *Proceedings of the Aristotelian Society* 220–38; E Bodenheimer, 'Modern Analytical Jurisprudence and the Limits of its Usefulness' (1956) 104 *University of Philadelphia Law Review* 1080–1102; DV Cowan, 'An Agenda for Jurisprudence' (1963) 49 *Cornell Law Quarterly*, 609–32; C Pannam, 'Professor Hart and Analytical Jurisprudence' (1964) 16 *Journal of Legal Education* 379–404.

[20] PF Strawson, *Analyse, science et métaphysique*, in Aa. Vv. *La philosophie analytique* (Paris, Éditions de Minuit, 1962).

[21] By 'natural language' I mean any system of communication by articulated sounds, or the corresponding graphic signs human communities employ, both in their daily linguistic transactions, and as the bedrock on which the specialized languages of scientific and practical disciplines are built up.

4.1.1 Tools from the analytic theory of natural languages

A theory of natural languages is a set of claims purporting to provide true information about their components and the ways those components work as communication tools. The enquiries of analytic jurisprudents typically presuppose a theory of natural languages. From that theory, they draw methodological instructions for the analysis of legal discourses. In what follows, I will provide a very tentative, rough and speedy reconstruction of such instructions.

1. Any fruitful analysis of legal discourses must be equipped with *a theory of words* and *a theory of sentences*, as much developed and sophisticated as possible.
2. So far as *words* are concerned, the following notions, distinctions and related instructions are to be considered by abiding analytic jurisprudents:
   (a) the distinction between *logical terms* (such as 'not', 'and', 'or', 'if … then') and *descriptive terms* (proper names, definite descriptions, ordinary names, adjectives and verbs);
   (b) the distinction between *concrete* ('real') *terms* (such as 'table', 'gold', 'elephant') and *abstract* ('fictitious') *terms* (such as 'fortitude', 'justice', 'legal duty', 'legal right', 'sovereignty', 'legal power', and so on), paying attention to whether abstract terms are being used, inside the analysed discourse, in ways that present them mistakenly or by guile as concrete ones, and so incurring an objectivist or substantive fallacy;[22]
   (c) the distinction between *emotively neutral terms* (that do not trigger the passions, emotions or sentiments of hearers/readers, such as 'moved by a monetary interest', 'government by universal suffrage and majority rule', 'policemen') and *emotively laden terms* (that trigger the passions, emotions or sentiments of hearers/readers, such as 'greedy', 'democracy', 'enforcer of law and order'), paying attention to the ways emotively laden terms are used to further mystifications of some aspect of legal reality;[23]
   (d) the distinction between *natural kind* ('water', 'gold', 'tiger'), *functional kind* ('appendectomy', 'vulcanization'), and *moral kind* ('marriage', 'freedom of expression', 'right to the equal protection of laws') *terms*, where the meaning thereof would depend on their objective reference, on the one hand, and *conventional terms*, where the meaning thereof depends contrariwise on linguistic usages, on the other hand, paying attention to the fact that no term is a self-qualifying entity (no term tells us: 'Hey, I am a genuine moral kind term!') and therefore to the fact that considering a certain term (say, 'freedom of expression') as a moral kind term depends not on some hard-and-fast linguistic datum (on 'the very nature of things', as it might be said) but rather on a deliberate or unconscious choice by the user and interpreter;

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[22] The distinction between 'real terms' and fictitious terms' lays at the core of Bentham's 'theory of fictions'. See CK Ogden, *Bentham's Theory of Fictions* (London, Kegan Paul, Trench, Trubner & Co, 1932); J Bentham, *De l'ontologie et autres textes sur les fictions* (Paris, Éditions du Seuil, 1997).

[23] For Bentham's distinction between 'eulogistic', 'dyslogistic' and 'neutral appellatives', see, eg, J Bentham, *Deontology together with A Table of the Springs of Action and The Article on Utilitarianism*, ed. A Goldworth (Oxford, Clarendon Press, 1983) 100–5.

(e) the distinction between *ordinary terms* ('water', 'tree', 'house', 'car') and *technical terms*, proper of specific disciplines, such as technical legal terms ('trespass', 'nuisance', 'strict liability'), paying attention to the fact that it can be the case that ordinary terms are being used also to convey specialized meanings, and vice versa;
(f) the distinction between *deontic terms* (such as 'permitted', 'obligatory', 'forbidden', 'authorized', 'ought to', 'ought not to', and so on) and *other terms that are indexes of a possible prescriptive use of discourse* (such as 'can', 'cannot', 'sovereign', 'penalty', 'prison', 'fine', 'sanction', 'punishment', 'punished', 'republic', 'prosecutor', 'contract', 'wrong', 'right', 'lawful', etc.), on the one hand, and *non-deontic, prescriptively neutral, terms* (such as 'open', 'closed', 'tiger', 'jogging', 'housing', 'rocks', 'mountain', 'seaside', and so on), on the other hand, paying attention to the fact that deontic terms are typically used *both* in sentences expressing legal prescriptions or conceived as legal norm formulations, *and* in sentences *about* legal prescriptions or legal norm formulations.

3. So far as *sentences* are concerned, the following notions, distinctions, and related instructions, are likewise to be considered by abiding analytic jurisprudents:
   (a) the grammatical-lexical distinction between *ontic sentences* (indicative sentences not containing deontic terms, such as 'Whoever trespasses into another person's property is punished with a €500 fine'[24]), *deontic sentences* (indicative sentences containing deontic terms, such as 'Trespassing into another person's property is forbidden', 'Whoever trespasses into another person's property ought to be punished with a €500 fine'), and *imperative sentences* ('Punish whoever trespasses into another person's property with a €500 fine'), paying attention to the fact that legal norm formulations and legal prescriptions are not necessarily put in the form of deontic or imperative sentences;
   (b) the functional distinction between *descriptive sentences*, conveying true or false pieces of information about the world (such as 'The Civil Code contains 2,367 articles'), *prescriptive sentences*, conveying instructions about what can, ought to, ought not to, be done (such as 'Civil Code provisions ought to be construed liberally'), and *constitutive sentences*, that immediately realize a certain state of affairs (such as 'The Civil Code is hereby derogated'), paying attention to the fact that the descriptive, prescriptive and constitute uses of discourse are just a few ways of using a language, though apparently the most relevant ones to the analysis of legal discourses;
   (c) the semantic distinction between *empirical sentences*, which are true or false in relation to how the piece of empirical reality they purport to describe in fact is, and *analytic sentences*, which contrariwise are true or false in relation *either* to the meanings of the words of which they are made (such as 'Bachelors are unmarried men') *or* to their syntactic structure (such as 'Harry likes seafood and does not like seafood'), which suggests analytic jurisprudents should be alert about the fact that

[24] The sentence contains many terms that, though not deontic, are nonetheless indexes of a possible prescriptive use of discourse. This suggests distinguishing between *purely* ontic sentences, and *prescriptively biased* ontic sentences.

the correctness of a sentence does not necessarily depend on its (direct) correspondence to states-of-affairs;

(d) the semantic-syntactic distinction between the *grammatical form* of sentences (the form they happen to have in a given piece of discourse) and the *logical form* of sentences (the form that exactly corresponds to their actual syntactic structure, full meaning and pragmatic force in a communicative context), paying attention to the fact they do not necessarily coincide; that it may happen contrariwise that, inside of an actual discourse, prescriptive sentences be formulated by means of ontic sentences, and descriptive sentences by means of deontic ones;[25]

(e) the semantic distinction between *first-order sentences* (which are immediately about some behaviour or state of affairs, such as 'Citizens ought to go to the Opera House every Sunday') and *meta-sentences* (which, contrariwise, are about other sentences: 'The norm "Citizens ought to go to the Opera House every Sunday" is hereby declared null and void'), paying attention to the fact that sentences inside of a legal discourse, far from dwelling all on the same semantic level, can belong to several different levels of discourse;[26]

(f) the fact that *descriptive sentences* and *prescriptive sentences* are *heterogeneous* communication items. The former serve to convey to people pieces of information about the world, saying how the world is, was, or (probably) will be; they are true or false according to whether what they say is or is not the case, has or has not the declared probability to be the case; they elicit attitudes of theoretical acceptance, rejection or doubt. Contrariwise, the latter serve to make people do something; they are neither true nor false, but, when legal prescriptions are at stake, possible or impossible to comply with, efficacious or not efficacious, legitimate or illegitimate, just or unjust, and so on they elicit practical attitudes of acceptance or rejection, consisting in a disposition to comply or not to comply with them;

(g) provided descriptive and prescriptive sentences are heterogeneous, the claim ('Hume's Law' or 'Hume's Guillotine') that no genuinely prescriptive conclusion (such as 'Freedonian citizens ought to go to the Opera House every Sunday night') can be logically derived from sets of genuinely descriptive (and non-contradictory) premises (such as 'There is a parliament in Freedonia', 'The Freedonian parliament

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[25] For instance, the grammatically descriptive sentence 'He is out' may be used, in contexts such as that of a cricket game, not to *describe*, or *state*, that somebody is out, but to *pass a judgment* to that effect. On this issue, see, eg, HLA Hart, *Definition and Theory in Jurisprudence*, 21 ff.; HLA Hart, 'Theory and Definition in Jurisprudence' (1955) 29 *Proceedings of the Aristotelian Society* 258 ff.; HLA Hart, *The Concept of Law*, ch. I; HLA Hart, *Problems of the Philosophy of Law*, 89 ff.; HLA Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence (1970)' in *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983) 269–77; HLA Hart, 'Introduction', in *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983) 1-6; R Guastini, *La sintassi del diritto* (Torino, Giappichelli, 2011) 2–7; M Jori and A Pintore, *Introduzione alla filosofia del diritto* (Torino, Giappichelli, 2014) 4–9.

[26] A relevant, law-peculiar instance of the distinction between sentences and meta-sentences is the distinction between *norms* and *normative propositions*: between sentences expressing norms imputable to some legal authority, on one side, and sentences from jurists or legal sociologists that inform about the enactment, efficacy or validity of norms, on the other side.

has enacted a law according to which Freedonian citizens ought to go to the Opera House every Sunday night');

(h) the fact of *linguistic indeterminacy* of the sentences in a natural language, due to syntactic, semantic or pragmatic ambiguity, as well as to the actual or potential vagueness of concepts;[27] though analytic jurisprudents should be aware that the linguistic indeterminacy of the sentences that are norm formulations (such as the provisions of a constitutional code) is not the only form of indeterminacy to be considered; that there is always the possibility of legal provisions being indeterminate not linguistically, but rather from the standpoint of powerful material or spiritual interests and conspiring juristic theories and constructions (*juristic indeterminacy*);

(i) the fact that strings of sentences inside of a legal discourse may instantiate different types of reasoning, such as deductive reasoning, analogical reasoning (in the sense of epistemology), inferences to the best explanation or rhetorical (*a contrario*, *a simili*, *a fortiori*, and so on) reasoning (*reasoning pluralism*);

(j) the fact that the instances of legal reasoning formulated within judicial opinions or doctrinal essays are often *enthymematic* strings of sentences, that is, logically incomplete sets, which suggests abiding analytic jurisprudents should identify and bring to the fore the missing premises, as a way to make judicial and juristic reasonings amenable to rational criticism.

4.1.2 Tools of hermeneutic investigations

Hermeneutic tools work as complements to the tools offered by the theory of natural languages. They reflect the twin interests of some analytic jurisprudents in anthropological philosophy (the use of anthropological tools in philosophical enquiries) and philosophical anthropology (the converse use of philosophical methods to construct and sharpen anthropological tools), fuelled by the spell, and promise, of contemporary developments in the social sciences.[28] It is precisely at this crossroads of perspectives that the distinction between the *internal* and the *external* points of view as to any set of social norms is found. Following Hart's lead, analytic jurisprudents should reject any purely behaviouristic conception of the external point of view, favouring instead a hermeneutic one. A wise *observer*, as any analytic jurist must be, is not to be content with recording the non-linguistic behaviour of *participants* or *users* regarding a social, rule-governed practice. She should also crucially consider the participants' *use* of normative language and normative concepts. Furthermore, by means of a process of identification (*Einfühlung*, *immedesimazione*), she should put herself in the participants' own shoes, in

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[27] See, eg, HLA Hart, *The Concept of Law*, Ch. I and VII; HLA Hart, *Definition and Theory in Jurisprudence*, 26 ff.; HLA Hart, *Jhering's Heaven of Concepts and Modern Analytical Jurisprudence*, 269–71, 274-275; CS Nino, *Introducción al análisis del derecho* (Barcelona, Ariel, 1983) 259–68.

[28] See, eg, HLA Hart, *The Concept of Law* (op. cit, 289) where, besides Winch (P Winch, *The Idea of Social Science* (London, Routledge, 1958)), he also quotes an essay by R. Piddington on B. Malinoswki's theory of needs, and p.291, where works by Malinowski, A.S. Diamond, K.N. Llewellyn and W. Hoebel are quoted.

order so far as possible to understand *their* normative structures as *they* themselves understand them.[29]

The observer–participant divide is connected to another key distinction to which analytic jurisprudents should pay attention. This is the distinction between *descriptive* sentences *about* a normative set (*external* statements of fact about the rules and rules-oriented behaviours and attitudes of the system's officials and subjects), on the one hand, and *applicative* sentences *grounded on* the (pretended) content of some normative system (*internal* statements, made by *users* of the rules or norms of some given normative system, such as statements of what duties, rights, liabilities, and so on a person has under that system, statements 'assessing' situations 'by reference to rules' assumed to be valid legal rules of the system), on the other hand.[30]

4.2 Tools for the Refinement of Extant Juridical Terminological and Conceptual Apparatuses

This subset encompasses four main tools: a theory of concepts, a theory of definition, a theory of classification and a theory of philosophical imagination.

4.2.1 A theory of concepts

Analytic jurisprudents should adopt a theory of concepts characterized by three backbone ideas.

First, concepts are a matter of either convention or stipulation. Outside of the realm of common (ordinary or specialist) uses of words, there are no true concepts. Contrariwise to *Begriffsjurisprudenz*, concepts are not to be found in some rarefied dimension of 'real essences'.[31]

Second, stipulated concepts are neither true nor false. Stipulations are to be assessed in terms of whether they are pragmatically justified; their value, if any, depends on the goal(s) they are meant to serve, and on whether they prove useful to such goal(s). Analytic jurisprudents should endorse a pragmatic view of concept (pragmatic conceptualism).

Third, theoretical concepts, like those worked out by expository analytic jurisprudence, should be stipulated concepts informed by an overall explanatory and refinement goal. They

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[29] See, eg, HLA Hart, *The Concept of Law*, 88 ff., 239 ff., 247–9; HLA Hart, *Essays on Bentham. Jurisprudence and Political Theory* (Oxford, Clarendon Press, 1982) 106–61; HLA Hart, *Introduction* in *Essays in Jurisprudence and Philosophy*, 13 ff. In his *Pragmatische Antropologie*, Immanuel Kant draws a like distinction between 'knowing the world' and 'having use of the world': the former amounts to the 'knowledge of a game which we watch'; the latter amounts instead to 'participating in the game' (I Kant, *Antropologia dal punto di vista pragmatico*, in *Critica della ragion pratica e altri scritti morali*, ed. P Chiodi (Torino, Utet, 1970) 542).

[30] See HLA Hart, 'Theory and Definition in Jurisprudence', 247 ff., where, at p.248, we read: 'We can contrast the "external" standpoint of the observer of a legal system who is thinking about its rules and their present and future operation with the "internal" standpoint of one who is using the rules of the system either as an official or private person in various ways'; see also HLA Hart, 'Definition and Theory in Jurisprudence (1954)' in *Essays in Jurisprudence and Philosophy*, 27 ; HLA Hart, *The Concept of Law*, 56–7, 88–90, 102–5, 109–10, 115–17, 291; HLA Hart, *Introduction* in *Essays in Jurisprudence and Philosophy*, 13 ff.

[31] See, eg, HLA Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence (1970)', in *Essays in Jurisprudence and Philosophy*, 265–77.

should amount, accordingly, to weak stipulations, meant not to depart altogether from the ways in which the redefined concepts are ordinarily understood, but to provide improved, puzzle-solving, versions thereof.[32]

4.2.2 A theory of definition

Analytic jurisprudents should adopt a theory of definition resulting from the combination of classical theory, Bentham's path-breaking account of fictitious terms (such as 'right', 'duty', 'power', 'responsibility', and so on) and method of paraphrasis (a specific method of definition in use),[33] and the contributions of contemporary linguistic philosophy.[34] It revolves around three ideas.

First, there are several different forms of definition. Besides definition *per genus et differentiam specificam* (definition by kind and specific difference), there is contextual definition (definition in use) and standard or central-case definition. These are more suitable to define legal terms, since either they do not refer to any definite object in reality ('duty', 'right', 'corporation') or no clear *genus*, no closed set of common necessary and sufficient properties, is available to characterize their reference ('punishment').[35]

Second, good definitions – so far as legal terms are at stake – are *explanatory* or *explicatory definitions*. These provide instruction both about how the term being defined is (or may be) used, and about the things to which the term refers. They are not just 'about words': rather, they should 'make explicit the latent principle which guides our use of a word' and should possibly 'exhibit relationships between the type of phenomena to which we apply the word and other phenomena'.[36]

Third, following John Austin, attention must be paid not to fall prey to the 'definitional fallacy': the methodological blunder of pretending to solve some complex theoretical problem – such as the long-standing problem 'What is law?' – by way of the sentences that make up the definition of a term (for example, by providing a strictly conceived, therapeutic-regulatory

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[32] See, eg, R Carnap, *The Logical Foundations of Probability* (Chicago and London, University of Chicago Press, 1950) 1–19; CG Hempel, *Fundamentals of Concept Formation in Empirical Science* (Chicago and London, The University of Chicago Press, 1952), 2–20; R Robinson, *Definition* (Oxford, Oxford University Press, 1954); U Scarpelli, *Il problema della definizione e il concetto di diritto* (Milano, Nuvoletti, 1955) 35–70; HLA Hart, *The Concept of Law*, 213–14; HLA Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence (1970)', in *Essays in Jurisprudence and Philosophy*, 269–71.

[33] See J Bentham, *A Fragment on Government*, ch. V, para. 6, n. 1; HLA Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence (1970)', in *Essays in Jurisprudence and Philosophy*, 272.

[34] HLA Hart, *The Concept of Law*, 279–80.

[35] Ibid., 15; HLA Hart, *Punishment and Responsibility. Essays in the Philosophy of Law* (Oxford, Clarendon Press, 1968) 4–5.

[36] HLA Hart, *The Concept of Law*, 13–14, 214–15.

definition of 'law').[37] At the heart of every theory, of course, there are definitions of key-terms;[38] but no theory can be superseded by definitions or should be 'built on the back of it'.[39]

4.2.3 A theory of classification

Since Bentham, analytic jurisprudents should also master the know-how for properly building up new terminological and conceptual apparatuses. These should be arranged in such a way as to identify, at every classificatory level, mutually exclusive and jointly exhaustive classes of individuals. Analytic jurisprudents should abide by such a technique, for instance, when drawing general theories of legal norms.[40]

4.2.4 Explanatory and constructive imagination

The purposes of refinement and demystification which analytic jurisprudents should pursue makes a combination requiring the carrying out also of investigations that are similar to those of so-called descriptive and reformatory metaphysics.[41]

Descriptive metaphysics purports to bring to the fore (expose) and explain the fundamental *conceptual structure* of our thought and discourse. This structure is (assumed to be) presupposed in our everyday talks (and thoughts), whenever we use, as we currently do, terms having to do with identity, existence, knowledge, space and time, cause, effect and the temporal order of objects, mental states, moral properties, classes of individuals in the animal or vegetable kingdoms, and so on. 'Descriptive metaphysics', it must be noticed, is a belittling label. Such inquiry must not only identify and provide an accurate *report* about the several basic concepts we make use of, and their mutual relationships. It should also *explain* why, at any given time, we have the basic conceptual structure we do. In view of these objectives, it must go beyond description in a proper or narrow sense. On the one hand, it must bring to the fore, and cure, the perplexities that may arise in the use of basic terms and concepts, performing a *therapeutic function*. On the other hand, in order to explain *why* we have the basic conceptual structure we in fact do, it must perform thought-experiments of *explanatory counter-factual imagination*. It

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[37] See JL Austin, *The Province of Jurisprudence Determined*, 370–1; HLA Hart, 'Definition and Theory in Jurisprudence (1954)' in *Essays in Jurisprudence and Philosophy*, 25–6, 26 ff., 47; HLA Hart, *The Concept of Law*, 16, 213–14; HLA Hart, *Law, Liberty and Morality*, 2–3.

[38] According to Hart, for instance, adequate descriptive theories of social phenomena like law are made of three basic ingredients: definitions of key terms; empirical statements about *passing features* of the world ('ordinary statements of fact'); and empirical statements about *constant features* of human beings and their world (statements 'the truth of which is contingent on human beings and the world they live in retaining the salient characteristics they have'); HLA Hart, *The Concept of Law*, 199–200.

[39] HLA Hart, *Definition and Theory in Jurisprudence* (1954) in *Essays in Jurisprudence and Philosophy*, 23 ff.; HLA Hart, *The Concept of Law*, 13 ff., 279–80.

[40] On classification see, eg, J Bentham, *Chrestomatia*, Part II (London, Payne and Foss, 1817), being an essay on nomenclature and classification.

[41] See PF Strawson, *Construction and Analysis*, in Aa. Vv., *The Revolution in Philosophy* (London, MacMillan, 1956), 97–110; PF Strawson, *Individuals. An Essay in Descriptive Metaphysics* (London and New York, Routledge, 1959) 9–12; PF Strawson, *Analyse, science et métaphysique*, in Aa. vV., *La philosophie analytique* (Paris, Les Éditions de Minuit, 1962) 105–18; PF Strawson, *Analyse et métaphysique* (Paris, Vrin, 1985), Ch. I–III.

must imagine what the basic conceptual structure would be like, if (we) humans and the world we live in were different.

Reformatory metaphysics purports to see whether the basic conceptual structure we have could be changed for the better, from the standpoint of the way we (and our world) in fact are, and the interests we in fact have. Reformatory metaphysics is parasitic on descriptive metaphysics. Its investigations start where the latter's end (and both are doomed to be never-ending enterprises). Its basic tool consists, again, in performing thought-experiments. In this case, however, they are experiments of *constructive imagination*, which are meant to set forth a *different* and *improved* conceptual structure.

Analytic jurisprudents are not philosophers *sans phrase*. Their lot consists, rather, in philosophizing about that specific province of social reality that is the law-world. They are local philosophers, dealing with local conceptual apparatuses, ontologies and epistemologies. However, it should be clear why some at least of their investigations should be like those of descriptive and reformatory metaphysicians. A central matter of their enquiries is the extant TCA legal cultures happen to make use of, together with legal thinking in its mystifying capabilities. The purpose of refinement requires conceptual description together with exercises in explanatory and constructive imagination. The purpose of demystification requires, in turn, conceptual description and therapeutic proposals.[42]

4.3 The Tools of Analytic Jurisprudence and Conceptual Analysis

How do the several sets of tools above fare in relation to 'conceptual analysis'? Are they amenable to it? Or, contrariwise, do they compose a methodological box of their own, for which such a label would be inappropriate? There is, to be sure, no objectively true notion of conceptual analysis that could help us out the riddle. In the next, and last, section, I will argue, by way of proposal, that the tools I have considered can reasonably be regarded as the instruments of a useful variety of conceptual (linguistic, philosophical) analysis in the service of profitable jurisprudential inquiries.

5. A MODEST AND RECONSTRUCTIVE VARIETY OF CONCEPTUAL ANALYSIS

Distinct forms of conceptual (linguistic, philosophical) analysis are conceivable. That being the case, two pairs of opposite varieties present as worth considering. Very roughly speaking, we can identify two pairs: conceptual analysis of a (purely) descriptive *or* of a reconstructive character, on the one hand, and conceptual analysis of grand *or* of modest ambition, on the other.

Descriptive conceptual analysis inquires on current conceptual and terminological apparatuses with the aim of clarifying and precisifying their scope in the light of the 'intuitions' of

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[42] See HLA Hart, *The Concept of Law*, 18 ff., 91 ff., 193 ff.; HLA Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence (1970)', in *Essays in Jurisprudence and Philosophy*, 270–1; HLA Hart, 'Introduction' in *Essays in Jurisprudence and Philosophy*, 12, 13–14.

those who make daily use of them ('the (mythical) folks'), whatever such intuitions may be.[43] Folks' intuitions (their methodologically unaccountable 'sense' about objects and concepts) are paramount: they both delimitate the ground, and determine the output, of the inquiry.

Reconstructive conceptual analysis, contrariwise, investigates current conceptual and terminological apparatuses with the aim of eventually and ultimately replacing them with 'better' ones, from the standpoint of the rational values of simplicity, clarity, precision, empirical adequacy, consistency, coherence, comprehensiveness, explicatory force and adequacy to the (presumed) purposes of the 'game(s)' they are played in. Reconstructive conceptual analysis too considers 'folks' intuitions' (if we like to describe in that way people's ordinary ways of thinking), as they are fatally embodied in, and mirrored by, linguistic practices. In so doing, however, it assumes those intuitions may back a conceptual and terminological apparatus in need of rational repair (rational reconstruction, rational revision).

Grand conceptual analysis is the Platonist-flavoured enterprise that, by way of linguistic-conceptual enquiries, presumes to be capable to 'reveal' the 'a priori', 'necessary', 'conceptual truths' about 'the way things are and the way the mind works'.[44] *Modest conceptual analysis*, by contrast, is characterized by the following views:

(a) it conceives of linguistic-conceptual enquiries mainly as leading to knowledge of the ways of thinking, and the sets of beliefs and attitudes, that are embodied in ongoing conceptual and terminological apparatuses;
(b) it grants to ongoing apparatuses only a presumptive epistemic value, assuming that the intuitions (beliefs, attitudes) they mirror may be inchoate, confused, contradictory, idle, superstition-laden, wrong as a matter of fact or otherwise flawed, so that such apparatuses may provide a misleading way of looking at the natural or social phenomena they are about;
(c) it adopts a conventionalist and pragmatist conception of conceptual sets;
(d) it does not look for 'necessary', 'a priori', 'conceptual truths' about reality, but is content to detect the (relatively) constant features thereof as they are mirrored in ongoing sets of concepts.[45]

Modest conceptual analysis is more than a 'glorification' of lexicography, though it may walk some way alongside it. It does not aim at 'teaching the use of sentences'; it does not wish to make its readers 'profit by the sentences' that they 'see or hear' or helping them 'react to' sentences 'in expected ways' and 'emit sentences usefully'.[46] Rather, it aims at providing people with improved, better, ways of thinking at some natural phenomenon or human undertaking, as observers or acting subjects ('participants') alike.

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[43] See B Leiter, *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Legal Philosophy*, (Oxford, Oxford University Press, 2007) 1–2, 183–99. The basic source for intuitionist conceptual analysis is F Jackson, *From Metaphysics to Ethics. A Defence of Conceptual Analysis* (Oxford, Clarendon Press, 1998), especially chap. 2.

[44] P Smith Churchland, *Foreword*, in WVO Quine, *Word and Object*, New Edition (Boston, The MIT Press, 2013) xi–xii.

[45] Ibid., xi–xiv; WVO Quine, *Word and Object* (Cambridge. Mass., The MIT Press, 1960) 275–6.

[46] WVO Quine, *Pursuit of Truth*, Revised Edition (Cambridge and London, Harvard University Press, 1992) 56–7.

By combination, four complex forms of conceptual analysis result: *grand and descriptive* conceptual analysis; *grand and reconstructive* conceptual analysis (ascribing to reconstruction the mysterious virtue of being capable to get at a 'conceptual truth about reality'); *modest and descriptive* conceptual analysis (which amounts to something very close to lexicography); and, finally, *modest and reconstructive* conceptual analysis.

The charter of analytic jurisprudence (section 3 above) and the tools it should employ (section 4 above) suggest its commitment to something very close to the modest and reconstructive variety of conceptual analysis. This variety can be presented as proceeding by means of enquiries articulated in the three stages of *conceptual detection*, *conceptual reconstruction* and *conceptual therapy*.

First there comes the stage of *conceptual detection*, or conceptual analysis in a narrow sense – what J.L. Austin proposes to call 'linguistic phenomenology'.[47] The ongoing terminological and conceptual apparatus that is the matter of the enquiry is identified and analysed, and its rational virtues and flaws dispassionately brought to the fore. The various tools for the analysis of legal discourses are to be put to work. Conceptual detection paves the way for the two following steps.

Second, there comes the stage of *conceptual reconstruction*. The ongoing terminological and conceptual apparatus is modified into a new one, which does, and should do, roughly the same job of the ongoing one, though in a better, more rational way – for instance, due to its finer articulation in a larger, more comprehensive set of terminologically distinct and semantically clearer and more exact concepts. The several tools for conceptual and terminological refinement are to be put to work. Conceptual reconstruction aims at the refinement and capture purposes of analytic enquiries.

Third, and finally, there comes the stage of *conceptual therapy*. The use of the reconstructed and replacing conceptual and terminological apparatus set forth in the second stage is recommended, and carried out, as a way out of the (supposed) rational flaws of the ongoing one. Conceptual therapy satisfies the demystification purpose of analytic enquiries.

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[47] JL Austin, *A Plea for Excuses* (1956–7) in *Philosophical Papers* (Oxford, Clarendon Press, 1961) 130.

3. A utilitarian theory of private law[1]

Craig Purshouse

1. INTRODUCTION

What connects such diverse legal issues as the validity of a marriage, whether body parts can be owed, what information doctors must disclose to you before performing surgery, a claim for the recovery of overpaid tax or whether a security guard is entitled to prevent you leaving a shop? At first glance, very little beyond the fact that they are all part of 'private law'. What, then, is private law? A book on the subject will usually include the law of obligations (contract, tort and unjust enrichment) together with the law of property and the law of persons (company law and family law). Often contrasted with public law, which is concerned with our rights against the state, it has been defined by the leading reference work on the topic as 'best viewed as concerned with the rights which, one against another, people are able to realize in courts'.[2] Given that the question of what rights or interests we have against each other is an important topic in moral philosophy, it is hardly surprising that private law has been subject to extensive theoretical discussion.

Alas, attempts to find a universal theory that explains private law have not been met with much success.[3] One school of analysis is economic in nature. Economic analyses focus on the maximisation of the wealth of society and maintain that the best explanation of private law rules is that judges decide cases, and should decide cases, in a way that promotes economic efficiency.[4]

Contrasted with the economic approach are what Steven Hedley calls 'moral theories'. The label is something a misnomer and creates the impression of a false dichotomy: the economic theories make prescriptive claims about what the law should be and so can also be classed as 'moral' in many respects.[5] The most notable of the so-called moral theories is based on corrective justice. Influenced by the work of Aristotle and Immanuel Kant, this approach was developed by Ernest Weinrib. Corrective justice is 'the idea that liability rectifies the injus-

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[1] This chapter builds upon arguments first developed in 'Utilitarianism as Tort Theory: Countering the Caricature' (2018) 38 *Legal Studies* 24; 'Arrested Development: Police Negligence and the *Caparo* "Test" for Duty of Care' (2016) 23 *Torts LJ* 1; and 'Flourishing Under Private Law? A Critique of McBride's Explanatory Theory' (2021) 34 *CJL&J* 239.

[2] A Burrows (ed), *English Private Law*, 3rd edn (Oxford University Press, 2013) 9. For sceptical comments on this definition see S Hedley, 'Is Private Law Meaningless?' (2011) 64 *CLP* 89, 90.

[3] See P Cane, 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 25 *OJLS* 203; J Goudkamp and J Murphy, 'The Failure of Universal Theories of Tort Law' (2015) 21 *LT* 47.

[4] R Posner, 'Wealth Maximisation and Tort Law: A Philosophical Inquiry' in David Owens (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1996) 99.

[5] Hedley, 'Is Private Law Meaningless?', 94.

tice inflicted by one person on another'[6] and is contrasted with distributive justice, which is concerned with what is fair across society or a particular group. By way of contrast, the focus of corrective justice is fairness between the parties (correcting wrongful losses). Losses will be wrongful under this theory if they interfere with the claimant's rights (as determined under Kantian principles).

Rights are also the focus of Robert Stevens's account of tort law. He maintains that the law of torts is 'concerned with the secondary obligations generated by the infringement of primary rights'.[7] When defendants interfere with a claimant's primary moral rights, they have an obligation to provide a remedy. Stevens has also used rights-based analysis in his writing on other aspects of private law.[8] Although distinct,[9] both rights theory and corrective justice are averse to consequentialist reasoning and the use of policy to resolve private law questions.[10]

A parade of criticism has been levelled at these theories. Economic analysis wrongly sees wealth as intrinsically valuable.[11] Corrective justice, being based on the legal philosophy of Immanuel Kant, wrongly sees independence as intrinsically valuable.[12] Furthermore, the scholars pushing this account only give a partial account of tort law and their opposition to distributive concerns makes them normatively unappealing.[13] Stevens's rights-based theory is often unclear about whether the rights in question are moral or legal, the basis of tort law's rights or how to deal with clashes between rights.[14]

Most fundamental, though, is the criticism that all three theories fail to *explain* the law. In a series of articles, Goudkamp and Murphy have highlighted this problem in relation to tort law. The parts of the law that corrective justice, rights and economic theories have failed to explain include tort statutes,[15] divergences in the common law[16] and several areas of tort doctrine (in particular, the recovery of pure economic loss in negligence, breach of duty, the

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[6] E Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 *UTLJ* 349, 349.

[7] R Stevens, *Torts and Rights* (Oxford University Press, 2007) 2. See also J Goldberg and B Zipursky's civil recourse theory: 'A person who is the victim of a legal wrong is entitled to an avenue of civil recourse against one who wrongs her', *Recognizing Wrongs* (Belknap Press, 2020) 3.

[8] R Stevens, 'The Unjust Enrichment Disaster' (2018) 134 *LQR* 574.

[9] See R Stevens, *Torts and Rights*, 326–9.

[10] For 'moral' theorists who have criticised utilitarianism see E Weinrib, 'Towards a Moral Theory of Negligence Law' (1983) 2 *Law & Phil* 37; E Weinrib, *The Idea of Private Law* (Oxford University Press, 1995) 151; A Beever, *Rediscovering the Law of Negligence* (Hart 2007) 110; A Beever *Forgotten Justice: A History of Political and Legal Theory* (Oxford University Press, 2013) ch. 11; J Goldberg and B Zipursky, *Recognizing Wrongs*, 72.

[11] See N McBride, *The Humanity of Private Law Part 1: The Explanation* (Hart, 2018) 10–11.

[12] *Ibid*., 13-14.

[13] See P Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 *OJLS* 471; C Witting, 'The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence' (2008) 71 *MLR* 621; D Priel, 'Land Use Priorities and the Law of Nuisance' (2015) 39 *Melb UL Rev* 346.

[14] D Priel, 'That Can't Be Rights' (2011) 2 *Jurisprudence* 277.

[15] J Goudkamp and J Murphy, 'Tort Statutes and Tort Theories' (2015) 131 *LQR* 133.

[16] J Goudkamp and J Murphy, 'Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories' in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2015).

rule in *Rylands v Fletcher*,[17] the defence of illegality and the availability of punitive damages).[18] Murphy has built on this critique in a series of solo-authored articles, arguing that these theories fail to explain the heterogeneity of tort law,[19] cannot account for 'hybrid torts' (these are causes of action that are treated like torts even though their ingredients suggest they are a hybrid of tort law and another area of law, such as contract or equity)[20] and are wrong to state that tort law develops in such a way as to gain greater coherence.[21] And this just relates to tort law. There have also been problems of fit with other areas of law. For example, Stevens's theory of unjust enrichment asks us to discard a series of decisions from apex courts.[22]

The above theories are by no means exhaustive. McBride has recently developed a theory based on the idea that private law is concerned with promoting flourishing.[23] Though it has much to recommend it, it also suffers from problems of fit.[24]

Given these shortcomings of the major private law theories, we might approach the endeavour to find such a theory with scepticism. As Cane states, 'there must come a point where gaps between the *explanandum* and the *explanans* cast doubt on the value of the explanation'.[25]

Yet in this chapter I will attempt to sketch how a utilitarian theory of private law might look. Utilitarianism is a consequentialist moral theory that requires that 'as far as it is within our power, we should bring about a world in which every individual has the highest possible level of wellbeing'.[26] This principle governs all moral questions.[27] The goal to be maximised, or the interpretation of 'wellbeing', varies within different versions of the theory.[28] I do not need to settle this question for the purposes of this chapter but I will assume that the goal to be maximised is *not* wealth, in order to distinguish the theory from economic theories.

Outside of law and economics, there have been few attempts to defend a utilitarian theory of private law.[29] Rule utilitarian theories of tort law were recently defended by the late John Gardner. Whatever problems rule utilitarians might face in other contexts, in tort theory they 'do not face the challenge that even the rule with the greatest utility must eventually come up against the extreme case in which there would be more utility in bending it'.[30] This is because

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[17] Rylands v Fletcher (1868) LR 3 HL 330.

[18] J Goudkamp and J Murphy, 'Failure of Universal Theories'.

[19] J Murphy, 'The Heterogeneity of Tort Law' (2019) 39 *OJLS* 455.

[20] J Murphy, 'Hybrid Torts and Contemporary Tort Theory' (2018) 64 *McGill LJ* 1.

[21] J Murphy, 'Contemporary Tort Theory and Tort Law's Evolution' (2019) 32 *CJL&J* 413.

[22] R Stevens, 'The Unjust Enrichment Disaster', 591–601.

[23] See N McBride, *The Humanity of Private Law Part 1: The Explanation.*

[24] See C Purshouse, 'Flourishing Under Private Law? A Critique of McBride's Explanatory Theory' (2021) 34 *CJL&J* 239.

[25] P Cane, 'Anatomy of Private Law Theory', 207.

[26] K de Lazari-Radek and P Singer, *Utilitarianism: A Very Short Introduction* (Oxford University Press, 2017) 1.

[27] N Simmonds, *Central Issues in Jurisprudence*, 4th edn (2013) 18–19.

[28] C Purshouse, 'Utilitarianism as Tort Theory: Countering the Caricature' (2018) 38 *LS* 24, 27.

[29] I will distinguish utilitarianism and law and economics by the fact that the latter sees wealth as intrinsically valuable whereas the former does not.

[30] J Gardner, 'Tort Law and its Theory' in J Tasioulas (ed), *The Cambridge Companion to Philosophy of Law* (Cambridge University Press, 2020) 15, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3108535>.

> the law of torts is not a good testbed for the objection, since the law of torts is rife with rules well-suited to being adapted to novel and unforeseen circumstances. Whatever else they may do, qualifications like 'reasonable', 'ordinary', and 'due' that are used in formulating many tort-law rules invite the rule-user to refer back the underlying merits of the case. And even when the rules are not already set up like this, familiar common-law techniques such as 'distinguishing' the earlier cases or creating an 'equitable' qualification to the rule can be used to bend them ad hoc into conformity with the underlying merits. Tort law is nothing if not pliable, as systems of rules go. So those offering a rule-utilitarian defence of tort law have nothing much to fear from the charge – if they really want to treat it as a charge – that their ethics cannot but licence a great deal of pliability in rules.[31]

Similarly, criticism that utilitarianism instrumentalises rules was misplaced. Gardner asked, 'What should the rules of tort law be if not instruments to improve what people do, namely by getting them to conform to those very rules?'[32]

After outlining what I see as the most persuasive account of utilitarianism, I will discuss how this will apply to private law. It is not my aim in this chapter to conclusively prove that utilitarianism provides the best explanation of private law. Nor will I be able to assess how utilitarianism performs against the criticisms that have been levelled against universal theories of private law.[33]

2. TWO-LEVEL UTILITARIANISM

A persuasive version of utilitarianism was developed by R.M. Hare. Hare distinguished two levels of moral thinking:

1. The *critical* level: For use in a 'cool hour',[34] at this level a moral agent is permitted to consider all the details which would enable them to weigh up the course of action that would satisfy the most interests and thus have the best consequences.
2. The *intuitive* level: This is intended for normal use under conditions of ignorance of the future, stress and temptation, and in moral education and self-education. At this level we should 'stick to firm and simple principles which are most likely in general to lead to right action'.[35]

The former level is used to select the principles to be adhered to in the second one. This distinction between the two levels of thinking indicates that the best way of maximising the satisfaction of interests is to place emphasis upon following rules or acting on shared intuitions in day-to-day moral decisions.

As we are not completely rational and often lack information, attempting to maximise good consequences with each and every action will be counterproductive. We often make mistakes

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[31] Ibid., 15–16.

[32] Ibid., 16.

[33] I have attempted to show how some criticisms of other universal tort theories do not apply to utilitarianism; see ibid., 36–7.

[34] RM Hare, 'Critical Study: Rawls' Theory of Justice I' (1973) 23 Phil Q 144, 153.

[35] Ibid.

in our thinking, as a wealth of psychological research confirms.[36] Having everyone behave like an act-utilitarian is therefore unlikely to achieve the best consequences.

Furthermore, by relying upon relatively general principles we are less likely to expose ourselves to special pleading: in practice, 'especially when in haste or under stress, we may easily, being human, "cook" our moral thinking to suit our own interest'.[37] Human beings are 'notoriously biased'[38] in their own favour. We frequently deceive ourselves into thinking something is in the general interest when in reality it is only in our self-interest. Freedom to do what seems good will result in most people doing what is good *for themselves*.

By following general principles, rules and intuitions we are more likely over the course of our lives to make the decisions that we ought to make than we are by doing a utilitarian calculation on every occasion.[39] The intuitive level therefore has an important part to play in moral thinking.

Given this, we should normally rely on general principles when making moral decisions, but in exceptional conditions it is permissible to depart from the intuitive level to the critical one and weigh up which action will produce the most utility. Examples of such circumstances might include those where two of our intuitive convictions conflict in a particular case so both cannot be acted on, or 'when we ask whether the intuitive principles which we have ourselves acquired through our upbringing are the ones which we ought to pass on to our children'.[40] Such scenarios, though, are likely to be rare. Normally, we should follow rules that have been selected by the principle of utility.

This theory can therefore be described as a sophisticated form of act-utilitarianism that acknowledges the benefits of using rules, principles and intuitions in guiding one's conduct and achieving the best outcomes. Two-level utilitarianism does not see the principle of utility as a decision-making procedure guiding everyday conduct, but instead as the standard of evaluation for morality (that is, the correct account of what makes actions and rules right or wrong).[41] The seeds of this idea appear in Mill's work:

> [T]o consider the rules of morality as improvable, is one thing; to pass over the intermediate generalisations entirely, and endeavour to test each individual action directly by the first principle, is another. It is a strange notion that the acknowledgment of a first principle is inconsistent with the admission of secondary ones.[42]

This framework therefore has an important role for rules and moral intuitions but the criterion of what rights, principles and intuitions we should encourage or enforce is utilitarian in nature.

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[36] D Kahneman, *Thinking, Fast and Slow* (Penguin, 2011) 156.

[37] RM Hare, *Moral Thinking: Its Method, Level and Point* (Oxford University Press, 1981) 44–5.

[38] J Greene, *Moral Tribes* (Atlantic, 2015) 167.

[39] R Goodin, *Utilitarianism as a Public Philosophy* (Cambridge University Press, 1995) 18; RM Hare, *Moral Thinking,* 192.

[40] RM Hare, 'Arguing About Rights' (1984) 33 *Emory LJ* 631, 634.

[41] J Gray, 'Indirect Utility and Fundamental Rights' (1984) 1 *Soc Phil & Pol'y* 73, 75.

[42] JS Mill 'Utilitarianism' in J Gray (ed) *On Liberty and Other Essays* (Oxford University Press, 1991) 156.

3. TWO-LEVEL UTILITARIANISM AS A THEORY OF PRIVATE LAW

Embracing a utilitarian view of private law does not mean instructing judges hearing cases to follow a maxim such as 'secure the outcome that will satisfy the most interests in each case'. Instead, the method of deciding cases can be divided into the two levels of thinking discussed above.

The intuitive level of moral thinking is analogous to the doctrine of precedent and the principles that judges follow when deciding tort cases. Having (fairly) certain rules that protect people's interests allows citizens to interact knowing that minimum standards of conduct will be respected.[43] If judges decided each case from scratch based upon what they believed would have the best outcomes, then the law would not achieve the satisfaction of people's interests. The law would become unpredictable and the result in each case would depend upon the moral opinions of the judge deciding it. In order to maximise the satisfaction of people's interests, the judge's role at the 'intuitive level' is to look at the previously decided cases and the relevant legal principles and apply them to the facts at hand.

Inflexibly following past decisions will provide certainty. But if those precedents are bad ones or no longer socially relevant then they will not maximise overall welfare. The benefits derived from having fixed principles can sometimes be eclipsed by the suffering they cause.[44] Inevitably, there will be situations where it is permissible for judges to depart from the intuitive level of relying upon previous decisions and principles.[45] In such circumstances, they may develop the law. They can do this by ascending to the critical level of thinking. This will involve weighing up what outcome will have the best results and satisfy the most interests. Wider questions of policy and fairness will therefore be appropriate at this stage.

When, then, should judges resort to such critical-level thinking? A case might be novel and so no previous precedent comfortably applies, or changing social facts may mean that a rule is no longer appropriate. In such circumstances, it is legitimate for judges to develop the law and decide the case based upon what outcome would have the best result. One would expect critical thinking to occur more frequently in higher appellate courts than in courts of first instance. Given that the common law is based upon the doctrine of precedent, though, consideration must be given to how the decision might be applied in future analogous cases. This may be difficult to predict and judges will have limited information about the wider impact of their decisions. The critical level should therefore not be the starting point in determining tort cases.[46]

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[43] C Witting, *Street on Torts*, 14th edn (Oxford University Press, 2015) 4; Overseas Tankship (UK) Ltd. Appellants v Morts Dock & Engineering Co. Ltd. (the Wagon Mound) [1961] AC 388, 423. See also A Robertson, 'On the Function of the Law of Negligence' (2013) 33 *OJLS* 31, 32.

[44] K Oliphant, 'Against Certainty' in S Pitel, J Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart, 2013) 1.

[45] This may not always be explicit as, given the indeterminate nature of many legal rules, there will scope for interpretation. See L Green, 'The Duty Problem in Negligence Cases' (1928) 28 *Colum L Rev* 1014, 1018.

[46] 'Arrested Development: Police Negligence and the *Caparo* "Test" for Duty of Care' (2016) 23 *Torts LJ* 1, 12–13.

Distinguishing between these two levels of thinking has the benefit of reflecting the way in which common law reasoning actually takes place.[47] Judges rely on previous precedents but *do* develop the law to achieve a fair result that satisfies the most interests.[48]

It is not implausible that judges deciding private law cases have been concerned with the importance of certainty (the intuitive level of utilitarian thinking) and obtaining a fair result that satisfied people's interests (the critical level). In fact, Lord Hodge, writing extra-judicially, was recently explicit that this is similar to the approach he takes. After discussing Neil MacCormick's work in *Legal Reasoning and Legal Theory*,[49] he stated:

> In difficult cases where there is a clash between opposing legal principles, a judge looks to the consequences of rival legal rulings. This consequential analysis involves an assessment of whether the grounds of judgment are repeatable in other cases as universal propositions of law, a requirement which one might describe as 'rule universalism'. A consequential analysis also involves the judge in assessing, so far as he or she can, the socio-economic consequences of a particular determination.[50]

Different judges will have different views regarding the correct balance between certainty and fairness. Some judges believe that following precedent and having clear, certain rules results in the best outcomes. Others believe that issues of fairness should be pre-eminent. It does not take too strenuous a search of the law reports to find examples of judges having different opinions regarding the balance of fairness and certainty. It is not implausible that they have *aimed*, overall, to have the best outcomes when deciding private law cases.[51]

4. ASSESSING THE EXPLANATION

Let us now assess how this explanation fares against some areas of private law doctrine. It is impossible to compare this explanation against all or even most aspects of private law within the space constraints of this chapter. The below examples are merely used to illustrate the theory.[52]

4.1 Negligence

Let us begin with the tort of negligence. This requires that defendants' breach of their duty of care has caused actionable damage to the claimant. Each element of the negligence inquiry –

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[47] Huddersfield Police Authority v Watson [1947] KB 842, 848 per Lord Goddard.

[48] See Practice Statement 8[1966] 1 WLR 1234.

[49] N MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, 1978).

[50] Lord Hodge, 'The Scope of Judicial Law-Making in the Common Law Tradition' speech at the Max Planck Institute of Comparative and International Private Law (28 October 2019, Hamburg, Germany) 23, available at www.supremecourt.uk/docs/speech-191028.pdf.

[51] S Waddams, *Dimensions of Private Law* (Cambridge University Press, 2003) 195.

[52] It is worth stating that in providing a utilitarian assessment of private law, a number of different perspectives could be used. There might be explicit reasoning by judges. This often takes place, particularly in the duty of care and breach elements of negligence. In other situations, the utilitarian considerations may be more implicit. Furthermore, the reasoning that a judge gives may not be utilitarian but an ex post justification of a ruling or law can be made in utilitarian terms.

duty, breach and causation – can be explained in utilitarian terms. Let us begin with duty of care.

4.2 Duty of Care

Utilitarian reasoning appears to be consistent with the way judges determine whether a duty of care is owed. Take *Caparo Industries plc v Dickman*.[53] This case is authority for the idea that judges should start with the previous categories of cases where a duty of care has been/has not been recognised instead of relying on universal tests. As Lord Bridge stated in *Caparo*, this is because 'the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes'.

It is only in novel cases that there should be resort to policy reasoning. In such cases the courts will look at whether there is foreseeability of damage and a relationship of proximity between the claimant and defendant and whether imposing liability will be fair, just and reasonable. The latter stage involves weighing up policy factors for and against imposing liability.[54] Despite extensive criticism of the use of universal tests, the case had been mistakenly interpreted as requiring a three-stage test.

A notable example of this unfortunate tendency was the Court of Appeal decision in *Robinson v Chief Constable of West Yorkshire Police*,[55] where the defendant police force injured an elderly pedestrian while carelessly attempting to arrest a drug dealer on a busy street. Contrary to authority, the Court of Appeal relied upon the supposed 'three-stage *Caparo* test' and held that policy reasons prevented a duty of care being owed.

Overturning the decision of the Court of Appeal, the Supreme Court put the three-stage test myth to rest. Lord Reed held that 'The proposition that there is a *Caparo* test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken'.[56] Instead, the focus should be on precedent and developing the law incrementally.[57] It still allows for policy reasoning to take place, but that is not the starting point.[58] In this respect, it achieves the correct balance between certainty and promoting utility.

Utilitarianism can therefore explain the law on duty of care. The approach in *Caparo* and *Robinson* is remarkably similar to the two-level utilitarian approach. It acknowledges the importance of certainty in the law by having the starting point be what previous cases have determined. This is akin to the intuitive level of utilitarian thinking. However, it allows for the law to develop and new duty of care situations to be recognised (or old ones removed) by considering questions of community welfare. The critical level can be utilised in novel cases.

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53 Caparo Industries plc v Dickman [1990] 2 AC 605.
54 Barrett v Enfield LBC [2001] 2 AC 550 at 559 per Lord Browne-Wilkinson.
55 Robinson v Chief Constable of West Yorkshire Police [2014] EWCA Civ 15.
56 [2018] UKSC 4 at [21] per Lord Reed.
57 Ibid.
58 Ibid., [42].

4.3 Breach of Duty

The breach element of negligence can also be justified in utilitarian terms.[59] The standard expected of defendants is one of reasonableness.[60] What is reasonable 'varies according to the circumstances',[61] but it is an objective test. According to Lord Macmillan in *Glasgow Corporation v Muir*, 'It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question'.[62]

The reasonable person is 'an abstraction whose characteristics are invented by the judges'[63] and the characteristics of the reasonable person are 'functions of ideas of justice and sound behaviour about which people (and judges) might justifiably disagree'.[64] These ideas of justice are informed by utilitarian considerations about what consequences will improve wellbeing for society rather than considerations about whether the defendant is morally at fault.[65]

Consider the standard for junior doctors, who are held to the same standard as more experienced clinicians.[66] In *FB v Rana*,[67] Jackson LJ held:

> In effect, the law of tort achieves a compromise. It takes account of those characteristics which cannot be ignored (for example that the defendant was a child or was blind), but subject to that it imposes a general duty of care upon all members of society, which is not tailored to their individual strengths and weaknesses.[68]

This 'imperfect compromise' achieves a 'balance between the interests of society and fairness to the individual practitioner'.[69] Judges therefore take into account the impact that their decisions will have on wider society when determining the characteristics possessed by the reasonable man. This choice is one informed by what judges believe will have the best outcomes for overall wellbeing. It is therefore utilitarian in substance: judges are aiming to enforce a standard that has the best consequences for society while also attempting to be fair to defendants.

To determine how the reasonable man behaves, the courts take a number of factors into account. In England, the determination of what constitutes reasonable care depends upon balancing 'not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures'.[70] The fact that judges balance these considerations is strong evidence that the breach element of negligence can be explained in utilitarian terms. Each

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[59] See SG Gilles, 'The Emergence of Cost-Benefit Balancing in English Negligence Law' (2002) 77 *Chi-Kent L Rev* 489.

[60] Blythe v Birmingham Waterworks Co. Ltd (1865) 11 Ex 781, 784 per Alderson B.

[61] Glasgow Corporation v Muir [1943] AC 448, 456 per Lord Macmillan.

[62] Ibid., 459.

[63] P Cane, *Atiyah's Accidents, Compensation and the Law*, 8th edn (Cambridge University Press, 2013) p.34.

[64] Ibid.

[65] Nettleship v Weston [1971] 2 QB 691, 700 per Lord Denning.

[66] Wilsher v Essex AHA [1987] QB 730.

[67] FB v Rana [2017] EWCA Civ 334.

[68] Ibid., [56].

[69] Ibid., [60].

[70] Tomlinson v Congleton BC [2004] 1 AC 46 at [34] per Lord Hoffmann.

factor is a relevant mid-level principle for determining what will improve people's wellbeing. For example, the reason why the courts' balancing exercise focuses on the risk of injury to the claimant is that it is of public benefit to prevent defendants engaging in risky activities. These have a human cost in causing devastating injuries to the individual and have a wider family and social impact.[71] They also cause a 'financial cost, either to the State or to an insurer, of providing care and treatment to someone who is rendered severely disabled as a result of an accident'[72] and so a consideration of the likelihood and gravity of the harm is relevant to any utilitarian calculation. On the other hand, the courts do not want to 'eliminate every iota of risk or to stamp out socially desirable activities'[73] and so the cost of taking precautions and the social value of the defendant's activity are relevant considerations in the cost–benefit analysis. Taking account of the social value of the defendant's activities to wider society is a clear example of the courts relying upon utilitarian reasoning and there are numerous cases where this has taken place.[74] Furthermore, two statutes confirm that utility should be taken into account when assessing whether a defendant has breached their duty of care. Section 1 of the Compensation Act 2003 states when determining whether a defendant has breached their duty of care, the court should consider whether requiring a defendant to take certain steps would:

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
(b) discourage persons from undertaking functions in connection with a desirable activity.

Section 2 of the Social Action, Responsibility and Heroism Act 2015 (SARAH) states: 'The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members.' For this, it appears that community welfare determines both the setting of the standard of care and also whether the defendant has met it.

4.4 Causation

A claimant must demonstrate that the defendant caused or materially contributed to her injury. The law of causation can also be explained in utilitarian terms. Generally, the law relies upon the 'but for' test in determining factual causation. One asks: *but for* D's breach of duty would C have suffered their injury? If the answer is no, then D will have caused the injury. If the claimant would have suffered the injury anyway then causation is not established.[75] There are some situations where the but-for test can lead to counterintuitive results.[76] Rigidly sticking to the but for test would lead to results that many would regard as unfair. It is for this reason that

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[71] Uren v Corporate Leisure (UK) Ltd, Ministry of Defence [2013] EWHC 353 at [197] per Foskett J.

[72] Ibid.

[73] The Scout Association v Barnes [2010] EWCA Civ 1476 at [34] per Jackson LJ.

[74] Uren v Corporate Leisure (UK) Ltd, Ministry of Defence [2011] EWCA Civ 66 at [69] per Smith LJ; The Scout Association v Barnes [2010] EWCA Civ 1476 at [46] per Smith LJ; Humphrey v Aegis Defence Services Ltd [2016] EWCA Civ 11 at [10]–[14] per Moore-Bick LJ.

[75] See Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428.

[76] G Turton, *Evidential Uncertainty in Causation in Negligence* (Hart 2016) ch. 2.

the courts have often departed from the test. Take the material contribution to risk exception. In *McGhee v National Coal Board*,[77] the House of Lords held that a defendant's material increase in the *risk* of damage was sufficient to establish causation. Lord Reid maintained that in a case such as this, the court must 'take a broader view of causation'.[78] This approach has since been held that it can apply where the claimant has been exposed to a risk by multiple defendants as in *Fairchild v Glenhaven Funeral Services Ltd*[79] but not where the claimant has been exposed to multiple different toxic agents or risk factors.[80] In *Barker v Corus plc*[81] the House of Lords changed the law of apportionment for this exceptional rule of causation to hold that a defendant is only liable for the amount of risk they exposed the claimant to, but this was reversed by legislation (but only in relation to mesothelioma claims).[82]

It is therefore evident that in most cases the courts believe that it is useful to have a clear rule for determining causation – the but for test – but that in exceptional circumstances this can be departed from for reasons of fairness. In such circumstances, developing the law will promote wellbeing to a greater extent than sticking to the original rule. This was the justification for the decision in *Fairchild*.[83] In this respect, judges' aims are utilitarian.

None of the above is to state that the law of causation as it presently stands actually promotes people's welfare. Some might argue that the uncertainty in the law of causation as a result of *Fairchild* has come at too a high cost and is bad for society. Indeed, it is not hard to find judicial dissatisfaction with this area of law.[84] Instead, the argument is that judges and the legislature have utilitarian *aims* when developing the law and the uncertainty in the law is often reflected in the differing viewpoints of lawmakers between the correct balance between fairness and certainty.

5. TRESPASS TO THE PERSON

Negligence is a flexible tort that lends itself to utilitarian reasoning. What about trespass to the person? At first glance, we might think that this group of torts lend themselves to rights-based reasoning. As the editors of *Clerk & Lindsell* summarise, 'interference, however slight, with a person's elementary civil right to security of the person, and self-determination in relation to his own body, constitutes trespass to the person'.[85]

This focus on rights does not appear to leave much room for utilitarian reasoning. However, this is a mistake. Obviously, one's interests in security of the person and self-determination

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77 McGhee v National Coal Board [1973] 1 WLR 1.

78 Ibid., 4.

79 Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32.

80 Wilsher v Essex AHA [1988] AC 1074.

81 Barker v Corus UK Ltd. [2006] 2 AC 572.

82 See UK's Compensation Act 2006, section 3.

83 See Fairchild at [33] per Lord Bingham.

84 Fairchild 'kicked open the hornets' nest' (Sienkiewicz v Greif Ltd [2011] 2 AC 229 at [167] per Lady Hale) and its subsequent decisions 'have cruelly exposed the problem of dealing with complex and interrelated issues piecemeal' (International Energy Group Ltd v Zurich Insurance Plc UK [2015] UKSC 33 at [128] per Lord Sumption).

85 M Jones, *Clerk & Lindsell on Torts*, 23rd edn (Sweet & Maxwell, 2020) 14-01.

in relation to one's own body are considered important. It is usually detrimental to people's welfare to hit or imprison them. Rules that discourage such behaviour will promote welfare. It might also be useful to have certain rules that make all intentional and direct touching *prima facie* unlawful even without injury rather than risk having it assessed on a case-by-case basis. The fact that trespass torts are less flexible than the tort of negligence does not mean that they do not have a utilitarian justification: it could merely mean that they operate more at the intuitive level of thinking rather than the critical level. Hare himself acknowledged that rights can operate at the intuitive level of thinking and that a utilitarian need not dissent from the view that rights could act as 'trumps'.[86]

In any event, the above rebuttal is based on the assumption that the trespass torts are merely concerned with the rights we have against each other. This assumption is questionable. Priel has argued that the trespass torts have 'much more to do with broad societal (or public) considerations than with those confined to the individual parties involved'[87] and that their role is to hold public authorities to account. Furthermore, the fact that touching must be 'unlawful' in order to constitute a battery means that there is scope for weighing up competing interests in determining whether touching constitutes a battery. Robert Goff LJ believed that 'unlawfulness' contained a 'general exception embracing all physical contact which is generally acceptable in the ordinary conduct of everyday life' (at 1177). This would include, for example, jostling in a supermarket or underground station, seizing someone's hand in friendship or touching someone to engage their attention. According to Beuermann, this means:

> the courts have become both more able and more willing to balance competing interests when imposing liability for trespass to the person, slowly shifting the focus from *what* the defendant did (engage in conduct that interfered with the plaintiff's personal security), to an analysis of *how* the defendant did it and the circumstances in which the interference occurred. This process of determining liability is not dissimilar to that utilised by the courts when imposing liability in the tort of negligence.[88]

The law of trespass can therefore be explained in utilitarian terms.

6. STRICT LIABILITY: THE RULE IN *RYLANDS V FLETCHER*[89]

Similar arguments can be made about torts of strict liability such as the rule in *Rylands v Fletcher*. This landmark case held that a tort is committed when the following requirements are met: (1) When the defendant brings for his own purposes something onto his land that is likely to do mischief; (2) The escape of that thing; (3) A non-natural use of the land; (4) Damage caused by the escape. In this respect, the tort is one of strict liability as it does not matter if the escape is unforeseeable or that the defendant took reasonable care attempting to prevent the escape (damage, however, must be reasonably foreseeable). Goudkamp and Murphy have emphasised that *Rylands* poses significant problems of fit for universal tort theories.[90]

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[86] RM Hare, 'Arguing About Rights', 635.

[87] D Priel, 'A Public Role for the Intentional Torts' (2011) 22 *Kings LJ* 183, 184.

[88] Christine Beuermann, 'Are the Torts of Trespass to the Person Obsolete? Part 1: Historical Development' (2017) 25 *Torts LJ* 103.

[89] Rylands v Fletcher (1868) LR 3 HL 330.

[90] J Goudkamp and J Murphy, 'Failure of Universal Theories', 77–84.

Does the fact that the rule in *Rylands v Fletcher* imposes strict liability mean that it is inconsistent with utilitarianism? Not necessarily. As Murphy notes, the rule arose at the height of the industrial revolution, when risky enterprises posed new dangers to the environment.[91] In *Transco plc v Stockport MBC*,[92] Lord Hobhouse declared the rule to be 'a coherent principle which accords with justice and with the existing legal theory at the time'.[93] He suggested that there are two potential solutions to damage caused by escapes. The first is to restrict what a defendant can do on their land. The second is to impose strict liability for the consequence of exercising their liberty. While the latter was 'entirely in keeping with the economic and political culture of the 19th century, laissez faire and an understanding of the "concept of risk", the culture has now changed to impose greater regulation limiting what a landowner can do on their land'.[94] Put simply, the rule in *Rylands* might now seem anomalous as the idea that liability should be based upon fault is more dominant than the idea that it should be based on strict liability. This has not always been the case. As Ibbetson notes, the medieval action of trespass was 'built on a theory of strict liability'.[95] At the time that *Rylands* was decided, it would have been thought beneficial to society to develop such a rule. Now, judges have limited the rule's role or attempted to subsume it within other torts.[96] Given how entrenched the rule is, there might be good reason for maintaining it, even at the expense of having an anomalous principle of liability. However, this is perfectly consistent with utilitarian reasoning. Judges aiming to craft a law of torts that maximises wellbeing might see the benefits of maintaining a supposedly anomalous rule to outweigh removing it.

7. PROPERTY LAW AND CONTRACT LAW

The above discussion has focused on the law of torts. How might it apply to other branches of private law? Land law, equity and trusts and contract law do not look like they have been developed in with the aim of improving people's welbeing. Land law's commitment to 'certainty, autonomous individualism, and efficiency'[97] is likely to work to the benefit of those who own property. Smilar criticisms can be levelled at many areas of contract law. The contract of employment, Collins argues, is 'in some respects both illiberal and inegalitarian'.[98] Property law and contract law often seem to promote the interests of those with capital at the expense of society at large. However, the theory advocated above is not that lawmakers have actually achieved utilitarian *outcomes*, but that they have utilitarian *aims* (or, at least,

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[91] J Murphy, 'The Merits of Rylands v Fletcher' (2004) 24 *OJLS* 643, 649.

[92] Transco plc v Stockport MBC [2003] UKHL 61.

[93] Ibid., [55].

[94] Ibid., [56].

[95] D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1991) 61.

[96] In English law it is now considered an extension of private nuisance: Cambridge Water Co Ltd v Eastern Counties Leather Plc [1994] 2 AC 264, 306 per Lord Goff.

[97] L Fox O'Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism' (2014) 67 *CLP* 409, 421.

[98] H Collins, 'Is the Contract of Employment Illiberal?' in H Collins, G Lester, and V Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 66.

that the reasoning and results of the law may be rationalised via a utilitarian explanation). Recall Hare's words that we often 'cook' our thinking to suit our own interests. Lawmakers, whether judges or members of the legislature, have, both historically and at present, been part of the class that is likely to benefit from a property law that protects the interests of those with private property. They, and their families, are more likely to benefit by protecting the interests of capital over the interest of labour. They need not have nefarious motives in this endeavour. A belief that what is good for *people like them* reflects what is good for society suffices for the purpose of the theory.[99]

8. THE DISTINCTIVENESS OF PRIVATE LAW

A counterargument to the above thesis is that it does not capture the distinctiveness of private law when compared to public law. Judges could have had utilitarian aims when developing the criminal law, for example.

Ultimately, this line of attack is not persuasive. We might find it useful to separate private law and public law when organising the law but this does not mean that they are not both underpinned by the same theoretical explanation. This is a perfectly reasonable viewpoint. Cane, who does not adopt the same explanation that I have adopted here, has stated that 'although public law and private law impose different obligations and recognize different rights, they are based on essentially similar concepts of interpersonal responsibility'.[100] In any event, a fundamental divide between public law and private law is a relatively recent phenomenon.[101] Priel has demonstrated that attempts at creating such a divide were motivated by a fear that judges creating law would lead to a lack of legitimacy and, as such, it is politically motivated.[102] As Dietrich states:

> Although legal categories have obvious utility as a means of synthesising the vast quantity of legal materials, such categories and their content are indistinct and overlap and their inherent limitations must constantly be kept in mind. One such limitation is that many decisions draw on legal concepts from different categories.[103]

The fluid boundaries in the organisation of private law and the distinction between private law and public law have a number of influences and are a historical accident. This fact does not imperil utilitarianism as explanation of the law. It simply means that lawmakers and commentators have believed that better outcomes will arise from organising the law in one way rather than another.

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[99] See C Purshouse, 'Utilitarianism as Tort Theory', 38–9.

[100] P Cane, 'Anatomy of Private Law Theory', 214. In a recent article, Donal Nolan has argued that tort and public law are overlapping categories ('Tort and Public Law: Overlapping Categories?' (2019) 135 *LQR* 272).

[101] D Priel, 'The Political Origins of English Private Law' (2013) 40 *JL & Soc* 481, 482.

[102] Ibid., 491.

[103] J Dietrich, 'What is "Lawyering"? The Challenge of Taxonomy' (2006) 65 *CLJ* 549, 575.

9. CONCLUSION

As I said in the introduction, I am not here attempting to demonstrate that utilitarianism can refute all of the charges laid at other universal tort theories. Instead, my aim was the more modest one of sketching a utilitarian theory of private law and applying it to a limited number of doctrines. It has been shown that the doctrines here could be explained in utilitarian terms, even if their form does not initially appear to be consequentialist. In explanatory terms, future research could apply utilitarian to other private law doctrines that have not been considered here. For example, the laws of unjust enrichment and trusts and specific elements of contract law have not been considered in detail here. Nor have the full range of torts. Another fruitful line of research would be normative in nature and consider how private law might be developed so that it maximises the satisfaction of people's interests.[104]

[104] This division is similar to Bentham's system of judicial referral to the legislator in cases where judges have doubts as to the utility of a given ruling. Bentham recommends judges to issue two rulings: one according to the law is it stands; one according to their best evaluation of social utility in the case at hand. The matter is then referred to the legislator, who alone has a general view of what is at stake beyond the concrete litigation. J Bentham, *Constitutional Code* in *The Works of Jeremy Bentham*, Vol IX (1843) 662, 481, 502–8, available at https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1999/0872.09_Bk.pdf.

4. The rise of utilitarianism in criminal justice

Malcolm Thorburn[1]

1. INTRODUCTION

Utilitarianism's intellectual roots were set down by eighteenth-century philosophers such as David Hume and Claude-Adrien Helvétius, and its implications for criminal justice were quickly recognised at the turn of the nineteenth century by reformers such as Cesare Beccaria and Jeremy Bentham. Utilitarianism has since dominated criminal justice scholarship (in the English-speaking world, at least) up to the present day. The leading text in criminal law in the United States – the *Model Penal Code*[2] – is a decidedly utilitarian document; the leading English-speaking philosopher of criminal law of the twentieth century – H.L.A. Hart – put forward a utilitarian conception of the field; and modern criminal justice reform efforts in much of the world are motivated by empirically driven, utility-maximising policy thinking. In the roughly 300 years since the advent of utilitarianism, it has transformed our thinking about criminal justice, root and branch.

This chapter surveys the birth, development and influence of utilitarianism in criminal justice thinking from the eighteenth century to the present. This is an overwhelmingly large and influential literature, so my survey, of necessity, only touches the surface of the many debates and schools of thought. For present purposes, however, we can think of the development of utilitarian thinking as progressing in three stages. Early utilitarian theorists such as Hume, Helvétius and Beccaria were writing in *Ancien Régime* Europe – a world still dominated by absolute monarchs, formally recognised aristocratic privilege and moralist criminal laws. Although Beccaria set out a number of specific proposals for the reform of criminal justice, these early writers were mostly concerned with even more large-scale problems. Before getting to fine-grained matters of criminal justice reform, they first had to work out their large-scale ambitions for reconfiguring the foundations and limits of legitimate state power and the connection between the positive law and matters of morality and religion. At this early stage of development, utilitarianism is best understood alongside Locke's liberalism, Rousseau and Kant's social contract and Montesquieu's study of constitutionalism as one of a number of Enlightenment critiques of the established legal and political order.

Utilitarianism came into its own in the nineteenth century in a second stage of development, with Beccaria as a transitional figure and Jeremy Bentham and John Stuart Mill as the central players. It was at the second stage that utilitarianism gave rise to a highly detailed set of principles for reforming virtually every aspect of human endeavour, including criminal justice: changes to the law of evidence, the law of criminal defences, sentencing regimes, prison

[1] Thanks to Michael Law-Smith for superb research assistance.

[2] The Model Penal Code, drafted by the American Law Institute in 1962, is (as its name suggests) a *model* code the purpose of which is to guide law reform in the various states. It is also the central object of study in criminal law courses in American law schools.

design, policing practices and much more besides. Finally, at a third stage, in the twentieth and twenty-first centuries, utilitarianism became the standard framework for policy analysis in a wide variety of legal arenas, including criminal justice reform. What is most notable in this third stage is the extent to which utilitarian thinking has become so much a part of the standard picture among law reformers that it often goes unnoticed. Although several important theorists take pains to show that utilitarian methods need not threaten to punish the innocent or undermine the importance of rights such as privacy or the presumption of innocence, the majority of utilitarian criminal justice writers simply take for granted that they are just doing good social policy. As a result, they devote their energies to advancing the utilitarian cause in practical ways, pointing out the many ways in which existing criminal justice institutions still fail to live up to the demands of utilitarian policy thinking, often with the help of sophisticated empirical methods.

After this introduction, the chapter proceeds in three main sections. In section 2, I consider the writings of eighteenth and early nineteenth-century utilitarian criminal justice thinkers, setting out the massive scale of their ambitions not only in criminal justice but also on our whole approach to matters of law and state more generally. In section 3, I consider a number of modern utilitarian criminal justice scholars and their proposals for the reform of criminal justice institutions and practices across five different areas of the law: (a) criminalisation (focused on the importance of codification in form and the 'harm principle' in substance); (b) procedure and the law of evidence; (c) criminal punishment (focused on deterrence and rehabilitation); (d) criminal defences, policing and enforcement (focused on the reduction of aggregate harm); and (e) policy alternatives to criminal justice (focusing on alternative policy instruments such as education, welfare policies, street lighting, and the like) and the question of privatisation. In section 4, I conclude with a brief survey of the implications and merits of utilitarian thinking on criminal justice and law more generally.

2. HISTORICAL ORIGINS

2.1 Philosophical Foundations: Hume and Helvétius

The earliest utilitarian thinkers did not focus much of their attention on criminal justice reform. David Hume – one of the leading philosophers of the Scottish Enlightenment, often credited with giving the term 'utility' its modern meaning – argued that morality is a positive social institution and that it favours conduct that promotes the general welfare. Insofar as morality can be rationally justified, Hume argued, it is best thought of as a set of injunctions to maximise utility. It is utility that connects morality to enlightened self-interest and that provides a coherent explanation for morality's many apparently diverse demands. 'It appears to be matter of fact', Hume writes, 'that the circumstance of *utility* […] is the sole source of that high regard paid to justice, fidelity, honour, allegiance, and chastity […] in a word, that it is a foundation of the chief part of morals'.[3] Hume's insight was revolutionary in both its power and its simplicity. It was also very controversial: in 1761, all of Hume's works were placed on

[3] D Hume, 'Enquiry Concerning the Principles of Morals' in *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, 3rd ed., ed. PH Nidditch (Oxford University Press, 1975) 231 [emphasis in the original]. See also: F Rosen, 'Reading Hume

the Inquisition's list of banned books – the *Index Liborum Prohibitorum*.[4] The very thought that morality might have its source in enlightened self-interest rather than in religion was thought to be a serious threat to the established order. But Hume's interest in law was considerably less radical. His primary interest there was in what contemporary legal theorists would call 'rational reconstruction': finding the rational basis for traditional doctrines of property, contract, and the like.[5]

The French Enlightenment thinker Claude-Adrien Helvétius, writing at roughly the same time as Hume, moved the utilitarian argument away from purely theoretical inquiry and rational reconstruction and toward quite radical policy recommendations. In his great work, *De l'Esprit*, Helvétius set out a reconstruction of the foundation of morality in utility that was quite similar to Hume's, but then followed up this thought with a quite detailed reform agenda. The book's publication caused great controversy, leading to its burning in 1759, and to broader attacks on the work of other *philosophes* such as Voltaire and Denis Diderot.[6] But Helvétius's *De l'Esprit* was not merely radical; it was also systematic and practical in its policy recommendations. Indeed, there is good reason to endorse Karl Marx's assessment that Helvétius, rather than Bentham, should be credited as the founder of systematic utilitarianism. Bentham, Marx insisted, 'simply reproduced in his dull way what Helvétius and other Frenchmen had said with wit and ingenuity in the eighteenth century'.[7]

Helvétius argued that utility – the balance of pleasure and pain – is the motive for all human action. Since all persons are motivated to gratify their desires, the value of human actions is a function entirely of their results rather than their motives. Further, it is up to lawmakers to design laws and incentives that will impel individuals to act in ways that promote utility. He writes:

> [J]e dis que tous les hommes ne tendent qu'à leur bonheur ; qu'on ne peut les soustraire à cette tendance; qu'il serait inutile de l'entreprendre, et dangereux d'y réussir ; que, par conséquent, l'on ne peut les rendre vertueux qu'en unissant l'intérêt personnel à l'intérêt général. Ce principe posé, il est évident que la morale n'est qu'une science frivole, si l'on ne la confond avec la politique et la législation: d'où je conclus que, pour se rendre utiles à l'univers, les philosophes doivent considérer les objets du point de vue d'où le législateur les contemple.[8]

In short, it is with Helvétius that Enlightenment thinking first brings together philosophical ideas about utility with that other child of eighteenth-century France: police science. It is in the early eighteenth century that scholars begin to pay close, systematic attention to the principles by which the state may rule its subjects in ways large and small for the public good. Police science – the 'science de la police' set out systematically in France in the writings of Nicolas

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Backwards: Utility as the Foundation of Morals' in *Classical Utilitarianism from Hume to Mill* (Routledge, 2003) 29–57.

4 See BFE Censored publications at *search.beaconforfreedom.org* (accessed on 2 December 2021).

5 D Hume, 'Enquiry Concerning the Principles of Morals'.

6 D Wooton, 'Helvétius: From Radical Enlightenment to Revolution' (2000) 28 *Political Theory* 307–36.

7 K Marx, *Capital*, trans. Ben Fowkes (Penguin, 1976) I, 758.

8 C-A Helvétius, *De L'Esprit* (1758, Durand) 139.

de la Mare[9] and embraced in Britain by Adam Smith and Patrick Colquhoun,[10] and broadly and enthusiastically received in Germany as 'Polizeiwissenschaft'[11] – put forward a way of thinking to guide the exercise of the executive power, organizing it toward the promotion of the public good. It is through police science that ideas as diverse as 'carrying dirt from the streets, and the execution of justice, so far as it regards regulations for preventing crimes and the method of keeping a city guard'[12] are united by their common role as purveyors of the general welfare and security into a single, unified field of study. The importance of this confluence of police science with utilitarianism cannot be overstated. Utilitarianism, as we shall see in greater detail below, is a philosophical method perfectly designed to guide theorising in the new police science, for it provides a ready-made set of normative tools to guide our thinking as we aim to refine all our social and political institutions toward the promotion of the general welfare and security.

2.2 Early Criminal Justice Reformers: Beccaria and Bentham

Although Hume and Helvétius are central figures in the birth of utilitarianism as a way of thinking about morality and even about legislation more generally, it is the name of Cesare Beccaria, a young Italian civil servant working in service to the Austrian emperor in the duchy of Milan, that is forever connected to the idea of utilitarian reform of criminal justice institutions.[13] It was his goal in his major work, *On Crimes and Punishments*, to ensure that criminal justice brings about 'the greatest happiness shared among the greater number'.[14] Unlike more systematic theorists such as Hume or Helvétius, however, Beccaria's primary interest was not in working out the idea of utility and rationalizing moral reasoning. Beccaria's focus was decidedly practical: he sought to *use* the idea of utility as a weapon with which to attack the injustices he saw in the criminal justice institutions of his day. But, as proof of his distinctly practical and ecumenical bent, Beccaria was just as happy to use other ideas current at the end of the eighteenth century to the same end, such as Rousseau's treatment of the social contract or Montesquieu's emphasis on codification and the elimination of administrative discretion. It

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[9] N de la Mare, *Traité de Police,* expanded edition (1722, Paris, Michel Brunet).

[10] A Smith, *Lectures on Justice, Police, Revenue, and Arms* (Oxford University Press, 1896); P Colquhoun, *A Treatise on the Police of the Metropolis* (Cambridge University Press, 2012).

[11] For a thorough treatment of the rise of police science in Germany, see P Preu, *Polizeibegriff und Staatszwecklehre: Die Entwicklung les Polizeisbegriffs durch die Rechts- und Staatswissenschaften des 18. Jahrhunderts* (Schwartz, 1983).

[12] A Smith, *Lectures on Justice, Police, Revenue, and Arms* at 154.

[13] For a more detailed treatment of Beccaria's contributions to criminal justice thinking, see M Thorburn, 'Public Institutions Without Public Offices: Beccaria's Use of Political Theory in the Reform of Criminal Justice' in A du Bois-Pedain and S Eldar (eds) *Re-Reading Beccaria: On the Contemporary Significance of a Penal Classic* (London, Bloomsbury, 2022).

[14] C Beccaria, *On Crimes and Punishments* (Cambridge University Press, 1995) 7.

was for this reason that Beccaria was read by his contemporaries as a follower of Rousseau[15] or Montesquieu[16] just as often as he was said to be a utilitarian in the tradition of Helvétius.[17]

For Beccaria, utilitarian ideas were crucial to the reform of criminal justice across five different dimensions. The first of these concerns the principles of criminalisation. Whereas traditional criminal law prohibited conduct based on religious or moral precepts and on the idea of personal honour, Beccaria insisted that 'the true measure of crime is […] *harm to society*'.[18] Notwithstanding Beccaria's important recognition of something akin to the modern harm principle, it is important to see that Beccaria's idea of harm is of *social* harm – harm imposed on the society as a whole – rather than an aggregation of individual harms. This is why he insists that the most serious crimes are crimes of sedition, aimed at the destruction of the society as a whole, rather than, say, murder or other crimes that cause harm to specific individuals.

Perhaps Beccaria's most important set of reform proposals concern criminal procedure. All laws, but especially criminal laws, should be made clear ex ante so that subjects can guide themselves accordingly and so that official discretion can be eliminated almost entirely in the application of the laws. In this way the criminal justice system can operate like an efficient machine, setting out clear deterrents, and prosecuting offenders in a clear and predictable way, open to public view. Secret evidence, evidence produced by torture and most hearsay evidence should not be received, he argued, and offences that tend to the collection of private information, such as adultery and private homosexual acts, should also be abolished. Further, Beccaria argued, trials should be quick, and punishments should be administered swiftly. This is because of a fact about efficient deterrence: we are deterred as much by the swiftness and predictability of punishment as we are by its severity. All of these reforms which Beccaria proposed for criminal procedure have clear roots in Montesquieu's *De l'Esprit des Lois* rather than in the utilitarianism of Helvétius. Nevertheless, Beccaria gave them a distinctly utilitarian defence, emphasising the resulting efficiencies rather than the rule of law benefits at the centre of Montesquieu's writings.

Beccaria's most famous criminal justice reform proposal concerns criminal punishment: the abolition of the death penalty. Here, too, his argument is broadly utilitarian. The point of punishment is not, as retributivists had it, to give the offender what he deserves. Instead, Beccaria argued, it is simply a matter of accomplishing a valuable social aim. 'What were wanted were sufficiently tangible motives to prevent the despotic spirit of every man from resubmerging society's laws into the ancient chaos. These tangible motives are the punishments enacted

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[15] *Gazette littéraire de l'Europe* (13 February 1765) 301–2: 'Son ouvrage […] n'est qu'un recueil des principales maximes du *Contrat social*, appliquées par l'Auteur à son sujet et dirigés à sa manière.'

[16] Beccaria refers to 'the immortal Président Montesquieu' and writes that 'indivisible truth' had compelled him 'to follow in the enlightened footsteps of that great man' (C Beccaria, *On Crimes and Punishments*, 8). See also: C Larrère, 'Droit de punir et qualification des crimes de Montesquieu à Beccaria' in *Beccaria et la culture juridique des lumières*, ed. Michel Porret (Actes du colloque européen de Genève, 1996).

[17] Gianni Francioni advocates for this Helvétius-inspired utilitarian reading of Beccaria in 'Beccaria, philosophe utilitariste' in Philippe Audegean, Christian Del Vento, Pierre Musitelli and Xavier Tabet (eds) *Le Bonheur du plus grand nombre: Beccaria et les lumières* (ENS editions, 2017) 1.

[18] C Beccaria, *On Crimes and Punishments*, 24.

against law-breakers.'[19] In punishing, he argued, we should aim at a maximum of deterrence at a minimum of social cost. But the death penalty is inferior to life imprisonment across both dimensions: 'Much more potent than the idea of death, which men always regard as vague and distant, is the efficacious because often repeated reflection that I too shall be reduced to so dreary and so pitiable a state if I commit a similar crime.'[20]

The rejection of the death penalty is only one of Beccaria's contributions to the reform of criminal punishments. More generally, he insisted that punishments ought to be administered only insofar as they are efficacious as deterrents and only where they cause no more harm than the act they are designed to deter. These are the principles of a modern (utilitarian) doctrine in sentencing law that Norval Morris called 'limiting retributivism': we should never punish more than is proportionate to the offence we mean to deter, and we should not even punish that much if it would be inefficacious to do so.[21] What is perhaps most revolutionary about Beccaria's account of punishment is that it directly challenges the state's right simply to punish as much as it sees fit. Whereas most criminal law scholarship and practice of the time took for granted the state's right to do as it saw fit in the enforcement of its laws, Beccaria imposed a strict utilitarian limit even on the state's own actions. As Bernard Harcourt puts it, 'Beccaria was one of the first theorists who treated punishment as a matter of state legitimacy and political obligation, rather than from a moral or religious point of view – what evil people or sinners deserve'.[22]

Beccaria also advocated for the reform of policing and criminal enforcement generally. If our aim is to reduce the incidence of socially harmful acts, then we should aim for that end with all of the state's policy instruments, and not only with the threat of punishment. It is here that we see the importance of 'police science' thinking on Beccaria most clearly. On this score, he advocated for the banishment of those who are without private means but still refuse to work (calling them 'parasites'); the importance of street lighting; the posting of guards in public places; and other measures to prevent the commission of offences.[23] Taking an even broader view, Beccaria insisted that 'the surest but hardest way to prevent crime is to improve education'.[24] In these and many other ways, he saw the punishment of criminal wrongdoers as just one (not particularly effective) policy instrument among many others that the state might use to increase the general welfare.

The nineteenth-century reformer most closely associated with utilitarianism is undoubtedly the English writer Jeremy Bentham. Bentham, like Beccaria, found inspiration in the works of several earlier writers. He writes, 'Montesquieu, Barrington, Beccaria, and Helvétius, but most of all Helvetius, set me on the principle of utility'.[25] Unlike Beccaria, however, Bentham was a doggedly systematic thinker, importing the principle of utility as a guide in almost every conceivable area of human endeavour. He shared none of Beccaria's interest in Rousseau's

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[19] Ibid., 9.

[20] Ibid., 67.

[21] N Morris, *The Future of Imprisonment* (University of Chicago Press, 1974).

[22] B Harcourt, 'Beccaria's "On Crimes and Punishments": A Mirror on the History of the Foundations of Modern Criminal Law' in M Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford University Press, 2014) 45.

[23] C Beccaria, *On Crimes and Punishments*, 29.

[24] Ibid., 110.

[25] *The Works of Jeremy Bentham*, 11 vols, ed. J Bowring (Edinburgh, 1838–43) vol x, 54.

social contract theory nor in any aspect of Montesquieu's theory that he felt was inconsistent with utilitarianism. For Bentham, the practice of threatening and carrying out criminal punishment is justified entirely as a means of maximising the happiness of the greatest number. 'The general object which all laws have, or ought to have, in common', Bentham insisted, 'is to augment the total happiness of the community'.[26] Bentham differs from Beccaria also in his prolixity. Whereas Beccaria's main output on utilitarianism and criminal justice is largely to be found in a 100-page pamphlet, Bentham's writings on criminal justice-related topics span thousands of pages in many different books. And, of course, if we want to understand Bentham's thinking on criminal justice properly, we must have some familiarity with his immense œuvre: volume upon volume of writings on moral philosophy, the study of identification and surveillance, the architecture of prisons and many other related topics. For present purposes, though, we can categorise Bentham's contributions to the reform of criminal justice along utilitarian lines within the same five categories we used to organize Beccaria's project.

In some cases, Bentham's reform project closely followed Beccaria's. Like Beccaria, Bentham advocated penal parsimony which was radically at odds with the practices of the day. He rejected the death penalty on the same utilitarian grounds as Beccaria – hard labour is a more effective deterrent – but Bentham added specific content and calculations to Beccaria's broad brushstroke comments and even set out a model penal code of his own.[27] Bentham's attention to detail is particularly evident in his treatment of what he calls 'cases unmeet for punishment'. Whereas Beccaria contented himself with generalisations about types of offences that ought not to be prosecuted (such as adultery and private homosexual acts), Bentham went much deeper into detail to determine when punishment is appropriate and, if so, how severe it ought to be. Like Beccaria, he recognised that punishment should be avoided where other, cheaper measures are available to deter offending (such as education, lighting, surveillance, and so on). Unlike Beccaria, he also engaged in a careful and detailed analysis of what are often loosely referred to as 'excusing conditions' – infancy, insanity, intoxication, lack of intention, involuntariness, mistake, duress, necessity and disability – to determine when they might undermine the utilitarian case for punishment.[28] Whereas most criminal law writers had assumed that each of these excusing conditions had its own specific rationale, often rooted in conceptions of responsible moral agency, Bentham found a single unifying rationale for them all in the principle of utility. Bentham's replacement of responsible moral agency here with considerations having to do with the utility of punishment foreshadows an important move in twentieth-century penal theory in the work of Barbara Wooton and the 1962 Swedish Penal Code (on which more below).

Bentham also moved the study of criminal justice even further in the direction of police science with his advocacy of a great number of preventative measures unrelated to the ordinary criminal process. Indeed, in the *Principles of Penal Law*, Bentham distinguished four different

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[26] J Bentham, 'Principles of Morals and Legislation' in *A Fragment on Government with an Introduction to the Principles of Morals and Legislation,* ed W Harrison (Basil Blackwell, 1948) 281.

[27] J Bentham, 'Specimen of a Penal Code' in *The Works of Jeremy Bentham*, vol 1. (Russell and Russell, 1962) 164 ff.

[28] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed W Harrison (Basil Blackwell, 1960) 284-5.

types of 'remedy' for offences that he took to be diseases of the body politic.[29] Bentham took what he called 'preventive remedies' (which deter or other ensure that the crime does not take place in the first place) to be the best option in most cases, for they avoid even the remote possibility of harm. These preventive remedies in many ways anticipate Richard Thaler and Cass Sunstein's principles of libertarian paternalist 'nudging'.[30] Among these preventive remedies are forms of what Bentham calls 'indirect legislation' – areas of silence within coercive legislation that induces subjects into acting in a particular way without directly requiring them to do so.[31] 'Suppressive remedies', which prevent the continuance of an offence that is about to begin, are second best; 'satisfactive remedies', which provide reparations or otherwise undo the harm caused by an offence, are the third best option. Only when all three of the prior remedies fail should we turn to penal remedies – for, as Bentham writes, 'all punishment is mischief: all punishment in itself is evil'.[32] On utilitarian grounds, it is clearly the least desirable response to harmful conduct of the four, for it not only presupposes the commission of a harmful wrong but also adds to it a harmful punishment. Among the preventative measures he considered are options that are unthinkable to us today, such as tattooing all subjects for ease of identification.[33] He also advocated at great length for the reform of prisons into what he called 'panopticons' – round buildings that allowed for the constant possibility of surveillance of all prisoners by guards in the central tower[34] – the better to ensure the reform of offenders. And, of course, Bentham was one of the most adamant advocates for the creation of a modern police force in England. In many ways, Bentham's most important contribution to criminal justice reform was his advocacy for its replacement in whole or in part by other, non-punitive measures.

Finally, amid Bentham's innumerable criminal justice reform proposals, we should note his radical challenge to the laws of evidence as they existed in England at the end of the eighteenth century. In voluminous writings, he insisted that virtually all the rules of evidence that justified the exclusion of otherwise relevant evidence (on grounds of privilege, hearsay, competence of witnesses, and so on) should be abolished.[35] The point of what he termed 'adjective law' was simply to ensure factually correct decision-making. Any rule that tended to exclude relevant evidence had the effect of making correct decisions less likely and therefore should be done

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[29] J Bentham, 'Principles of Penal Law' in *The Works of Jeremy Bentham*, vol 1. (Russell and Russell, 1962) 367.

[30] RH Thaler and CR Sunstein, *Nudge: Improving Decisions and Health, Wealth and Happiness* (Yale, 2008).

[31] For more on Bentham's indirect legislation, see S Engelmann, '"Indirect Legislation": Bentham's Liberal Government' (2003) 35 *Polity* 369; A Brunon-Ernst (ed.), 'Indirect Legislation' (2016) 43 *History of European Ideas* 1–121.

[32] J Bentham, *An Introduction to the Principles of Morals and Legislation*, 281.

[33] J Bentham, *University College London Collection of Bentham Manuscripts*, cited in M Quinn, 'Editorial Introduction', *Bentham: Writings on Political Economy* vol 1, ed. M Quinn (Oxford University Press, 2016) 17. See, generally, M Thorburn, 'Identification, Surveillance, and Profiling: On the Use and Abuse of Citizen Data' in GR Sullivan and I Dennis (eds) *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart, 2012).

[34] J Bentham, *The Panopticon Writings* dd. Miran Bozovic (Verso, 1995).

[35] J Bentham, 'The Rationale of Judicial Evidence, Specially Applied to English Practice', in *The Works of Jeremy Bentham*, ed. J Bowring, vols vi–vii (Tait, 1827) 1838–43. See Olivier Leclerc's contribution to this volume.

away with. Radical as Bentham's advocacy of the 'principle of free proof' might seem, we should remember the context in which he was working. The law of evidence in late-eighteenth century England was filled with inflexible rules that really did tend to exclude plenty of important and quite reliable evidence. As the eminent evidence scholar William Twining points out, 'nearly all changes in the law of evidence since Bentham's day have moved in the direction that he charted, but in a piecemeal and slow fashion that he would have deplored'.[36]

3. MODERN UTILITARIAN POSITIONS

For much of the twentieth and twenty-first centuries, utilitarianism has been the dominant theoretical framework for analysing criminal justice institutions, at least in the English-speaking world. Because there are so many contemporary advocates of utilitarian approaches to criminal justice, we will not have time to consider each writer's work on its own. Instead, I will consider the field as a whole, following the same five general topics set out above.

3.1 Criminalisation

On the topic of criminalisation, the work of John Stuart Mill, the great nineteenth-century economist, reformer and moral philosopher, still plays a central role in modern debates, even though its effect is difficult to register. To this day, discussions of criminalisation are dominated by talk of the 'harm principle' by which Mill connected utilitarianism to the maximisation of individual liberty, rather than to the maximisation of security (as Bentham was inclined to do). Although Bentham (like Beccaria) saw utilitarianism as a tool for attacking the excesses of the absolutist states of Europe in the eighteenth century, his aim was to replace them with efficient 'good police': states that minimised the incidence of crime through pervasive and sometimes invasive police measures, rather than harsh punishments. Mill, by contrast, tried to connect utilitarianism to his own late nineteenth-century British liberalism. Mill's sometimes awkward combination of liberalism and utility is summed up in the famous wording of his harm principle, according to which

> the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[37]

These evocative but cryptic words have dominated discussions about criminalisation in the English-speaking world ever since. The leading criminal law theorist of the twentieth century, H.L.A. Hart, took this utilitarian principle as the starting point of much of his work, showing that one can have the prevention of harm as one's general justifying aim in criminal justice

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[36] W Twining, 'Bentham's Theory of Evidence: Setting a Context' (2019) 18/1 *Journal of Bentham Studies* 28.

[37] JS Mill, 'On Liberty' in *On Liberty and Other Essays* (Oxford University Press, 1991) 14.

while still respecting the individual responsibility of each offender for their wrongdoing.[38] Prominent liberal philosophers such as Joel Feinberg have spent years trying to work out the harm principle's implications in almost every possible context: does it ever extend to offensive conduct? Can it ever be used to prevent harm to oneself? And so on.[39] More recently, Joseph Raz has reinterpreted the harm principle in a manner that is consistent with his own perfectionist tendencies, permitting the prohibition not only of conduct that is in itself harmful but also of harmless conduct, so long as its prohibition will tend to minimise harm in one way or another.[40] Instead, in one of many ways in which Raz turns liberalism away from Mill and toward Bentham, he insists that it is the state's role to promote autonomy by making available a range of valuable options to its subjects. As he puts it, 'social, economic and technological processes are constantly changing the opportunities available in our society […] The requirements of autonomy as well as other considerations may well call for governmental intervention in directing or initiating such processes.'[41] Raz's re-reading of the harm principle has had a very important effect on criminal law theory through the work of his most brilliant student, the late John Gardner,[42] and, through Gardner, to much of English-language criminal law theory.

In the twenty-first century, however, Mill's harm principle has not had a significant effect on criminalisation. On a theoretical level, many influential writers, such as Gardner, who invoke it do so largely in order to do away with it as a significant constraint. One might even be tempted to say, with Bernard Harcourt, that the harm principle has collapsed entirely as a meaningful constraint on criminalisation.[43] Instead, Gardner, like many other contemporary criminal law theorists, focuses on the moral wrongness of conduct (understood in deontological terms) as the primary driver of criminalisation, rather than any utilitarian idea of harm.[44] What is more, on a practical level, the harm principle has never been embraced as an actual limiting principle of criminalisation. In Canada the criminalisation of drug possession was challenged as unconstitutional on the grounds that it offended Mill's harm principle, but this argument was rejected out of hand by the Supreme Court of Canada.[45] Even the American Model Penal Code, which embraces utilitarian ideas very explicitly in its principles both of justification and of sentencing, imposes no such constraint on criminalisation, following instead the traditional categorisation of offences in the common law.

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[38] HLA Hart, 'Prolegomenon to the Principles of Punishment' in *Punishment and Responsibility* (Oxford University Press, 1968).

[39] J Feinberg, *The Moral Limits of the Criminal Law*, four volumes, revised edition (Oxford University Press, 1989).

[40] J Raz, 'Autonomy, Toleration and the Harm Principle' in R Gavison (ed), *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford University Press, 1987).

[41] J Raz, *The Morality of Freedom* (Oxford University Press, 1988) 411.

[42] J Gardner, 'The Wrongness of Rape' in *Offences and Defences* (Oxford University Press, 2008) 30: 'the harm principle does not say that only harmful wrongs may be criminalised. It says that the criminalisation of wrongs is justified only in order to prevent harm'.

[43] B Harcourt, "The Collapse of the Harm Principle" (1999) 90 *Journal of Criminal Law and Criminology* 109.

[44] J Gardner, *Offences and Defences* (Oxford University Press, 2007); A Duff, *Answering for Crime* (Bloomsbury, 2009); A Duff, *The Realm of the Criminal Law* (Oxford University Press, 2018).

[45] R. v. Malmo-Levine; R v. Caine [2003] 3 SCR 571.

3.2 Punishment

Utilitarianism has not dominated the discussion on matters of criminalisation, but its importance in discussions of punishment is unrivalled. Throughout much of the twentieth century, the only respectable defence of criminal punishment has been utilitarian, framed either in terms of deterrence or rehabilitation. The rehabilitative ideal – by which the central purpose of punishment was conceived, following Bentham, as a sort of moral re-education – dominated accounts of criminal sentencing. The main debates among sentencing scholars did not concern whether this was the appropriate purpose of criminal sentencing, but only whether that purpose could be squared with the criminal law's commitment to the distribution of punishment on the basis of individual responsibility for wrongdoing. The most familiar challenge to utilitarian accounts of punishment is that it has the potential to justify punishing the innocent where doing so would lead to greater social welfare – a challenge that Bentham famously failed to answer adequately.[46] There were a few writers in the middle part of the twentieth century, such as Barbara Wooton and the drafters of the Swedish Penal Code of 1962, who embraced a version of this thought as it concerns mentally disordered offenders.[47] The more common reaction among utilitarians, though, was to find some way to keep both utilitarian ideas of rehabilitation and moral notions of individual responsibility in play at the same time. Political philosopher John Rawls and criminal law theorist H.L.A. Hart both developed accounts to do just that, insisting that one could be a fully committed utilitarian about the purpose of the *institution* of criminal punishment while at the same time remaining committed to distributing punishment only to those who have been proven to be responsible for criminal wrongdoing.[48] Indeed, the ascendancy of utilitarian ideas of punishment was so great in the mid-twentieth century that one of America's leading criminal law theorists, Sanford Kadish, called the very idea of retributive punishment a 'rationally indefensible practice'.[49]

Since the mid-1970s, utilitarian ideas of punishment have been on the defensive, at least in theoretical discussions. In their place, retributivism of one sort of another has been on the ascendant. In some cases, this is what is sometimes called 'positive retributivism' – the view that the very fact of criminal wrongdoing is itself a sufficient justification for punishing the wrongdoer.[50] In most cases, though, the challenge to utilitarian accounts of punishment is more moderate. Leading sentencing scholars such as Andrew Ashworth and Andreas von Hirsch have argued for a hybrid justification of criminal sentencing according to which the fact of wrongdoing is a necessary but not sufficient justification for punishment. A complete

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[46] HLA Hart, 'Prolegomenon to the Principles of Punishment', 19: 'Bentham's argument is in fact a spectacular *non-sequitur*.'

[47] For discussion of the Swedish Penal Code of 1962, see C Lernestedt, 'Insanity and the "Gap" in the Law: Swedish Criminal Law Rides Again' in P Wahlgren (ed), *Scandinavian Studies in Law*, volume 54 (Stockholm, 2009).

[48] J Rawls, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3; HLA Hart, 'Prolegomenon to the Principles of Punishment'.

[49] S Kadish, 'Criminal Law and the Luck of the Draw' (1994) 84 *Journal of Criminal Law and Criminology* 679–97.

[50] M Moore, *Placing Blame* (Oxford University Press, 1997).

justification for criminal punishment, they argue, requires *both* proof of criminal wrongdoing *and* the satisfaction of utilitarian policy concerns.[51]

In contemporary policy debates, the central rationale of criminal sentencing remains distinctly utilitarian, albeit within the sorts of limitations set out by Rawls, Hart, Ashworth and von Hirsch. In Canada, for example, although the 'fundamental principle' of sentencing is that 'a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender', every criminal sentence must promote one or more of a list of enumerated policy purposes (including general and special deterrence, and rehabilitation).[52] Without such a utilitarian justification, a criminal sentence cannot stand. Similarly, the new Model Penal Code sentencing provisions in the United States explicitly endorse the utilitarian principle of 'limiting retributivism'.[53] That is, criminal sentences may not impose more harm than is proportionate to the wrong they are designed to deter, and they may not involve any harms at all unless they can be justified according to some policy purpose.

3.3 Criminal Trials and Criminal Evidence

In the law of criminal trials and proof, utilitarianism – and, in particular, the influence of Jeremy Bentham – has had two sorts of effect: the first is large but largely unnoticed; the second is smaller but presented as a radical challenge to existing practice. The larger effects of utilitarian thinking on the criminal process are the myriad changes in the law of evidence in the common law world since the mid-nineteenth century. As we saw above, Jeremy Bentham took great pains to challenge the many byzantine rules of evidence (in criminal law and elsewhere) that bedevilled English law in his day. Although Bentham is often cast simply as an advocate of 'free proof' – doing away with virtually all constraints on the admissibility of evidence at trial – his main focus was challenging specific rules of evidence that he took to have little or no rational justification. His purpose was not (as some have suggested) to do away with the law of evidence entirely; rather, it was to do away with strict bright-line rules in order to allow for a more fact-specific and nuanced treatment of the key matters of evidence law. In this, Bentham's view of the law of evidence is now the dominant position. Noted evidence scholar William Twining makes this clear: 'Today there are almost no priority rules, no rules of weight or probative force, and hardly any rules about capacity of witnesses or corroboration. By 1900 nearly all of Bentham's main targets had disappeared from English law…'[54]

What is equally clear, however, is that these changes in the law of evidence have arisen almost entirely without any explicit invocation of Jeremy Bentham's name or the cause of util-

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[51] A Ashworth and A von Hirsch, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005).

[52] Criminal Code of Canada, ss. 718, 718.1.

[53] Kevin Reitz, the reporter in charge of the new Model Penal Code Sentencing, writes: 'a new Code should sketch the general outlines of a program such as Morris's limiting retributivism in statutory language…' ('American Law Institute, Model Penal Code: Sentencing, Plan for Revision' 6 *Buffalo Criminal Law Review* 525–57). For discussion, see: M Thorburn and A Manson, 'The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning' (2007) 10 *New Criminal Law Review* 278.

[54] W Twining, 'Bentham's Theory of Evidence: Setting the Context' (2019) 18 *Journal of Bentham Studies* 20–8.

itarianism. Bentham's instrumentalism about what he called 'adjective law' has so permeated the current discourse that his approach to the law of evidence simply goes without saying. In Canada, for example, the many old technical rules governing hearsay evidence and similar fact evidence have been almost entirely replaced with a loose balancing exercise (that the Supreme Court of Canada calls the 'principled approach') and incapacity rules related to spouses of accused persons, children and intellectually disabled adults have all been replaced with much more permissive case-by-case tests.[55]

In contrast to these important changes, however, there are a number of important evidence and procedure scholars who present their positions in a much more theoretically engaged register. The American philosopher Larry Laudan takes a decidedly instrumentalist approach to criminal justice in taking apart some of the most important elements of the criminal process including the standard of proof beyond a reasonable doubt. He argues, *inter alia*, that the standard of proof in a given criminal case should track the severity of the possible punishment upon conviction: proof beyond a reasonable doubt for very serious punishments; balance of probabilities for more trivial punishments; and a standard of clear and convincing evidence for offences with intermediate punishments.[56] More recently, Federico Picinali has argued in explicitly utilitarian terms for the replacement of the proof beyond a reasonable doubt standard with a considerably lower standard[57] and (perhaps even more radically) for the replacement of the bivalent guilty/not-guilty verdict system with a many-valued model that might track the various interests in play more accurately.[58] In these and other recent works in evidence law and procedure, the ascendancy of utilitarian thinking is not always on the surface, but the move away from deontological thinking about the right to be presumed innocent and toward an account of proof as concerned with balancing the harms of wrongful conviction against the harms of incorrect acquittals is a clear inheritor of Bentham's thinking about the criminal process.

3.4 Justifications and Excuses

The Model Penal Code, the leading document in American criminal law scholarship,[59] sets out a general principle of justification for criminal wrongdoing in the following terms: 'Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged…'[60]

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[55] On the rules of testimonial competence, see: Canada Evidence Act ss. 4(2). On the "principled approach" to hearsay in Canada, see: R. v Khelawon [2006] 2 SCR 787; on the balancing approach to similar fact evidence, see: R. v Handy [2002] 2 SCR 908.

[56] L Laudan, *Truth, Error and Criminal Law: An Essay in Legal Epistemology* (Cambridge, 2006).

[57] F Picinali, 'Can the Reasonable Doubt Standard be Justified? A Reconstructed Dialogue' (2018) 31 *Canadian Journal of Law & Jurisprudence* 365.

[58] F Picinali, 'Do Theories of Punishment Necessarily Deliver a Binary System of Verdicts? An Exploratory Essay' (2018) 12 *Criminal Law and Philosophy* 555–74.

[59] H Wechlser, 'The Challenge of a Model Penal Code' (1952) 65 *Harv L Rev* 1097–1133.

[60] *Model Penal Code: Complete Statutory Text* s. 3.02 (American Law Institute, 1985) 42.

That is, in a single provision the structure of criminal law in the Model Penal Code is transformed from what might otherwise be a moralist criminal code into a distinctly utilitarian document. Traditionally, criminal codes set out prohibitions that would apply in almost every circumstances; defences applied in only a very small number of exceptional, narrowly defined circumstances. By setting out a very broad utilitarian standard of justification, the Model Penal Code turns criminal prohibitions into mere default presumptions: 'do not do the following acts unless it turns out that utility is promoted by doing them.' Instead, the only real standard of conduct is the principle of utility, which is the final arbiter in the case of any dispute about what is or is not permitted by the criminal law. Some writers – most notably Paul Robinson[61] – have seen this utilitarian justification principle as a brilliant insight into the true nature of criminal law. Many of the most influential contemporary criminal law scholars have seen this as a challenge to their moralist understanding of criminal prohibitions and justifications.[62] In my own writing, I have challenged both accounts as missing the true importance of justification defences. They should not be thought of as either utilitarian refinements (as Robinson would have it) or a set of moral justifications for moral wrongdoing (as Duff and Gardner maintain); rather, they should be thought of as the conditions under which we are permitted to do in the state's name things that we are always prohibited from doing in our own private capacity.[63]

3.5 Policing, Prevention, Pre-emption

In some ways, the utilitarian contribution to contemporary criminal justice scholarship and law reform concerns the broadening of the lens from the stuff of criminal law proper (trials and punishments) to the broader set of concerns that are the stuff of modern criminology. In the United States today, there have been a raft of contributions to the debate on over-incarceration, some focused on its historical continuity with institutions of chattel slavery, others focused on its connection to the 'war on drugs' and others focused on more technical matters such as the exercise of prosecutorial discretion or the focus on criminal procedure rather than substantive criminal law in American constitutional jurisprudence.[64] In each case, however, writers go well beyond the scope of individual offenders and their culpability, and often beyond the scope of the criminal justice system altogether, to look for ways to bring about systemic reductions in incarceration. The writers in this tradition are certainly not all avowed utilitarians. Nevertheless, their single-minded focus on achieving systemic reform to reduce incarceration

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[61] PH Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *UCLA L. Rev*. 266.

[62] J Gardner, 'Justifications and Reasons' in *Offences and Defences* (Oxford University Press, 2007); A Duff, *Answering for Crime* (Bloomsbury, 2009).

[63] M Thorburn, 'Justifications, Powers, and Authority' (2008) 117 *Yale LJ* 1070; M Thorburn, 'Criminal Law as Public Law' in Duff and Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2010).

[64] On slavery, see M Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press, 2020). On the war on drugs, see E Hinton, *From the War on Poverty to the War on Crime* (Harvard University Press, 2017). On prosecutorial discretion, see J Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* (Basic Books, 2017). On criminal procedure and substantive criminal law, see WJ Stuntz, *The Collapse of American Criminal Justice* (Harvard University Press, 2011).

in America (in contrast to many 'tough on crime' politicians who prefer to focus on stories of individual moral desert) bespeaks a utilitarian-influence change in focus on criminal justice matters so deep that it need not even be made explicit any more.[65]

4. CONCLUDING THOUGHTS

In the eighteenth-century world of Hume and Helvétius, the principle of utility was a radical, socially subversive philosophical position. In twenty-first-century America, utilitarian assumptions underlie virtually all of the most prominent criminal justice reform proposals. Of course, some areas of utilitarianism have been more influential than others. Utilitarian justifications of punishment have won the day: even the critics of utilitarianism recognise the importance of some sort of consequentialist justification for the hardships we impose in the form of criminal punishment. Utilitarianism has been much less successful in changing our thinking about criminalisation. Here, the same basic motivations – moral intuitions about wrongdoing and the state's need to pursue its own varied purposes – that dominated criminalisation debates in the eighteenth century still play an important role in modern debates. In other areas such as the reform of criminal trials and the law of evidence, utilitarianism as a theoretical framework is not generally accepted even though many of Jeremy Bentham's challenges to the eighteenth-century common law of evidence have won the day. Utilitarianism has been triumphant over the *Ancien Régime* criminal justice practices it was used to oppose. Many of the other great eighteenth-century systems that arose alongside utilitarianism to challenge the status quo have not gained nearly so much attention in criminal justice circles. We would do well to take up these accounts – Rousseau and Kant's social contract, Montesquieu's study of constitutionalism, Locke's liberalism, and others – to unlock their insights, too.[66]

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[65] For a discussion of successful decarceration strategies in five U.S. states, see www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/ (accessed 30 March 2022).

[66] My own work in criminal justice has been a long plea to recover the important lessons of Rousseau and Kant's social contract theory promise for criminal justice.

5. Jeremy Bentham, J.S. Mill and the utilitarian constitution[1]

Xiaobo Zhai

This chapter is chiefly an introductory account of Bentham's utilitarian constitutional theory. In addition, I will compare some aspects of Bentham's constitutional theory with those of J.S. Mill, illuminating the distinctive features of the former, and also showing the internal complexity of utilitarian constitutional theory as a whole.

Following this introduction, the chapter has five sections. Section 1 discusses Bentham's and Mill's theories of the nature and the ideal shape of a constitution. Section 2 analyses the principles of Bentham's constitutional design, and investigates the differences between them and those of Mill's. Section 3 explores Bentham's and Mill's theories of the moral limits of the power of government. Section 4 presents the system and the machinery of Bentham's form of representative government. Section 5 examines Mill's discussion of the tyranny of the majority, the resources in Bentham's thought which can be deployed to tackle this danger and Bentham's attitude towards checks and balances.

1. THE IDEA OF A CONSTITUTION

1.1 The Nature of a Constitution

Bentham offers two formulations of the meaning of 'the constitutional branch of law': one is wide, the other narrow. First, according to the wide formulation, constitutional law is the substantive public law which invests some classes of persons with, or divests them of, 'semi-public and public trusts' and powers to 'be exercised for the good of the whole society', and prescribes duties to them. These persons then become officials or public servants.[2] Second, in his narrow formulation, Bentham uses the phrase '*leges in principem*' to refer to constitutional law, which 'prescribe to the sovereign what he shall do: what mandates he may

[1] I thank Chris Riley and Guillaume Tusseau for their comments and corrections on an earlier version of this chapter.

[2] J Bentham, *An Introduction to the Principles of Morals and Legislation (Collected Works),* eds JH Burns and HLA Hart (Oxford, Clarendon Press) 308–9 (hereafter *IPML*); J Bentham, *Of the Limits of the Penal Branch of Jurisprudence* (*CW*), ed. P Schofield (Oxford, Clarendon Press, 2010) 239, 315 (hereafter *Limits*); J Bentham, 'Economy as applied to Office' in *First Principles Preparatory to Constitutional Code* (*CW*), ed. P Schofield (Oxford, Clarendon Press, 1989), 3 (hereafter *EAATO*); J Bentham, 'First Lines of a proposed Code of Law for any Nation compleat and rationalized', in *'Legislator of the World': Writings on Codification, Law and Education* (*CW*), eds P Schofield and J Harris (Oxford, Clarendon Press, 1998) 191. See also G Postema, *Bentham and the Common Law Tradition* (Oxford, Oxford University Press, 1986) 358.

or may not address' to his subjects.[3] These two formulations are of one idea, although with different emphases, because officials are the sovereign's officials, and the sovereign itself is composed of the highest officials.

Early in his literary career, Bentham believed that the constitutional, among all branches of law, 'stand[s] the farthest' from the happiness of the people.[4] In his later writings he came to emphasize that the constitution surpasses every other branch of law in both importance and complexity,[5] and that constitutional reform is the precondition of successful legal reform. When originally stating that constitutional law 'stands the farthest' from the happiness of the people, Bentham did not mean that it is not vital but rather that it is 'the remotely operative branch' of law, to be contrasted with penal and civil laws which comprise 'the immediately operative branch'.[6] Constitutional law is immediately operative not upon ordinary subjects, to whom it is only remotely or intermediately operative, but upon public officials. This 'remote operativeness', however, explains its extraordinary significance:

> On the texture of the *constitutional* branch of law, will depend that of every other. For on this branch of law depends, in all its branches, the *relative and appropriate aptitude* of those functionaries, on whose will depends, at all times, the texture of every other branch of law. If, in the framing of this branch of law, the greatest happiness of the greatest number is taken for the end in view, and that object pursued with corresponding success, so will it be in the framing of those other branches: if not, not.[7]

The 'appropriate business' of constitutional law is to maximize the happiness of the people by providing securities against all acts of misrule conducted by officials, whom Bentham considers the internal and irresistible enemies of the happiness of the people.[8]

Bentham's constitution, although liberal, is very different from most modern constitutions. One of the major differences is that its securities against misrule do not include entrenched basic rights limiting the supreme legislature. Namely, Bentham's constitution is not rigid, and can be amended by means of majority rule. The other major difference is that it rejects the principle of checks and balances.[9] Constitutional law, like laws *in populum* – which are addressed to, and regulate the behaviour of, ordinary people – also emanates, or 'receive[s] determination', from the sovereign. 'The quality of the parties who are […] bound by [*leges in principem*]', however, is different from that by laws *in populum*. The former are addressed 'either [to] the sovereign himself who issues them, or to his successors, or to the one as well as to the other'.[10]

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3 J Bentham, *Limits* (*CW*), 86.

4 J Bentham to Shelburne (17 July 1781), in *The Correspondence of Jeremy Bentham*: *Volume 3* (*CW*), ed. by IR Christie (London, Athlone Press, 1971) 28–9.

5 See J Bentham, 'Leading Principles of a Constitutional Code', in J Bowring, ii. 270 (hereafter *Leading Principles*); J Bentham, *Constitutional Code: Volume I* (*CW*), ed. by F Rosen (Oxford, Clarendon Press, 1983) 11 (hereafter *Constitutional Code*).

6 J Bentham, *EAATO*, 3.

7 J Bentham, *Leading Principles*, 271.

8 J Bentham, *Leading Principles*, 270.

9 See below.

10 J Bentham, *Limits* (*CW*), 89–90.

How, then, can constitutional law be implemented? A popular answer is by constitutional review, exemplified by the practices of the modern American Supreme Court or German Constitutional Court. This answer is rather shallow, however, and is unable to explain how the American Supreme Court or German Constitutional Court themselves – crucial apparatuses of their respective sovereigns – are each bound by constitutional law. Constitutional law cannot be enforced upon the sovereign by any formal institution; nor can the sovereign enforce it upon himself. Many thinkers before and after Bentham were therefore forced to believe that constitutional law is not law. However, Bentham insisted – perhaps for the first time in history[11] – that constitutional law is indeed law. He provided two solutions to the problem concerning the binding force of constitutional law. First, if an ordinance appearing 'anti-constitutional' or 'repugnant to the principles of the Constitution' had been enacted by the legislature, it is not for this reason to be treated as null and void by any judge; but it will be 'an apt ground' for the electorate to remove or punish the members of the legislature who had supported it.[12] Second, constitutional law can receive its binding force from the public opinion tribunal, the voice of which can only be fully heard through a free press.[13] The public opinion tribunal is composed of 'the public', membership of which Bentham extends to all the people of the world who are interested in and concern themselves with the constitutional laws in question. Bentham's theory of the public opinion tribunal is remarkably original in that he conceptualizes it in expressly juridical terms. The public opinion tribunal combines all essential functions and powers belonging to any official judicatory. It forms the model for the official judicatory, because it is less corruptible and more correct and effective than the latter.[14] Constitutional laws, whether written or not, will very likely be taken up by the public opinion tribunal as public norms, according to which it can judge and criticize, and thereafter punish, the sovereign.[15] Constitutional laws hence become the mandates of the public opinion tribunal: they are 'the sort of law established and enforced' by it.[16] Under Bentham's reasoning, then, the real cause of the binding force of constitutional laws in the UK, US and Germany is not that they are applied by supreme or constitutional courts, but that they are accepted and supported by the public opinion tribunal, which guarantees that the supreme or constitutional courts themselves are bound by constitutional laws.[17] The label 'legal or judicial constitutionalism' has been

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[11] See G Tusseau, 'Between Constructivism and Immanentism: Bentham's Unsettled Conception of Constitutional Law', in P Schofield and X Zhai (eds), *Bentham on Democracy, Courts, and Codification* (Cambridge, Cambridge University Press, 2022), 195–213.

[12] J Bentham, *Constitutional Code* (*CW*), 45.

[13] Ibid., 39.

[14] Ibid., 304; J Bentham, *EAATO*, 56–9; J Bentham, *Political Tactics* (*CW*), eds MH James, C Blamires and C Pease-Watkin (Oxford, Clarendon Press, 1999) 29–34; J Bentham, *Securities against Misrule and Other Constitutional Writings for Tripoli and Greece* (*CW*), ed. by P Schofield (Oxford, Clarendon Press, 1990), 54–6, 72. See also D Lieberman, 'Economy and Polity in Bentham's Science of Legislation', in S Collini, R Whatmore and B Young (eds), *Economy, Polity, and Society: British Intellectual History 1750–1950* (Cambridge, Cambridge University Press, 2000) 129. For a detailed account of the public opinion tribunal, see P Schofield, *Utility and Democracy* (Oxford University Press, 2006) 259–63.

[15] J Bentham, *Constitutional Code* (*CW*), 37.

[16] Ibid., 134.

[17] Ibid., 25, 54, 436.

used frequently to (mis)characterize the constitutional law practised in the US and Germany.[18] Rather, Bentham would suggest that the correct label be 'public opinion constitutionalism'.

His disciples John Austin and J.S. Mill did not grasp or relay to others this teaching of Bentham. According to Austin, constitutional law is

> the positive morality or the compound of positive morality and positive law which fixes the constitution or structure of the supreme government […] which determines the character of the person or the respective characters of the persons in whom for the time being the sovereignty shall reside.[19]

Austin's understanding of the content of constitutional law is narrower than Bentham's, and he adopts a different view regarding its legal nature. There is no concentrated discussion of the legal nature of a constitution in Mill's writings either, but his view on this issue is clear from one passage discussing the relationship between a stable constitution and 'the actual distribution of real political strength'. Following Austin, Mill believes that a political constitution includes two sorts of norms: legal norms on the one hand, and maxims of positive political morality on the other.[20] This Austinian–Millian bifurcation of constitutional norms anticipated the famous Diceyan distinction between constitutional conventions and the laws of constitution.[21]

1.2 Constitutional Universalism and Constructivism

Bentham believes that the basic elements of human nature are the same, and the basic principles of good constitutions are therefore the same. He maintains that representative democracy is the best political system for all countries. In this sense, Bentham – 'a citizen of the world'[22] – was an advocate and practitioner of constitutional universalism and constructivism.[23] In contrast, Mill was a constitutional relativist. In his view, different nations are suitable for different constitutions, 'according to the degree and kind of civilization and cultivation' attained by them.[24] Despotism is fit for a nation of slaves who lack public spirit. Mill accepted the reasonableness of Burke and Macaulay's idea of the spontaneous growth of political norms. But he is not a constitutional fatalist, and he believes, similarly to Bentham, that 'people learn to do things new to them', and 'institutions and forms of government are a matter of choice':

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[18] For the term 'legal constitutionalism', see A Tomkins, *Our Republican Constitution* (Oxford, Hart Publishing, 2005) 10–25.

[19] J Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, intr. HLA Hart (Indianapolis, Hackett, 1954) 259.

[20] JS Mill, *Considerations on Representative Government* (hereafter *CRG*), in *The Collected Works of John Stuart Mill* (hereafter *CWJSM*), ed. by JM Robson (Toronto, University of Toronto Press, 1963–91) xix. 427.

[21] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis, Liberty Fund, 1982) cxl–cxlv.

[22] J Bentham, *Colonies, Commerce, and Constitutional Law* (*CW*), ed. by P Schofield (Oxford, Clarendon Press) 204.

[23] For a more sophisticated interpretation, see G Tusseau, 'Between Constructivism and Immanentism: Bentham's Unsettled Conception of Constitutional Law'. See also JS Mill, 'Remarks on Bentham's Philosophy', *CWJSM*, x. 16.

[24] JS Mill, 'On Bentham', *CWJSM*, x. 106.

they are 'the work of men'. Mill paid more attention than Bentham to the 'capacities and qualities' of the people for whom the constitution is intended. He advises that reformers ask three questions when recommending and advocating a form of government to a nation: 1. whether the people are willing to accept it; 2. whether they are willing and able to do what is necessary to keep it standing; and 3. whether they are willing and able to do what is necessary to enable it to fulfil its purposes.[25] Bentham, however, did not ignore local needs and circumstances in his constitutional design.[26] As Mill himself explicitly acknowledged, 'the different exigencies of different nations with respect to law, occupied [Bentham's] attention as systematically as any other portion of the wants which render laws necessary'.[27] For Bentham, constitution-making is a balance between reform and accommodation.[28]

1.3 The End of a Good Constitution

For Bentham, the principle of utility is the standard of the rightness and wrongness of every action, including the making of a constitution. The end of a good constitution is 'the interest of the community', namely 'the sum of the interests of the several members who compose it'.[29] Furthermore, political power is a trust:[30] '[g]overnment is good in proportion to the measure of happiness of which it is productive on the part of the body of the people subject to it'.[31] To achieve this end, the constitution is composed of a series of securities against misrule, which aim at maximizing aggregate official aptitude and minimizing expense.[32] In contrast to Bentham's 'sum of the interests of the members of the community', Mill argues that a good constitution should aim at increasing 'the sum of good qualities in the governed': the first question in relation to political institutions is 'how far they tend to foster in the members of the community the various desirable qualities, moral and intellectual'.[33] Mill therefore thinks that political institutions should be regarded as 'the principal means of the social education of a people',[34] and he emphasizes that these good qualities are made possible only with adequate freedoms or through 'the antagonism of influences'.[35]

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[25] JS Mill, *CRG*, 375–80, 398.

[26] See J Bentham, *IPML*, ch. vi; J Bentham, 'Place and Time', in *Selected Writings: Jeremy Bentham*, ed. by S Engelmann (New Haven, Yale University Press, 2011).

[27] JS Mill, 'On Bentham', in *CWJSM*, x. 105.

[28] SG Engelmann and J Pitts, 'Bentham's "Place and Time"' (2011) 32/1 *The Tocqueville Review/La revue Tocqueville* 43–66.

[29] J Bentham, *IMPL*, 12; J Bentham, *Leading Principles*, 269; J Bentham, *Rights, Representation, and Reform*, 411, 415; J Bentham, *EAATO*, 3; J Bentham, *Constitutional Code* (*CW*) 18–19.

[30] See M Quinn, 'Bentham, Democracy, Free Government, and the Relationship between Rulers and Ruled', in P Schofield and X Zhai (eds) *Bentham on Democracy, Courts, and Codification* (Cambridge, Cambridge University Press, 2022).

[31] J Bentham, *IPML*, 12; J Bentham, 'Division of Power' (1789) in *Rights, Representation, and Reform* (*CW*) 415.

[32] J Bentham, *Colonies, Commerce, and Constitutional Law*, 277–8; J Bentham, *EAATO*, 4–5; P Schofield, *Utility and Democracy*, 287.

[33] JS Mill, *CRG*, 389–90.

[34] JS Mill, 'Remarks on Bentham's Philosophy', 16.

[35] JS Mill, *CRG*, 401, 397.

Bentham does not talk specifically about the best form of government *vis-à-vis* the 'good qualities of human beings', yet he values most of the freedoms which Mill considered indispensable, and which he thinks will encourage malcontents to 'practise every mode of opposition short of actual revolt'.[36] A good citizen, while obeying 'punctually', Bentham argues, ought to 'censure freely'.[37] He condemns the 'abject and indiscriminating homage' paid by lawyers and politicians to rulers and their laws:

> A passive and enervate race, ready to swallow any thing, and to acquiesce in any thing: with intellects incapable of distinguishing right from wrong, and with affections alike indifferent to either: insensible, short-sighted, obstinate: lethargic, yet liable to be driven into convulsions by false terrors: deaf to the voice of reason and public utility: obsequious only to the whisper of interest, and to the beck of power.[38]

Bentham would therefore, like Mill, be happy to see citizens to be active and public-spirited and vigilant.

2. CONSTITUTIONAL DESIGN: PRINCIPLES AND STRUCTURE

The major propositions of Bentham's philosophy of constitutional design, apart from those on the end of a good constitution which have been discussed already, are as follows.[39]

1. 'Man, from the very constitution of his nature, prefers his own happiness to that of all other sensitive beings put together.' Bentham calls this the principle of self-preference.[40] There is therefore a 'natural and diametrical opposition' between the interests of officials and those of the greatest number of the community[41] – and the actual aim of officials, if their powers are unchecked, is to use their power for private and sinister purposes.[42]
2. Constitutional law ought to be modelled upon criminal law, and regard officials as potential criminals. The 'necessary elements' of a good constitution are composed of sufficient securities against misrule and measures for maximizing official aptitude. Official aptitude is divided into three branches, namely moral, intellectual and active, among which moral aptitude – that is, 'the disposition to contribute, on all occasions and in all ways, to the

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[36] J Bentham, *A Comment on the Commentaries and A Fragment on Government*, JH Burns and HLA Hart (eds) (London, Athlone Press, 1977) 485 (hereafter *Comment/Fragment*).

[37] Ibid., 399.

[38] Ibid., 402.

[39] This section draws upon my chapter 'The People's "Greatest Misfortune" and "All the Chance the People Have": Bentham on the Separation of Powers' in Schofield and Zhai (eds), *Bentham on Democracy*.

[40] J Bowring, x. 80 and ix 62. See also J Bentham, *Constitutional Code* (*CW*) 20; J Bentham, *Rights, Representation, and Reform* (*CW*) 415.

[41] J Bentham, *EAATO*, 16.

[42] J Bentham, *Constitutional Code* (*CW*) 20; *Constitutional Code*, Book I, in Bowring, ix. 62.

greatest happiness of the greatest number' – is foundational:[43] if deficient, 'the more able the functionary, the more mischievous'.[44]

3. To prevent misrule and maximize official aptitude, the check upon or the counterforce against the power of rulers, or the responsibility of rulers, must be maximized. This is possible only insofar as the good produced by the check is not exceeded by the evil produced by it, and as the rulers themselves remain imbued with the powers necessary to render the best possible services expected by the people.[45]
4. There are two formal mechanisms of checking power: either by making its exercise dependent upon the will of the governed, or by checking its exercise with another co-ordinate power. Bentham adopts the first, since it will bring forth the identification of interests between the rulers and the subjects: in this way, 'the course prescribed by [the rulers'] particular interest shall on each occasion coincide, as completely as may be, with that prescribed by his duty: which is as much as to say, with that prescribed by his share in the universal interest'.[46] This is *the principle of duty and interest coincidence*, and its core idea is the dependence of the governors on the governed: the former's moral aptitude will be 'in exact proportion to' this dependence.[47] Different levels of officials ought to be connected directly or indirectly to the people via a chain of dependence.[48] Any circumstance that contributes to the dependence of rulers on the people is to be welcomed:[49]

> In as far as a man who has power is independent, his inclination will be [to] make use of it for his own benefit: in as far as he is dependent upon any one, he will find himself obliged to employ it for the benefit of him on whom he depends. In this there is no jargon, no obscurity. It is founded on the universal, necessary, undisputed and not even to be lamented, property in human nature – the predominance of the self-regarding affections over the social.[50]

Bentham argues, therefore, that every official or power-holder should be dependent directly or indirectly upon the people: otherwise, he will be in 'a state of incontestable and implacable hostility with the interest and greatest happiness of the greatest number of the members of which the community is composed'.[51]

5. To make rulers dependent upon subjects, the constitution must place the supreme constitutive power in the hands of subjects, whose interest and will it is that the universal happiness

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[43] J Bentham, *Leading Principles*, 273. See also G Postema, *Bentham and the Common Law Tradition* (Oxford, Clarendon Press, 1986) 360.

[44] J Bentham, *Leading Principles*, 273. See also J Bentham, *Rights, Representation, and Reform* (*CW*), 415–16; J Bentham, *Securities against Misrule* (*CW*), 5; P Schofield, *Utility and Democracy*, 274, 279.

[45] J Bentham, 'Elements of the Art of Packing', in Bowring, v. 69; J Bentham, *EAATO*, 30.

[46] J Bentham, *Leading Principles*, 273.

[47] Bentham, 'Division of Power' (1789), in *Rights, Representation, and Reform* (*CW*) 415.

[48] Ibid., 270.

[49] J Bentham, *Rights, Representation, and Reform* (*CW*) 408, 409, 415; J Bentham, *Securities against Misrule* (*CW*), 226–7.

[50] J Bentham, *Rights, Representation, and Reform* (*CW*) 415. See also P Schofield, *Utility and Democracy*, 279.

[51] J Bentham, *Securities against Misrule* (*CW*) 252–3.

be promoted.[52] It is 'the interest of all' that the supreme constitutive power of subjects be maximized.[53] As Bentham stipulates in his *Constitutional Code*, '[t]he sovereignty is in the people. It is reserved by and to them. It is exercised, by the exercise of the Constitutive authority.'[54] In relation to the people's sovereignty, all other powers should be subordinate,[55] the end of which is to give 'execution and effect' to 'the superior will, and at length the supreme will of all [in fact, of the majority]'.[56] The people should be enabled to stop any measures which they do not like.[57]

Bentham's justification for democracy is complex. The major merit of popular sovereignty is that it is the surest way of ensuring that power-holders are motivated to pursue the greatest happiness, which can be termed the motivational justification. But Bentham's justification is also epistemic, based upon the best-judge principle, namely that each person is the best judge of his or her own interest, and that people themselves know their interests better than anyone else: 'Every person is not only the most proper judge, but the only proper judges of what with reference to himself is pleasure: and so in regard to pain.'[58]

In Bentham's view, popular sovereignty has two crucial mechanisms. One is the public opinion tribunal, as mentioned above, and the other is the hierarchical structure of government based upon virtually universal suffrage.[59]

6. Despite the fact that it may often be prejudiced, the public opinion tribunal is essential to Bentham's constitutional design. It has been pointed out above that the binding force of constitutional law, according to Bentham, comes from popular sanctions exerted by the public opinion tribunal. In *Constitutional Code*, Bentham states that 'Public opinion may be considered as a system of law, emanating from the body of the people […] To the pernicious exercise of the power of government it is the only check', adding that 'the public opinion tribunal is to the Supreme Constitutive, what the Judiciary is to the Supreme Legislative'.[60] Besides, it can keep the power of the government on the path of universal happiness by forcing officials to give reasons for all of their decisions.[61] The public

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[52] J Bentham, *First Principles* (*CW*) 407–9; J Bentham, *Leading Principles*, 273; J Bentham, *Constitutional Code* (*CW*), 21; *Constitutional Code*, in Bowring, ix. 107. See also P Schofield, *Utility and Democracy*, 235; E Halévy, *The Growth of Philosophic Radicalism*, trans. M. Morris (London, Faber & Faber, 1901) 411, 416.

[53] J Bentham, *First Principles* (*CW*) 30.

[54] J Bentham, *Constitutional Code* (*CW*) 25; J Bentham, *Securities against Misrule* (*CW*) 72.

[55] J Bentham, *First Principles* (*CW*) 6.

[56] J Bentham, *Securities against Misrule* (*CW*) 227.

[57] J Bentham, *First Principles* (*CW*) 409.

[58] J Bentham, *Deontology. Together with a Table of the Springs of Action and Article on Utilitarianism* (*CW*), ed. by A Goldworth (Oxford, Clarendon Press, 1983) 150.

[59] J Bentham, *Rights, Representation, and Reform* (*CW*) 237; P Schofield, *Utility and Democracy*, 233.

[60] J Bentham, *Constitutional Code* (*CW*) 36, 35, 54. See also J Bentham's 'Draught for the Organization of Judicial Establishments, Compared with that of the National Assembly', Bowring, iv. 316, 317.

[61] See G Postema, 'The Soul of Justice', in Zhai and Quinn, *Bentham's Theory of Law and Public Opinion*, 52–4.

> opinion tribunal is made effective by the right and ability of the people to manifest their sentiments, which is made possible by virtue of the liberties of speech, assembly, political communication, and the publicity of state proceedings:[62] 'it is on the opportunities possessed by the people of manifesting their will that the freedom of a constitution in reality and immediately depends, and not upon any other circumstance such as that of the division of the general mass of power into three independent branches.'[63]

Overall, Mill accepts these principles of checking the abuses of power and maximizing the responsibility of rulers, as advocated by Bentham. He agrees with Bentham that the identification of interest between the rulers and the ruled is an end to be aimed at incessantly and approximated,[64] and he too espouses the principle of duty and interest coincidence: 'the ideally perfect constitution of a public office is that in which the interest of the functionary is entirely coincident with his duty.'[65] He praises Bentham for having devised 'means […] for enabling […] the majority to exercise […] control unremittingly; and for providing them with servants of every desirable endowment'.[66] For Mill, Bentham's basic principle, namely that governors should be chosen by and accountable to the greatest number of the people, 'is a universal principle in politics'.[67] He also argues that '[r]esponsibility to the governed is the greatest of all securities for good government',[68] and that 'the ideally best form of government is that in which the sovereignty, or supreme controlling power in the last resort, is vested in the entire aggregate of the community'.[69] These ideas were appropriated by A.V. Dicey, who claimed that 'the aim and effect' (or 'the essential property') of representative government is 'to produce a coincidence between the wishes of the sovereign and the wishes of the subjects' or 'between the external and the internal limitations on the exercise of sovereign power'.[70]

Mill, nevertheless, has some disagreements with Bentham, and three of these are especially deserving of attention here. First, Mill accepts Bentham's motivational and epistemic justifications for democracy, insisting that 'each is the only safe guardian of his own rights and interests',[71] yet he proceeds to develop a third justification, namely that of democratic participation. For Mill, voting, public deliberation, the discharge of public functions and collective political action, for instance, all have educative effects and can improve citizens' moral, intellectual and active aptitude, which will suffer under despotism (including so-called good despotism).[72]

Second, Bentham is optimistic about people's rationality, but deeply pessimistic about people's morality. For him, officials' moral aptitude, namely, their disposition to contribute to the greatest happiness, can only be created and maintained by democratic institutional

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62 J Bentham, *First Principles* (*CW*) 408–9. See also P Schofield, *Utility and Democracy*, 236.
63 J Bentham, *First Principles* (*CW*) 413.
64 JS Mill, 'Rationale of Representation', in *CWJSM*, xviii. 22–3; JS Mill, 'Bentham', 109.
65 JS Mill, *CRG*, 391.
66 JS Mill, 'Bentham', 106.
67 JS Mill, 'Montesquieu', in *CWJSM*, xxvi. 452.
68 JS Mill, *CRG*, 572.
69 Ibid., 404.
70 AV Dicey, *The Law of Constitution*, 34–5.
71 JS Mill, *CRG*, 404.
72 Ibid., 404, 410–12, 469.

arrangements and the watchful eye of the public opinion tribunal, which make promoting the general interest the best way for officials to pursue their particular interests.[73] Mill adopts this security of officials' moral aptitude, but he is not content with it. He thinks that officials should be 'persons of superior virtue', motivated by 'unselfish sentiment of identification with the public', and he believes that participation in public functions can cultivate their feelings for the general interest.[74]

Third, in Mill's view, '[That] there must […] be some paramount power in society; and that the majority should be that power, is on the whole right […] But it is necessary that the institutions of society should make provision for keeping up […] as […] a shelter for freedom of thought and individuality of character, a perpetual and standing Opposition to the will of the majority'. Mill's most important quarrel with Bentham is that Bentham's constitutional devices may lead to forms of legislative or public-opinion despotism, because his theory gives 'the numerical majority' absolute political or social authority, by means of 'universal suffrage', and by 'riveting the yoke of public opinion […] round the necks of all public functionaries'.[75] As Mill correctly points out, Bentham had failed to devise a system by which democratic institutions can preserve and strengthen 'respect for the personality of individual, and the deference to superiority of cultivated intelligence', but, as I will argue in Sections III and V below, it is mistaken, or at least exaggerated, to say that Bentham gives the numerical majority absolute political or social authority.

3. LIMITED GOVERNMENT

Although Bentham thinks that the supreme legislator should be legally 'omnicompetent', he accepts that there are moral limits to the direct or punitive interferences of the supreme legislator. The principle of utility requires each of us to perform or abstain from acts insofar as they are expected to increase or decrease the greatest happiness, but this does not mean that the legislator ought to compel us to perform or to abstain from them.[76] The occasion for the legislator to punish is, generally speaking, when a man injures another. Bentham prescribes four types of moral limits to the supreme legislator's interference, which Bentham also calls 'the limits of the law'.[77]

First, only when the pain that follows from an act exceeds the pleasure that it produces, that is, when the tendency of an act is 'pernicious', should the supreme legislator punish this act; otherwise, if an act has produced no mischief, there would be no ground for punishment.[78] An act apparently mischievous to a person should not be punished if the person has freely given his consent to it,[79] if its mischief can be adequately compensated or if its mischief is

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[73] For a different reading, see G Postema, *Bentham and the Common Law Tradition*, 390–1, 393.

[74] JS Mill, *CRG*, 390, 412, 392.

[75] JS Mill, 'Bentham', 108.

[76] J Bentham, *Limits* (*CW*) 7: 'If legislation interferes in a direct manner, it must be by punishment.'

[77] Ibid., 14–5.

[78] Bentham, *IPML* (*CW*) 18, 74.

[79] Ibid., 159–60.

outweighed by its benefit, which explains why freedom of the press and association should be protected.

Second, the legislator ought not to punish an act where the punishment would be inefficacious. It ought not to make ex post facto laws, or laws that are not easily knowable. It ought not to punish a mischievous act which is unintentional.[80]

Third, the legislator ought not to punish an act where the punishment would be unprofitable.[81] The examples include, among others, (a) the punishment that will merely satisfy people's ill-will towards some acts that they do not like; (b) the interference that aims at removing inequality, but will cause a shock to security;[82] (c) with a few exceptions, the interference that aims to make one fulfil his duty to himself;[83] (d) with a few exceptions, the interference that aims to make one fulfil his positive duty of beneficence.[84] The legislator ought not to punish an act where its interference will involve the risk of punishing the innocent. For example, it ought not to characterize punishable actions with vague expressions, such as rudeness, treachery or ingratitude.

Fourth, the legislator ought not to punish an act where punishment would be needless, that is, if its mischief can be prevented by other cheaper means, for example by instruction or pen.[85]

The above limits, as determined by the principle of utility, are moral limits, and Bentham does not think that they are entrenched institutional or legal limits or rights, given his insistence that the supreme legislature ought to be omnicompetent. These limits are of the province of the legislature's punitive power, and not of the tasks of the legislature or government overall. Under Bentham's constitutional system, the responsibilities of government cover not only army, navy, foreign affairs, trade and finance, but also education, health, indigence relief, internal communications and preventive services.[86] Many of these tasks would be carried out via indirect means.[87]

Mill accepts at least two principles put forward by Bentham regarding the moral limits of the supreme legislature's power. First, an individual has absolute independence and sovereignty over his self-regarding acts, namely the acts that merely concern himself. Second, as to his other-regarding acts, the legislature can only interfere when these acts cause genuine harm, 'a definite damage' or 'a definite risk of damage' to others: mere offence is not harm.[88] Following these two principles, Mill argues that individuals ought to have the following basic liberties, and the coercive interference with them is groundless or unprofitable: 1. 'Liberty of conscience', 'liberty of thought and feeling; absolute freedom of opinion and sentiment', and 'the liberty of expressing and publishing opinions'; 2. 'Liberty of tastes and pursuits, of

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[80] Ibid., 162.

[81] Ibid., 163–4.

[82] J Bentham, *Leading Principles*, 272. M Quinn, *Bentham* (Cambridge, Polity Press, 2022) 93–7.

[83] J Bentham, *Limits* (*CW*) 12.

[84] Ibid., 14–15.

[85] J Bentham, *IPML* (*CW*) 164.

[86] See F Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* (Oxford, Clarendon Press, 1983) 136–43.

[87] On Bentham and 'Indirect Legislation', see M Quinn, *Bentham*, chapter 4, 64–82; SG Engelmann, '"Indirect Legislation": Bentham's Liberal Government' (2003) 35/3 *Polity* 369–88.

[88] JS Mill, *On Liberty*, in *CWJSM*, xviii. 223, 276.

framing the plan of our life to suit our own character'; and 3. 'The liberty of combination among individuals'.[89]

For Mill, 'being harmful to others' is only a necessary but not of itself a sufficient condition for punishing an act: even if it is harmful to others, legal penalties may not be 'safely applicable' in all instances. The occasions on which they may not be safely applicable include Bentham's cases where punishment would be inefficacious, unprofitable or needless: or, to use Mill's words, where 'the attempt to exercise control would produce other evils, greater than those which it would prevent'.[90] Mill believes that 'there are […] many positive acts for the benefit of others, which [a person] may rightfully be compelled to perform'. However, similar to Bentham, he warns that this case 'requires a much more cautious exercise of compulsion' than the case of doing evil. 'To make one answerable for doing evil to others, is the rule; to make him answerable for not preventing evil, is, comparatively speaking, the exception.'[91]

Regarding the right of private property, Bentham's view is, as we have seen above, that reducing inequalities can improve the happiness of the community, but only on the condition that this effort will not harm security, which for Bentham is 'the supreme principle'.[92] Mill's view is more ambiguous, and he does not have as much confidence in the market as Bentham does.[93] On the one hand, he says that 'the feeling of security of possession […] is of the very greatest importance as an element of human happiness'.[94] On the other hand, he thinks that socio-economic inequalities should be constrained by government in order to ensure that equal opportunities for pursuing self-realization could be provided for all individuals.[95] He argues that

> the guarantee [to people] of the fruits of the labour and abstinence of others transmitted to them without any merit or exertion of their own, is not of the essence of the institution [of private property], but a mere incidental consequence, which, when it reaches a certain height, does not promote, but conflicts with, the ends which render private property legitimate.[96]

He even claims that his ideal of ultimate improvement 'would class [him] decidedly under the general designation of Socialists'.[97]

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89 Ibid., 226.
90 Ibid., 225.
91 Ibid., 225.
92 See G Postema, *Bentham and the Common Law Tradition*, 188.
93 See D Brink, 'Mill's Moral and Political Philosophy' (2007) available at https:// plato .stanford.edu/entries/mill-moral-political/ (accessed March 2022).
94 JS Mill, 'Later Letters', in *CWJSM*, xvii, 1740.
95 See D Brink, 'Mill's Moral and Political Philosophy'.
96 JS Mill, *Principles of Political Economy*, Part II, in *CWJSM*, iii. 208.
97 JS Mill, *Autobiography*, in *CWJSM*, i. 239.

4. THE SYSTEM AND THE MACHINERY

4.1 The System

Within the above limits of the power of government, both Bentham and Mill accept the principle of popular sovereignty, and believe that the best government is representative democracy. Their reasons for supporting representative democracy, however, are not entirely the same.

There are two concepts of democracy: democracy as 'rule by the people' where the people function as law-makers or governors; and democracy as the popular supervision of the exercise of power. Bentham thinks that the former is incoherent:[98] his democracy is the latter, where governors and subjects or the people are kept distinguished and separate.

> The power of making laws, of carrying on the business of government, and the power of determining who shall make them, who shall carry it on, are powers perfectly distinct in themselves, and which […] should be kept so in practice. In the former it is not possible that each man should have a share, in the latter it is not only possible but easy and expedient.[99]

Bentham thinks that the latter, namely the supreme constitutive power, should belong to the people, and the former, namely the supreme operative power, should belong to the supreme legislature. The people have sufficient moral and intellectual aptitude to allow them to tell who are good law-makers, but they do not have expertise for law-making, in the same way as everyone knows whether shoes fit their feet, but they may not know how to make shoes:[100] 'In the exercise of political power, whatsoever is done by the possessors of the supreme power must be done through agents: for as to actual governing, for this, it is admitted, the people are essentially unapt.'[101]

Mill shares Bentham's worry about ordinary people's aptitude: he is more dismissive than Bentham of their aptitude, and has even less confidence than Bentham in ordinary people. He thinks that their low aptitude is dangerous for democracy,[102] but, still, as shown above, he believes that the best way to improve their aptitude is for them to participate actively in public affairs. The theoretically best form of government is therefore direct and participatory democracy, with 'the admission of all to a share in the sovereign power of the state'.[103] This is not practicable in a large modern country, however. A government should be made as participatory as the circumstances allow,[104] for example through decentralization. But, still, 'since all cannot in a community exceeding a single small town, participate personally in any

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[98] See M Quinn, 'Bentham, Democracy, Free Government, and the Relationship Between Rulers and Ruled', in Schofield and Zhai (eds), *Bentham on Democracy*, 44–67; F Rosen, *Jeremy Bentham and Representative Democracy*, 12. See also G Postema, *Bentham and the Common Law Tradition*, 375–6.

[99] UC cxxvii. 2 (1790), cited in M Quinn, 'Bentham, Democracy, Free Government'.

[100] P Schofield, *Utility and Democracy*, 101; M Quinn, *Bentham*, 131.

[101] J Bentham, *Constitutional Code* (*CW*), 98.

[102] JS Mill, *Autobiography*, 239; JS Mill, *CRG*, 448.

[103] JS Mill, *CRG*, 412, 403–4.

[104] D Thompson, *John Stuart Mill and Representative Government* (Princeton, 1976) 9.

but some very minor portions of the public business, it follows that the ideal type of a perfect government must be representative'.[105]

4.2 The Machinery[106]

Bentham's representative government takes the overall shape of a tripartite division of power. Between the sharers of different and divided operative powers, there is a relationship of dependence or responsibility, instead of co-ordinate checks and balances.[107]

4.3 The Legislature

Bentham's constitution allocates the supreme constitutive power to the people, and the supreme operative power to the supreme legislator. The former has the power of locating (or dislocating) and punishing the latter,[108] which makes the latter dependent upon the former: 'the dependence of the possessors of efficient [i.e. operative] power upon the originative [i.e. constitutive] power of the body of the people', Bentham says, is 'the true and efficient cause and measure of constitutional liberty or rather security'.[109]

Bentham advocates equal suffrage, the justification for which is threefold: 1. the happiness of one individual has no more value than the equal amount of happiness of another; 2. 'all individuals had both an equal capacity for and an equal desire for happiness'; 3. it has to be assumed that all individuals have an equal capacity of judging the aggregate aptitude of an candidate to maximize the happiness of the community.[110] But minors, lunatics, non-readers and women were excluded on different grounds, the former three because of their incapacity.[111] Bentham does not think that there is any rational and principled justification for excluding women; but owing to the prevalent prejudice against women, their inclusion in Bentham's time would have created more obstacles to his whole project of radical democratic reform.[112]

Similarly, Mill also advocates 'unexclusiveness', and argues for a near universal adult suffrage (subject to a literacy limit), with 'no persons disqualified, except through their own default'.[113] All literate adults have suffrage, including women and those from the working class.[114] Mill's justification is that only universal suffrage can best promote the interest of all

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[105] JS Mill, *CRG*, 412.

[106] This section draws upon Zhai, 'The People's "Greatest Misfortune"'.

[107] On Bentham's complex and sophisticated view on checks and balances, see Zhai, 'The People's "Greatest Misfortune"'.

[108] J Bentham, *Rights, Representation, and Reform* (*CW*) 407. The specific arrangement is by allowing the supreme legislators to be punished by 'the next supremely operative body': see J Bentham, *First Principles* (*CW*) 31.

[109] J Bentham, *Rights, Representation, and Reform* (*CW*) 409, 407. See also J Bentham, *First Principles* (*CW*) 31.

[110] P Schofield, *Utility and Democracy*, 79.

[111] For the assumed benefits of excluding non-readers, see ibid., 90.

[112] P Schofield, 'Jeremy Bentham', in DJ Galligan (ed), *Constitutions and the Classics* (Oxford, Oxford University Press, 2014) 240.

[113] JS Mill, *CRG*, 469–70.

[114] Ibid., 479–81.

and best improve the moral and intellectual aptitude of those in possession of it. Instead of equal suffrage, however, Mill excludes those who do not pay taxes and live on parish relief or public assistance,[115] and he advocates a plurality of voting on the basis of education. His reason for the latter is that people's pleasures and opinions are not of the same value.

> It is a personal injustice to withhold from any one, unless for the prevention of greater evils, the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people […] If he is required implicitly to obey, he should be legally entitled to […] have […] his opinion counted at its worth, though not at more than its worth.[116] Every one has a right to feel insulted by being made a nobody […] No one but a fool […] feels offended by the acknowledgment that there are others whose opinion […] is entitled to a greater amount of consideration than his.[117]

Mill believes that 'every person should have one vote, but […] every well-educated person in the community should have more than one, on a scale corresponding as far as practicable to their amount of education'.[118] His hope was that plural voting would prevent the tyranny of the majority but, as Bentham says, 'on every occasion, the conduct of every human being will be determined by his own interest';[119] Mill's remedy might thus have given rise to a bigger problem, that is, a tyranny of an intellectually elite minority, or the aristocracy, as Bentham calls it.[120]

Rosen notes that Bentham applies the education and examination system, developed originally for public servants, to legislators: 'each candidate for the legislature must have undergone the course of instruction and passed the various examinations' as a condition for eligibility for election.[121] Both Bentham and Mill hold a Burkean conception of representation, believing that the constitutive authority should not give direction to the legislators' measures and representatives should vote in accordance with their own considered views about what is likely to maximize the common good of the community.[122]

As to the composition of the legislature, Mill is sympathetic towards a second chamber,[123] whereas Bentham rejects bicameralism: if both chambers represent the people, one of them is useless and needless, and having two only complicates and slows down democratic legislation. If one chamber does not represent the people, it is worse than useless: Bentham suggests that it ought to be abolished.[124] Unicameralism, plus virtual universal and equal suffrage, equal constituencies, annual elections, the secret ballot, the people's right to revoke deputies and the punishability of the deputies by 'the next supremely operative body', Bentham believes,

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[115] Ibid., 472.

[116] Ibid., 469–70.

[117] Ibid., 474.

[118] JS Mill, 'Thoughts on Parliamentary Reform', in *CWJSM*, xix. 325.

[119] J Bentham, *Constitutional Code*, in Bowring, ix. 43.

[120] See also JS Mill, 'Thoughts on Parliamentary Reform', 328–9; JS Mill, *CRG,* 458, 476.

[121] F Rosen, *Jeremy Bentham and Representative Democracy*, 63.

[122] J Bentham, *Constitutional Code* (*CW*) 153; J Streintrager, *Bentham* (London, George Allen & Unwin Ltd., 1977) 107; G Postema, *Bentham and the Common Law Tradition*, 376; JS Mill, *CRG*, 490.

[123] Ibid., 513–19.

[124] 'Bentham to his Fellow Citizens of France, on the Houses of Peers and Senates', in Bowring, iv. 420–1; J Bentham, *Constitutional Code,* in Bowring, ix. 115–16.

will together ensure the legislature's dependence upon the people. Mill does not think that longer terms present a problem, and even a term of seven years is fine for him, depending upon whether the democracy is weak or strong. He shares Madison's worry that a short-term parliament might not be able to govern effectively.[125]

In addition to standard law-making powers, Bentham suggests that the legislature should, first, have the power to

> *locate* the *Chiefs* of the two other departments; and eventually to dislocate them: to give – not general only, but upon occasion, *individual direction* to their conduct, as well as to that of all the several functionaries respectively *subordinate* to them: eventually also to punish them, in case of non-compliance with its directions.[126]

Second, it should hold the powers of declaring war and making peace, of making treaties and of 'burthening the Nation with debts'. It would be unwise, Bentham suggests, to give these powers to the administrative branch of government, since war is 'a well-known door to despotism and every mode of political abuse', and a declaration of war or the signing of a treaty 'suspends a multitude of rights and powers and revives a multitude of others'.[127]

Regarding the functions of legislature, Mill has radical disagreements with Bentham. Mill emphasizes the importance of the functional division between 'governing' and 'the control of government', stating that 'the proper office of a representative assembly is to watch and control the government', and not to govern or administer.[128] One of Mill's mature views on 'the best form of a popular constitution' is that a numerous popular assembly is 'radically unfit' for 'the function of making laws', but that 'its proper duty' is 'that of getting good laws made'. To achieve 'the combination of complete popular control over public affairs with the greatest attainable perfection of skilled agency', Mill suggests the appointment of

> a Legislative Commission, as a permanent part of the constitution of a free country; consisting of a small number of highly trained political minds on whom, when Parliament has determined that a law shall be made, the task of making it should be devolved; Parliament retaining the power of passing or rejecting the bill when drawn up, but not of altering it otherwise than by sending proposed amendments to be dealt with by the Commission.[129]

Bentham prefers simple or unitary governments.[130] In a large country, however, he says that it is 'altogether inexpedient and next to impossible' that the supreme legislature should 'engross to itself the whole business of legislation', and that it would be better to distribute, either explicitly or implicitly, some legislative power to local legislatures in certain cases, on the condition that the latter are subject to its control.[131] Accepting that some circumstances will make a federal government possible, necessary and beneficial, Mill's clear preference

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[125] See JS Mill, *CRG*, 501–3.

[126] J Bentham, *Constitutional Code* (*CW*) 26.

[127] J Bentham, *Constitutional Code* (*CW*) 253–5. See also J Bentham, *Preparatory Principles* (*CW*) 211; P Schofield, *Utility and Democracy*, 233.

[128] JS Mill, *CRG*, 424–5, 432, 353.

[129] JS Mill, *Autobiography*, 265.

[130] J Bentham, *Constitutional Code*, in Bowring, ix. 643–7.

[131] J Bentham, *Rights, Representation, and Reform* (*CW*) 407. See also J Bowring, ix. 647.

is also for a decentralized unitary government. In his view, decentralization and federalism have the benefits of contributing to: 1. maximizing political participation, accountability, and efficiency; 2. minimizing the evils of largeness; 3. dispersing power and keeping government under restraint; and 4. protecting minority rights and diversity by institutionalizing counterbalancing forces.[132]

4.4 The Executive

The essential function of the executive branch, Bentham argues, is 'to give execution and effect' to the will declared by the legislative,[133] and indirectly to 'the rightly presumed will of the Constitutive'.[134] In order for this to take place, and as a security for moral aptitude, the functionaries exercising the supreme executive power shall be subject to those exercising the supreme legislative power.[135] 'Administrative functionaries are *servants* of the Legislature.'[136] However, Bentham suggests that the administrative should be kept at a distance from the legislative. The chief executive functionary is not allowed to have a seat in the legislature or take part in its debates, and he is required to communicate with the legislature by message, which Bentham believes will prevent him from being exposed 'to those angry feelings and imputations of sinister conduct, from which, consistently with the nature of man, and the nature of the case, debates, especially when on political subjects, can seldom be altogether free'.[137] Under Bentham's constitution, the prime minister and other ministers are more like civil servants than politicians. One of his principles of the management of civil servants is 'official aptitude maximized, expense minimized', which he translates into a whole series of administrative arrangements, such as public and competitive examination for offices, the economic auction of offices, reward linked to attendance, 'single-seated responsibility' and the transparency of administrative process. Mill accepts most of these measures or principles, although he gives the executive more independence than Bentham does.[138]

There are two branches of executive power: the administrative and the judicial. Bentham is unwilling to see that both branches have any power of legislation, or any veto on democratic legislation, because this will put them on a level with the legislature.[139] However, if the executive disobeys the legislature, Bentham says, the latter can enforce its mandates by itself assuming some executive power.[140]

Interestingly, Bentham allows the supreme legislature to be dissolved by the supreme administrative power. In this way, there will be a 'sort of mutual subjection' between them.

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[132] RB Porter, 'John Stuart Mill and Federalism'(1977) 7/2 *Publius* 101–24.

[133] J Bentham, *First Principles* (*CW*) 6; J Bentham, *Securities against Misrule* (*CW*) 224. For the details, see J Bentham, *Constitutional Code* (*CW*) 149–56.

[134] J Bentham, *Constitutional Code* (*CW*) 149.

[135] J Bentham, *First Principles* (*CW*) 33–4.

[136] J Bentham, *Constitutional Code* (*CW*) 147–8.

[137] J Bentham, *Constitutional Code* (*CW*) 148, 152. See also MJC Vile, *Constitutionalism and the Separation of Powers* (Indianapolis, Liberty Fund, 1998) 126.

[138] JS Mill, 'Reform of Civil Service', in *CWJSM,* xviii. 209; JS Mill, *CRG*, 520–1, 529–30.

[139] J Bentham, *Preparatory Principles* (*CW*) 208; J Bentham, *Rights, Representation, and Reform* (*CW*) 237; J Bentham, *Securities against Misrule* (*CW*) 236.

[140] J Bentham, *Preparatory Principles* (*CW*) 206–8.

Bentham does not think this sort of 'mutual subjection' involves any inconsistency: in both cases, an appeal will be 'ultimately made to the people at large in their character of possessors of the supreme constitutive power', because both the wrong removal of the supreme administrative functionaries by the supreme legislature and the wrong dissolution of the supreme legislature by the supreme administrative functionaries will be punished by the next ensuing supreme legislature elected by the people. This mutual subjection is in fact a design which guarantees the people as the principal and other authorities as their instruments,[141] 'the utmost effect of which is the preferring an appeal from one set of deputies chosen by the people to a succeeding set of deputies chosen in like manner'.[142] Mill believes that this type of mutual subjection is desirable: it is an appeal to the people and a 'mode of giving the head of the administration as much independence of the legislature, as is at all compatible with the essentials of free government'.[143]

4.5 The Judiciary

The judiciary is a branch of the executive, whose right and proper end, Bentham claims, is two-fold. First, its 'main and positive' end is 'giving execution and effect to the laws, whatsoever they may be'.[144] Second, its 'collateral and negative' end is 'avoidance of all needless delay, expence, and vexation in other shapes: all needless delay is injustice while it lasts'.[145]

Judicial independence, Bentham suggests, 'is in direct contrariety with my principle of absolute and universal dependence on the supreme power of the whole [that is, the people]'.[146] An independent court 'is dependent on its own passions and caprice. Independence makes virtue as towards this or that man or body of men: but it is dependence that makes virtue as towards the body of the people.'[147] It must be noted that Bentham's denial of independence to the judiciary does not mean that the exercise of judicial power is not autonomous, or that the legislature, the administrative, or any other party or entity can interfere with judges' adjudication, which must strictly be carried on according to the law.[148]

Bentham welcomes the separation between the judiciary and the administration. Among the 14 ministers, only the minister of justice is elected directly by the legislative assembly, whereas the other ministers are nominated by the prime minister.[149] Bentham does not allow

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[141] J Bentham, *First Principles* (*CW*) 35. See also P Schofield, *Utility and Democracy*, 232–3.

[142] J Bentham, *Rights, Representation, and Reform* (*CW*) 407. See also P Schofield, *Utility and Democracy*, 236. The textual support for Bentham's design of 'mutual subjection' is available in 'Division of Power', written in 1789 (see *Rights, Representation, and Reform* (*CW*) 407), and in 'Economy as Applied to Office', written in 1822 (see *First Principles* (*CW*) 35). In one of his written comments on an early version of this chapter, Schofield says that Bentham rejected this idea of 'mutual subjection' in *Constitutional Code*, written between 1822 and 1832, and that this idea is inconsistent with Bentham's overall democratic constitutional thought.

[143] JS Mill, *CRG*, 525.

[144] J Bentham, *Securities against Misrule* (*CW*) 252.

[145] Ibid.

[146] Ibid., 243.

[147] UC li (a). 213, as quoted in G Postema, *Bentham and the Common Law Tradition*, 363–4.

[148] See J Bentham, *Rights, Representation, and Reform* (*CW*) 408. See also Schofield, *Utility and Democracy*, 237.

[149] J Bowring, ix. 609.

the chief executive functionary any share of judicial power, 'whether in the giving direction to the exercise of that power or in the appointment of the persons by whom it shall be exercised'.[150] He argues that 'any […] union of the functions of accuser, judge and executioner, would be incompatible with justice'.[151]

Despite his emphasis on the dependence of the judiciary on the people, Bentham in his mature thought opposes the popular election of judges and gives their appointment to the minister of justice, but allows them to be displaced by the majority of the electors.[152] Mill agrees with Bentham that judges should not be appointed by popular election, but he insists that they should not be removed from office by a popular vote either. According to Mill, 'absolute impartiality, and freedom from connexion with politicians or sections of politicians' are of equal importance for judges as 'professional qualifications'. He says that the practice of 'submitting judicial officers to periodical popular re-election' is 'one of the most dangerous errors' that a democracy can fall into.[153]

Bentham is clear that judges should not make laws: they are appointed to enforce obedience to laws, and their duty is to obey laws according to their 'decided meaning'; otherwise they ought to be dismissed.[154] Judges, Bentham insists, should not be allowed to invalidate laws, except in instances where an act of subordinate legislation has been deemed to have exceeded its proper scope. To 'place the disagreement between two of those branches, the legislative and the judicial, everything is in confusion', says Bentham. 'What the one commands, the other forbids. The citizens know not whom to obey, nor what to do to be at peace.'[155] Moreover, this kind of judicial review confers upon judges 'a controlling power over the acts of the legislature'. Bentham thinks that this is 'a remedy worse than the disease', in that even an undemocratic legislature is still more democratic than judges appointed solely by the administrative branch.[156]

Bentham is, however, happy to give judges some functions or powers which will in fact place some checks upon the legislature. Most importantly, judges possess the suspensive power, whereby, if a judge thinks 'what the letter of the law imports' in a given case is not what the legislature would have meant if they had contemplated the same case, then he is 'authorised, and even required' to suspend the law, and to take measures 'necessary to prevent the happening of any irremediable mischief in either event'.[157] Bentham also calls this power 'the execution-staying function'.[158] Bentham's judges also possess a 'contested-interpretation

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[150] P Schofield, *Utility and Democracy*, 236.

[151] J Bentham, *Constitutional Code*, in Bowring, ix. 42.

[152] J Bentham, *Securities against Misrule* (*CW*) 245. In his works on the judicial organization for France written in 1789, Bentham endorsed the popular election and dismissal of district judges, which had already been experimented with by the French *Comité de Constitution*. See P Schofield, *Utility and Democracy*, 93, 308.

[153] JS Mill, *CRG*, 526–8.

[154] J Bentham, 'Draught of a Code for the Organization of the Judicial Establishment', in Bowring, iv. 287. See also P Schofield, *Utility and Democracy*, 307.

[155] J Bentham, *Rights, Representation, and Reform* (*CW*) 412.

[156] J Bentham, *Comment/Fragment*, 487–8. See also J Bentham, *Securities against Misrule* (*CW*) 236.

[157] J Bentham, 'Organization of the Judicial Establishment', 287–8.

[158] J Bentham, *Constitutional Code*, in Bowring, ix. 508.

-reporting function' and the 'eventually-emendative function'. By means of these two functions, judges propose to the legislature interpretations or amendments to the law, which will become valid if no action is taken by the legislature within a certain number of days.[159]

Mill's view regarding the relationship between the judiciary and the legislature is more flexible. He appreciates that 'under the more perfect mode of federation, where every citizen of each particular State owes obedience to […] that of the federation', 'there must be a Supreme Court of Justice' which remains 'supreme over the various Governments, both State and Federal; having the right to declare that any law made, or act done by them, exceeds the powers assigned to them by the Federal Constitution, and, in consequence, has no legal validity'.[160]

According to Bentham's proposal, judges' power of enforcing the law is checked by the quasi-jury and the public opinion tribunal. The quasi-jury attends trials, and is composed of 'ever changing' lay members convened from 'the body of the people at large'. It has no power to make decisions, but serves as a check upon the power of judges.[161] The quasi-jury represents the public opinion tribunal, and is internally adopted into and constitutes a vital part of the legal tribunal.[162] In addition, the power of judges is checked by judicial inspectors, that is, spectators at trial, who form a sort of sub-committee of the public opinion tribunal.[163] In a word, the judiciary must operate under the eye of the public opinion tribunal,[164] and all this presupposes the publicity of the trial: 'Doors of the Judicatory constantly open to all visitants.' After all, says Bentham, 'in judicature, where there is no publicity, there is no justice'.[165] Mill supports judicial transparency, but he seems to think that public opinion is 'incompetent' to evaluate a judicial decision 'for want of having heard the case, or from having heard it without either the precautions or the impartiality belonging to a judicial hearing'.[166]

The most distinctive view held by Bentham regarding the relationship between the legislature and the executive (comprising the judicial and administrative) is what he terms 'the extraordinary exercise of the supreme legislative power': the subordinate executive's unsatisfactory performance may necessitate the removal or punishment of the delinquents, or create the necessity for the supreme legislature to assume for itself the whole or part of the judicial or administrative business or functions.[167] In Bentham's view, the legislature 'may without prejudice to liberty possess a portion of judicial power […] so long as the members of that

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[159] Ibid., 502–6. See also P Schofield, *Utility and Democracy*, 310–11.

[160] JS Mill, *CRG*, 556.

[161] J Bentham, *Constitutional Code*, in Bowring, ix. 465; J Bentham, 'The Elements of the Art of Packing, as applied to Special Juries, particularly in Cases of Libel Law', in Bowring, v. 67–70. On Bentham's quasi-jury, see P Schofield, *Utility and Democracy*, 309; D Lieberman, 'Bentham, Courts and Democracy', in Schofield and Zhai (eds), *Bentham on Democracy*, 258–284.

[162] J Bentham, *Constitutional Code*, in Bowring, ix. 41.

[163] See TP Peardon, 'Bentham's Ideal Republic' (1951) 17/2 *The Canadian Journal of Economics and Political Science* 196.

[164] J Bentham, *Constitutional Code*, in Bowring, ix. 41–4, 155–60.

[165] J Bentham, *Securities against Misrule* (*CW*) 251–2.

[166] JS Mill, *CRG*, 528, 391.

[167] J Bentham, *First Principles* (*CW*) 7; J Bentham, *Constitutional Code*, in Bowring, ix. 203, 124.

supreme body are maintained in strict dependence upon the body of the people'.[168] Otherwise, the authority of the legislature would be 'without execution and effect – it would itself be without efficiency or use', and anarchy would be substituted for government.[169]

5. THE TYRANNY OF THE MAJORITY

One of Bentham's core principles of constitutional design is popular sovereignty. Bentham is frank that the interests of people by nature are divided and conflicting,[170] and that the perfect constitution should therefore aim at the greatest happiness of all if the happiness of all can be increased without defalcating from the happiness of any, which, however, is unlikely in most instances.[171] '[T]o provide for the greatest felicity of the greatest number', therefore, is the utmost that can be done towards the maximization of universal national felicity, in so far as depends on government'.[172] According to Bentham, each individual ought to have an equal vote, the legislature ought to possess an overruling influence over the other branches and the tribunal of public opinion is the most important check upon official power.

All these claims made by Bentham represent a significant departure from, and indeed an attack upon, the despotism of monarchy or aristocracy in European history. They are nonetheless deeply worrying for Mill, however, who assumes that they will overlook the interests of minorities and lead to a tyranny of the majority. 'Is it […] good for mankind to be under the absolute authority of a majority of themselves?'[173] Mill's answer is no: '[t]o give any one set of partialities, passions, and prejudices, absolute power, without counter-balance from partialities, passions, and prejudices of a different sort, is to render the correction of any of these imperfections hopeless.'[174] 'It is an essential part of democracy that minorities should be adequately represented. No real democracy, nothing but a false show of democracy, is possible without it.'[175] In order to maintain democracy while striving to prevent the tyranny of the majority, he suggests that 'it is necessary that the institutions of society should make provision for keeping up, in some form or other, as a corrective to partial views, and a shelter for freedom of thought and individuality of character, a perpetual and standing opposition to the will of the majority'. He also suggests that '[a]n organized opposition to the ruling power' or 'a centre of resistance is as necessary where the opinion of the majority is sovereign, as where the ruling power is a hierarchy or an aristocracy'.[176] Besides raising 'a strong barrier of

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[168] J Bentham, *Rights, Representation, and Reform* (*CW*) 409. On the legislature's powers to punish judges, see LJ Hume, *Bentham and Bureaucracy* (Cambridge, Cambridge University Press, 1981) 117.

[169] J Bentham, *Constitutional Code*, in Bowring, ix. 124.

[170] Ibid., ix. 121.

[171] J Bentham, *First Principles* (*CW*) 3.

[172] J Bentham, *Leading Principles*, 269; J Bentham, *Rights, Representation, and Reform* (*CW*) 410.

[173] JS Mill, 'On Bentham', 106.

[174] Ibid., 107.

[175] JS Mill, *CRG*, 452.

[176] JS Mill, 'On Bentham', 107–8; JS Mill, *CRG*, 446, 452. See also F Rosen, *Jeremy Bentham and Representative Democracy*, 196.

moral conviction' in protecting basic liberties from the powers of society in general,[177] Mill's institutional devices against the tyranny of the majority include proportional representation, plural voting, decentralization or federalism, in particular.

It may not be fair, however, to accuse Bentham of tyranny of any kind on the grounds that he advocates the greatest happiness of the greatest number, the rule of the majority, universal and equal suffrage, the tutelary power of the public opinion tribunal and legislative supremacy. As Halévy says, 'the question is to know whether the real interest of the majority does command it to destroy or to despoil the minority'.[178] Halévy's answer is that 'a "pure representative democracy" does not necessarily tend to the levelling of fortunes; such was the profound conviction of Bentham and of his disciples'.[179] Bentham often uses the United States of America as an example in this respect.[180] He later regretted his formulation of the principle of utility in terms of 'the greatest number', and was worried that it might give a misleading message that his principle of utility would allow sacrificing the happiness of a minority as long as the sacrifice increased that of the majority.[181] Schofield argues that Bentham thinks 'the interest of the majority would not necessarily outweigh the interest of the minority', and that Bentham imposes a high threshold on the sacrifice of the interest of the minority.[182] Other defenders of Bentham claim that the illegitimate sacrifice of the interest of the minority would rarely occur under Bentham's constitution because the interests that his principle of utility and form of representative democracy protect and promote are 'exclusively common interests in which all have a stake, like interest in public goods'.[183] Bentham obviously believed that any potential legislative tyranny of the majority would be obviated by having a utilitarian tribunal of public opinion, annual popular elections of deputies, the simple fractionization of legislative power itself and adequate scope for public and rational legislative deliberation.[184]

One popular arrangement against the tyranny of the majority is the use of a system of checks and balances.[185] Madison dismisses popular and annual elections as incapable of preventing the tyranny of the majority,[186] and his alternative is an arrangement in which 'the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by

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[177] JS Mill, *On Liberty*, 227.

[178] E Halevy, *Philosophic Radicalism*, 410.

[179] Ibid., 428. See also P Schofield, *Utility and Democracy*, 101; M Quinn, 'Bentham, Democracy, Free Government, and the Relationship between Rulers and Ruled', in Schofield and Zhai (eds) *Bentham on Democracy*, 44–67.

[180] J Bentham, *Leading Principles*, 274.

[181] J Bentham, *Official Aptitude Maximized; Expense Minimized* (*CW*), ed. by P Schofield (Oxford, Clarendon Press, 1993), 352; P Schofield, *Utility and Democracy*, 39.

[182] Ibid. See also P Schofield, 'Intellectual Aptitude and the General Interest in Bentham's Democratic Thought', in Schofield and Zhai (eds) *Bentham on Democracy*, 21–43; M Quinn, 'Bentham, Democracy, Free Government, and the Relationship between Rulers and Ruled', in Schofield and Zhai (eds) *Bentham on Democracy*, 44–67.

[183] See G Postema, 'Introduction', in *Bentham: Moral, Political and Legal Philosophy,* vol 1 (Aldershot, Ashgate, 2002).

[184] For this purpose Bentham wrote *The Book of Fallacies* (*CW*) ed. by P Schofield (Oxford, Clarendon Press, 2015) and *Political Tactics* (*CW*).

[185] This section draws upon Zhai, 'The People's "Greatest Misfortune"'.

[186] J Madison, A Hamilton and J Jay, *The Federalist* (1788) 258–9, 257.

the others'.[187] Bentham fiercely denounces this idea of checks and balances as nonsense, and argues that it leads to anarchy and the exploitation of the majority by the minority. When the polity is democratic, such checks will tend, in his view, to lead to complication, waste and inefficiency. Bentham nevertheless suggests that when the government is independent of the people, checks and balance may be all the chance that the people have to avoid oppression: they can weaken bad laws, contribute to public deliberation of laws, and even force power-holders to appeal to the people and thereby make them democratically dependent. Checks and balances are of no use when rulers are completely accountable to the subjects. However, real democracies are only democratic to a certain degree, and they can never be perfectly democratic. A real political body is always a mixture of democracy and despotism, which seems to suggest that, even in Bentham's eyes, both the principle of dependency and that of checks and balances are necessary, and that there is a necessary role for the principle of checks and balances to play in our actual politics.

[187] Ibid., 295.

6. Bentham and administrative law[1]

Thomas Perroud

The Enlightenment generated new ways of thinking about administration, and new plans to reform it. By applying reason to the administrative phenomenon, thinkers of the period created new theories, new ways to think about the State that can be considered precursors to public management. Cameralism in Prussia[2] and the physiocrats in France[3] are two intellectual expressions of this new atmosphere concerning the administration. Philosophers such as Condorcet reflected on plans to improve education. Administrators such as Nicolas de La Mare[4] in France also developed a comprehensive overview of the science of administration. The nascent political economy endeavored to propose plans to reform the administration.[5]

In other words, Bentham developed his ideas in a favorable atmosphere. He is, to this author's knowledge, the most prolific writer at that time on the topic of administrative reform, developing both general ideas on administration and the civil service and concrete reform designs in almost all areas of public action, from poverty to education and prisons. In many respects he is, in this field, a precursor, a visionary. None has so systematically applied reason and a consistent belief in the efficacy of the utility principle to public management. His vision of the administration is as scientific as the one Weber will theorize.[6] The Constitutional Code provides the most thorough and minute details of administration. All the more striking is the fact that it was done by an English lawyer, if one has in mind that in the second part of the 19th century Dicey will say that the English have no administrative law.[7] Benthamism and the Benthamites (such as Chadwick) will be the great reformers of the administration.

Also, it is striking to see the topicality of his analyses. His ideas on poverty and the Poor Man's Bank lead him to propose something that looks very close to microcredit.[8] Similarly, the use of auctions, of procurement, and of contracting out as a means to secure the quality of service seem very modern, as does his continuous insistence on transparency and publicity as

[1] The author wishes to thank Anne Brunon-Ernst and Malik Bozzo-Rey for their help and comments. All mistakes are his.

[2] HC Johnson, "The Concept of Bureaucracy in Cameralism" [1964] *Political Science Quarterly* 378–402; E de Champs, *Enlightenment and Utility: Bentham in French, Bentham in France* (Cambridge, Cambridge University Press, 2015).

[3] A Mergey, *L'Etat des physiocrates: autorité et décentralisation,* vol 37 (Presses Universitaires d'Aix-Marseille, 2010).

[4] P Napoli, *Naissance de la police moderne. Pouvoir, normes, société* (La Découverte, 2003).

[5] A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan and T Cadell, 1776). He discusses Nicolas de La Mare's treatise in several places in the book.

[6] M Weber, *Économie et société*, 1 (Paris, Plon, 1995) 301.

[7] AV Dicey, *Introduction to the Law of the Constitution* (Macmillan, 1885) Chap. XII.

[8] J Bentham, *Writings on the Poor Laws*, Vol I, ed. M Quinn (Clarendon Press, 2001) 80–1; M Quinn, "Jeremy Bentham, 'The Psychology of Economic Man,' and Behavioural Economics" [2016] *Œconomia* 3–32.

a means to control the administration. Also, his objective to secure the best quality of service at the least expense—or, as he says ,"Official Aptitude Maximized; Expense Minimized"[9]—is a concern that appears extremely contemporaneous. Finally and more importantly, he attributed to public action a goal, "the greatest happiness of the greatest number," that echoes countless studies today, for instance on capabilities.[10]

It is therefore striking to note a paradox. Although quantities of texts were devoted by Bentham to administration, the scientific literature on this topic is extremely limited. General studies on the topic are rare and we have found only one, by Hume on *Bentham and Bureaucracy*.[11] We also found some interesting developments in Philip Schofield's *Utility and Democracy*, which devotes a chapter to publicity (chapter 10) and another to Bentham's ideas on the civil service (chapter 11). There are however quantities of sectoral analysis dealing with one aspect of Bentham's ideas, one plan. For instance, there are quantities of writings on the Panopticon, which is indeed a fascinating administrative project but has attracted little reflection from a public administration angle.

The corpus we used in order to study Bentham's idea can also be divided in two: from the more general ideas on public administration that he exposes in the *Comment on the Commentaries*,[12] the *Fragment on Government*,[13] the *Introduction to the Principles of Morals and Legislation*,[14] and *Of the Limits of the Penal Branch of Jurisprudence*,[15] to the projects he designed to remedy poverty[16] and to improve education,[17] imprisonment,[18] and public finances.[19]

It is not possible, although it would be a great endeavor, to go through all his projects and derive from them the general principles of administration that Bentham designed. Instead, we first discuss the general principles that Bentham established in his general writings on public administration (section 1) and then study one case – his most famous project, the Panopticon – to understand the concrete mechanisms he envisaged to deliver a good service (section 2).

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[9] J Bentham, *The Collected Works of Jeremy Bentham: Official Aptitude Maximized; Expense Minimized*, ed. P Schofield (Oxford University Press, 1993).

[10] M Nussbaum and A Sen, *The Quality of Life* (Clarendon Press, 1993).

[11] LJ Hume, *Bentham and Bureaucracy* (Cambridge University Press, 1981).

[12] J Bentham, *A Comment on the Commentaries and A Fragment on Government*, eds JH Burns, HLA Hart and P Schofield (Clarendon Press, 2008).

[13] Ibid.

[14] J Bentham, *An Introduction to the Principles of Morals and Legislation*, eds JH Burns and HLA Hart (Clarendon Press, 1996).

[15] J Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed. P Schofield (2010).

[16] J Bentham, *Writings on the Poor Laws*, ed. M Quinn, vol 1 (2001); J Bentham, *Writings on the Poor Laws*, ed. M Quinn, vol 2 (2007) contains a text entitled "Pauper Management Improved." See CF Bahmueller, *The National Charity Company. Jeremy Bentham's Silent Revolution* (University of California Press, 1981).

[17] J Bentham, *The Collected Works of Jeremy Bentham: Chrestomathia*, eds MJ Smith, WH Burston and F Rosen (Clarendon Press, 1983).

[18] M Bozovic, *Jeremy Bentham: The Panopticon Writings* (Verso, 1995).

[19] J Bentham, *Official Aptitude Maximized, Expense Minimized*, ed. P Schofiel (Clarendon Press, 1993); J Bentham, *Writings on Political Economy*, ed. M Quinn, vol 1 (Oxford University Press, 2016); J Bentham, *First Principles Preparatory to Constitutional Code*, ed. P Schofield (Oxford University Press, 1989).

In our conclusion, we briefly discuss the legacy of administrative Benthamism in 19th-century England.

1. GENERAL FEATURES OF THE BENTHAMITE ADMINISTRATION

Bentham's reflections on public administration surprise the reader with their coherence and consistent application of reason to the issues he addresses. He applies his ideas both to the regulation of the administration on the inside (how to remedy issues of corruption, how to make the administration more efficient at the least expense for the public purse) and to its relation with society. This is why we distinguish here these two elements: Bentham tries to elaborate plans for a rational administration and to design new techniques of administration.

1.1 A Rational Administration

Bentham is aware that the administration needs to be controlled. In a sense, utilitarianism being an art of governing behavior, it is no wonder that Bentham tried to apply his ideas to the business of administration in order to align the interests of the ruled with the interests of the rulers. Going from the more general to the more specific, we will expose here his general ideas on the control of administrative action, in order to study afterwards his ideas on the civil service.

None better than Bentham establishes the paramount importance of publicity – we would say today transparency[20] – to foster good government. Control is often linked to vision in Bentham and his ideas on publicity go hand in hand with architectural design for the minister's office of the *Constitutional Code*, or the courtroom. Administrative action is to be scrutinized by public opinion in order to ensure the rectitude of the decision and avoid abuse of power. The public opinion tribunal[21] existed to check the use of public power and ensure that the interests of the community as a whole were taken into account. Philip Schofield describes the tribunal thus:

> This body was not formally constituted in the manner of a court of law; nor did it have particular, designated individuals as its judges or other officials; nor did it have agents to carry out its orders. Its decisions were likely, though not necessarily, to be pronounced in much less determinate terms, and the sanctions at its disposal were again likely, though not necessarily, to be administered more haphazardly. Nevertheless, there was a mechanism through which the public opinion tribunal functioned in a way that was analogous to that of a legal tribunal—namely, a newspaper. The procedure followed in a legal tribunal when a claim or accusation was brought forward by an injured party was similar to what occurred when an individual made, in a newspaper, an allegation of misconduct against a government official. The receipt by the newspaper editor of the allegation was the equivalent of the receipt by the legal tribunal of the claim or accusation. Just as the legal tribunal would then receive a defence from the accused, and receive, collect, and store evidence, both in support of and in opposition to the accusation, so the newspaper editor would receive information from correspondents,

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[20] Bentham even uses the word transparency in the *Constitutional Code*, 146, and in *First Principles Preparatory to Constitutional Code*, ed. P Schofield (Clarendon Press, 1989) 102.

[21] See J Bentham, *Securities against Misrule and Other Constitutional Writings for Tripoli and Greece*, ed. P Schofield (Oxford University Press, 1990), *passim*.

> and publish a reply to the allegation from the official concerned—whether a confession, a denial, or a presentation of arguments in justification of his conduct. Both the legal tribunal and the newspaper would provide a forum in which arguments relating to the evidence would be rehearsed. […] If the editor concluded that the official in question had committed a disreputable act, this was equivalent to a judgment in favour of conviction. The judgment would be executed to the extent that the reputation of the official was lowered in the eyes of the other members of the public opinion tribunal, and they in consequence either deprived him of any benefits or favours they might otherwise have conferred on him, or subjected him to any burdens or disfavours they might not otherwise have inflicted on him. The force exerted by the popular or moral sanction depended upon "notification"—namely making known both the decision pronounced by the public opinion tribunal and the grounds on which the decision was made. Bentham recognized that the decision could never be definitively ascertained, but it was possible for each individual to come to a view as to what the content of the decision might be.[22]

Bentham's scheme could in a sense be considered a precursor of modern ideas on participation, with the Citizen Jury.[23] It can also be seen as an expression of the nascent public space whose history was traced by Habermas.[24] The only criteria to be part of the tribunal is to "take cognizance of the question, whatever it may be."[25] It was the ultimate wielder of the moral sanction of members of the government and the administration.

Although he was aware that public opinion could be deceived, Bentham firmly believed that the increase in the amount of information delivered to the public would improve the quality of their opinion.[26] Hence his interest in the freedom of the press. Faithful to Locke's ideas that government is based on trust, Bentham justifies thus the empire of publicity upon public affairs:

> Is it objected against the regime of publicity, that it is a system of *distrust*? This is true; and every good political institution is founded upon this base. Whom ought we to distrust, if not those to whom is committed great authority, with great temptations to abuse it? Consider the objects of their duties: they are not their own affairs, but the affairs of others, comparatively indifferent to them, very difficult, very complicated,—which indolence alone would lead them to neglect, and which require the most laborious application. Consider their personal interests: you will often find them in opposition to the interests confided to them. They also possess all the means of serving themselves at the expense of the public, without the possibility of being convicted of it. What remains, then, to overcome all these dangerous motives? what has created an interest of superior force? and what can this interest be, if it be not respect for public opinion—dread of its judgements—desire of glory?—in one word, everything which results from publicity? The efficacy of this great instrument extends to

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[22] P Schofield, *Utility & Democracy: The Political Thought of Jeremy Bentham* (Oxford University Press, 2006) 260–1.

[23] N Crosby, "Citizens Juries: One Solution for Difficult Environmental Questions" in O Renn, T Webler, and P Wiedemann (eds), *Fairness and Competence in Citizen Participation. Technology, Risk, and Society (An International Series in Risk Analysis)* vol 10 (1995) 157–74.

[24] J Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity, 1989).

[25] J Bentham, Constitutional Code, ed. F Rosen and JH Burns, vol 1 (Clarendon Press, 1983) 35–6.

[26] J Bentham, *Political Tactics*, eds MH James, C Blamires, and C Pease-Watkin (Oxford University Press, 1999) 34–6.

> everything—legislation, administration, judicature. Without publicity, no good is permanent; under the auspices of publicity, no evil can continue.[27]

State proceedings are to be transparent in order for public opinion to be enlightened and be able to form a judgment. Long before the principle became law in most western countries, he was in favor of the giving of reasons for public action. According to Hume, "The proceedings of the State that were to be publicized were the fees payable for official transactions, the duties of officers, public accounts, judicial proceedings, proposed legislation, the reasons on which measures were grounded and 'a view of the data referred to by those reasons'."[28] In sum, Bentham was aware that public opinion can judge official action only if it can understand the reasons for the decision and the data relied upon. That is why "the responsibility to prepare and publish reports[29] or to allow open access to certain documents was a common feature in most of his schemes". Reason giving, access to documents, reporting: Bentham's ideas concerning the publicity of administrative action are striking.[30]

In French administrative law, it is still today not a legal requirement to give reasons for rules of general application, unlike in the United States, where the Administrative Procedure Act requires it. The European Court of Justice had to intervene recently in order to force the European Commission to give NGOs access to an impact assessment.[31] We are still today not up to the standards Bentham established centuries ago.

The virtues of open government are paramount for Bentham. He is also aware that the civil service needs to be controlled; this is why the principle of subordination is so important in his theory.[32] Long before Weber, he saw the bureaucracy in a hierarchical way.[33] What are the problems he intends to remedy and which solutions does he find? We use the expression civil service although we know the legal concept did not exist at the time. We want to refer to agents working for the administration.[34]

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[27] Ibid., 37. Cited by P Schofield, *Utility & Democracy: The Political Thought of Jeremy Bentham* (Oxford University Press, 2006) 270.

[28] LJ Hume, *Bentham and Bureaucracy*, 99.

[29] Ibid., 151.

[30] This is coherent with his ideas on education whose purpose is to enhance the public's understanding of public issues.

[31] ECJ, ClientEarth v Commission [2019] 1 CMLR 7.

[32] E de Champs, "Les fonctionnaires dans le Code Constitutionnel" (2006) 1 *Revue d'études benthamiennes* §35.

[33] What French administrative law calls "hierarchical power" is expressed thus by Bentham in the *Constitutional Code*: "Art. 2. Exceptions excepted, —on each occasion, in the exercise of his several functions, subject is each subordinate functionary, to the exercise given to the directive function of his immediate superordinate: subject however to any counter direction, given by any superior superordinate, and so on upwards in the scale of subordination" (Section 19). Oddly enough, today, we have been unable to find any English administrative law textbook studying this principle of administrative organization.

[34] M Bozzo-Rey, "M. Bentham et le management des fonctionnaires : Utilité, transparence et management de soi" (July 2011) Raison-Publique, available at http://1libertaire.free.fr/MBozzo-Rey01.html; M Bozzo-Rey, "Organising the utilitarian state: the official aptitude of functionaries," in *Bentham Late Constitutional Theory,* eds P Schofield and X Zhai (Cambridge University Press, 2022).

First, his ideas on functionaries tend to increase their aptitude.[35] He distinguishes between moral, intellectual (divided into scientific aptitude or knowledge and judicial aptitude or judgment), and active aptitude.[36] Moral aptitude is the quality of a person who does not let self-interest predominate over all other interests and thus sees the interests of society as a whole. Intellectual aptitude is the knowledge one has to make good decisions. Finally, active aptitude is the punctuality and physical presence in office;[37] the ability of the agent to be in office at the right time.[38]

Concerning access to official posts, he favors competitive examinations as a sure means to secure intellectual aptitude among public agents.[39] Contrary to what would become a central idea of civil service law, Bentham advocated the venality of offices. His views on the topic are coherent with his ideas that public services should be contracted out, or farmed.[40] As Hume says: "Competitive examinations were the only reliable means of testing and thus securing intellectual aptitude. Pecuniary competition for official posts (outside Parliament) was the best way to secure active talent and to reduce expenditure on pay to a tolerable level."[41] He even imagined a process: "the identification and advertising of posts, and the invitation of tender for them; the interviewing and (if appropriate) viva voce examination of suitable candidates; the opportunity for an auction (presumably revised tenders); the final decision." Where a formal examination was needed according to the specificity of the post, he thought that it "implied the existence of a definitive set of examiners and definite subjects."[42] For the competition to be fair every candidate has to be examined in the same place. Although venality would later disappear, especially in France, the idea of a competition examination was to become law in most countries such as France or England.

Next to aptitude, Bentham emphasized the need for probity. In order to prevent the connections officials could make, he was in favor of moving officials frequently from one place to another.[43] He is conscious that the more connections one has, the more one is prone to the risk of conflicts of interests. Being aware that behavior is dependent upon influence, he is also con-

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[35] The most detailed account of Bentham's ideas on this topic are to be found in his *Economy as applied to Office* in *First Principles Preparatory to Constitutional Code*, ed. P Schofield (Oxford University Press, 1989).

[36] P Schofield, *Utility & Democracy*, 274. We are following his description here.

[37] "Active aptitude requires the functionary's physical presence in office" (Bentham, "Economy as Applied to Office," in P Schofield, *The Collected Works of Jeremy Bentham: First Principles Preparatory to Constitutional Code* (Clarendon Press, 1989) 87–9). Whereas he defines intellectual aptitude as requiring "the functionary to hold the appropriate knowledge for his office and to make the appropriate judgements when asked to take a decision" (ibid., 77). Lastly, moral aptitude "requires the functionary to set aside his personal interest and to look at the best interests of the people from whom he derives his power" (ibid., 13, 16). Bentham stresses the importance of physical presence in order to fight against the aristocracy attributing and transmitting official positions to itself and not doing the job.

[38] Ibid.

[39] LJ Hume, *Bentham and Bureaucracy*, 204.

[40] Ibid., 106.

[41] Ibid., 204.

[42] Ibid., 204.

[43] Ibid., 99.

scious that people will try to influence public action and public agents in their favor.[44] Good administration requires sufficient checks to prevent this and that is why the Constitutional Code also contains a detailed list of powers to be exercised on functionaries should they fail to act correctly.[45] He also developed very complete schemes relating to public finances.

To enforce these obligations, he argued for the necessity of sanctions against public officials, should they fail to fulfill their duties: reprimand, suspension, dismissal, and fines.[46] Bentham's conception of public administration is therefore highly hierarchical: one person has to be responsible and accountable for the policies, and citizens may at all times take action against them in order to orient public action. Malik Bozzo-Rey explains the democratic character of the sanctioning system:

> The power to dismiss and sanction functionaries naturally belongs to the people, to the greatest number—at least according to Bentham's logic—insofar as the aim is to maximise this interest: collective utility rather than the individual interests of a few. Every functionary is therefore constantly subject to the confidence of the greatest number, and their position depends on the choice made by the people.[47]

The modern lawyer can only be surprised by Bentham's ideas. He does not speak at any time of judicial review. Judicial review is today the central means for holding government to uphold the law, to check that powers are exercised legally. Bentham is interested in mechanisms that keep the courts out of the picture. At that time, judicial review was certainly more limited than it is today. However, he mentions briefly the need for a "legal sanction," but it is not clear what he means exactly by that.[48] Bentham's ideas are coherent with the English preference for redressing maladministration through informal mechanisms (ombudsman), administrative ones (tribunals), and political ones (Parliament) over legal ones.

Bentham's thinking is also striking because he thought through the techniques of administration.

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[44] On this topic see: P Rudan, "L'influenza come fattore costituzionale: Jeremy Bentham e l'etica pubblica," (2019) 37/2 Giornale di storia costituzionale, 265–75; also published as "Influence as a constitutional factor: Bentham's public ethics" in *La déontologie publique: trajectoire et présence d'une notion ambiguë*, dir. G Tusseau (Institut Francophone pour la Justice et la Démocratie, 2019).

[45] J Bentham, *Constitutional Code*, 202: "Art. 4. Modes of power necessary, are the following—1. Power of direction: corresponding function, the directive. 2. Power of suspension: corresponding function, the suspensive. 3. Power of dislocation: corresponding function, the dislocative. 4. Power of punition: corresponding function, either the punitive, or the punifactive. 5. Power of suppletion, that is to say, of fresh location, in case of suspension or dislocation: corresponding function, the suppletive." These categories are common in French administrative law.

[46] LJ Hume, *Bentham and Bureaucracy*, 149.

[47] M Bozzo-Rey, "Organising the utilitarian state: the official aptitude of functionaries," in *Bentham Late Constitutional Theory*, dir. P Schofield and X Zhai (Cambridge University Press, 2022).

[48] E de Champs, "Les fonctionnaires dans le Code Constitutionnel," §40.

1.2 The Techniques of Administration

The notion of administrative process so present today was also a concern of Bentham's. We will stress several elements that seem particularly topical. First of all, his attention to information gathering shows his awareness of the need to base administrative action on fact. He could be seen as a grandfather of the debates on evidence-based regulation. Second, we want to highlight the use of contracting out.

Information is key for the administration to make sound decisions. Bentham was even anxious, says Hume, to promote the receipt of anonymous information.[49]

The first step in the administrative process is the gathering of information and that's why Bentham stresses the importance of inspections. Inspection was a classical device in Bentham's schemes, along with publication to control the behavior of administrators. In 19th-century England, inspection would become a very common tool to control the compliance of private actors with laws and regulations.[50] The inspectorate in English administrative law was indeed to become a central feature of administrative control. Because these companies were not under an obligation to publish information and therefore to be under the scrutiny of public opinion, inspections were useful to gear their actions toward compliance.

In addition, Bentham theorized report-making. The purpose here is also to publish as much information as needed to orient public action:

> The officially informative, or say Report-making function: exercised by a subordinate functionary, by communication, made to his superordinate, of a discourse called a Report: in which expression and arrangement are given to a body of evidence, having for its purpose the constituting, or contributing to constitute, an appropriate ground in point of fact, for exercise to be eventually given on some particular occasion, to some function or functions, by the superordinate. It may, in the whole or in any proportion, consist of evidence, elicited by the thus information-giving functionary, with or without comments, having for their object the affording assistance to judgment, and consequent action on the part of the information-receiving functionary.[51]

If we follow Bentham, the report is drafted by a subordinate functionary and addressed to a superior. Its purpose is to give evidence to the superior in the decision-making process. A decision is therefore made after a judgment examining the evidence available and the purpose of inferior functionaries is to gather this evidence.

He also laid stress on the "statistic" function. As Bentham says of this function in the Constitutional Code:

> In the exercise of this function, at the commencement of every year,—the Prime Minister will, in the form of a Message, lay before the Legislative Assembly, the general condition of the State, according to his view of it, pointing their attention, in general terms, to any measures which present themselves as conducing to the conservation or the melioration of it.[52]

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[49] LJ Hume, *Bentham and Bureaucracy*, 234.

[50] See our conclusion and the influence of Benthamites like Chadwick in the creation of the first inspectorates.

[51] J Bentham, *Constitution Code*, 200.

[52] Ibid., section 7, 218.

In other words, the statistic function is linked to the accountability of the government and also to ensuring that Parliament is given the correct representation of the state of affairs in the country.

From a public administration point of view, Bentham's modernity lies therefore in his awareness that the administration needs to be given sound evidence in order to perform its tasks correctly. Also, the legal tools he advocates are echoed in discussions of today.

Bentham seems to be an advocate of contracting out. Critics of privatization today seem to take for granted that privatization and contracting out are recent phenomena.[53] The farming of taxes was well known but it is in this respect interesting to note that most of Bentham's schemes for public services are based on the use of a private contractor. We will give more details of the scheme when we study the Panopticon in the next chapter. The National Charity Company to take care of the poor was to be a joint-stock company. He did not want to farm out all government services, says Hume:[54] the Post Office, the naval dockyard, the issue of currency notes "and some other ventures into banking and insurance" "were to be placed in government hands."[55] He argued that services suitable for direct management were relatively simple whereas those that could be contracted out were endeavors that needed external forms of discipline such as the threat of bankruptcy. For this second kind, the joint-stock company was to be used. The public provision of some service could only be envisaged in the future: "in 'another century or even half a century […] the discipline of government might have made such a progress, and to such a degree outgrown its present habitual disease of relaxation' that it too might have been brought nearly to the level of joint-stock concern."[56] In his scheme to remedy poverty, he imagined a joint-stock company and justified his preference of a private vehicle over a public one saying that it was easier this way to raise funds, and that it was a better way to ensure a thrifty management.[57]

As we will see now, Bentham is aware that it may be in a private company's interests to ill-treat the people of whom it is in charge. Studying now more closely the administration of the Panopticon project, we will see that he thought about incentives to treat prisoners well.

2. THE *PANOPTICON*: ADMINISTRATIVE ARRANGEMENTS

In addition to being a fantastic architectural program, the *Panopticon* is an administrative project. That is what we intend to study now.[58]

The design of the architecture reconciles two public policy objectives: effectiveness, in the sense that the architecture must give the inmates the impression of being at all times in the presence of the inspector, under his scrutiny, and economy. Economy – or frugality, in his

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[53] Jon Michaels, *Constitutional Coup. Privatization's Threat to the American Republic* (Oxford University Press, 2017).

[54] LJ Hume, *Bentham and Bureaucracy*, 137.

[55] Ibid., 137.

[56] Ibid., 138.

[57] J Bentham, *Tracts on the Poor Law and Pauper Management*, Pauper Management Improved, ed. J Bowring, vol VIII (Edinburgh, W Tait, 1838–43) 369.

[58] On the panopticon, see: A Brunon-Ernst, *Le Panoptique des Pauvres: Jeremy Bentham et la réforme de l'assistance en Angleterre* (Presses de la Sorbonne Nouvelle, 2007).

words – for the public purse is a constant concern of Bentham's. As we saw earlier, publicity is used by Bentham as a way to control behavior at no expense. He applies this principle to the whole project, even in its administrative aspects.

The first thing to notice is that the prison is contracted out to a private company. Bentham provides for the powers of the contractors as well as checks to ensure the quality of the service.

2.1 The Contract

In today's world, there is a great division between countries that accept the private prison, such as the United States or the United Kingdom,[59] and those that refuse them, such as France[60] or Israel.[61] Could this difference be explained by the relative importance of utilitarianism in these countries? This is unfortunately not a question we are able to answer.

Bentham's choice of management is to contract out the service: "To come to the point at once, I would do the whole by *contract*. I would farm out the profits, the no-profits, or if you please the losses, to him who, being in other respects unexceptionable, offered the best terms." This sentence seems to imply that the contract is to be awarded after a procurement procedure. The justification Bentham gives for this choice is to reward his invention. Bentham considers himself as having invented a new system; he is therefore to be "rewarded accordingly, just as success in other inventions is rewarded, by the profit which a monopoly secured by patent enables a man to make; and that in proportion to the success which constitutes their merit."[62] This seems to show that in his mind he is going to be given the contract because he is the inventor of the scheme.[63]

He also contends that the contractor should be under an obligation of "*good behaviour*" (Bentham's italics). This means that the contractor can be removed in case of misbehavior, proved in "a legal way." It is not clear what he means by "legal way." Does he refer to formal legal proceedings before the administration or before a court? He does not say. The contract is also to be awarded for life, which is very unusual for contracts of this kind because the contractor needs to be under competitive pressure to improve the service. Here again, the conflict of interests between Bentham as an inventor and Bentham as a contractor seems obvious. As he is the inventor, only he, it seems, can run the facility. He justifies such a provision by saying that it is the best way to secure a good price. Also, the life term gives an incentive to the contractor to disclose as much information as possible.[64]

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[59] T Jones and T Newburn, "Comparative Criminal Justice Policy-Making in the United States and the United Kingdom: The Case of Private Prisons" (January 2005) 45/1 *The British Journal of Criminology* 58–80; DC McDonald, "Public Imprisonment by Private Means—The Re-Emergence of Private Prisons and Jails in the United States, the United Kingdom, and Australia" (1994) 34 *Brit. J. Criminology* 29.

[60] Conseil constitutionnel, décision no 86-207 DC des 25–26 juin 1986.

[61] HCJ 2605/05 Academic Center of Law & Business v Minister of Finance, 27, 27 (2009) (Isr.).

[62] M Bozovic, *Jeremy Bentham: The Panopticon Writings* (Verso, 1995) 51.

[63] P Delvolvé, 'Quelle est la nature juridique du contrat de gestion d'un Panoptique?' in *Bentham juriste. L'utilitarisme juridique en question*, eds M Bozzo-Rey and G Tusseau (Economica, 2011).

[64] "It is for clearing away any as much as possible every motive of pecuniary interest that could prompt him to throw any kind of pecuniary interest that could prompt him to throw any kind of

It is interesting to note that private delivery of public service seemed to have been a contested issue then as it is today. Bentham mentions this: "But *contractors*, you will say perhaps, or at least if you don't, there are enough that will, '*are a good-for-nothing set of people; and why should we be fleeced by them? One of them perjured himself not long ago, and we put him into the pillory. They are the same sort of gentry that are called farmers-general in France, and publicans in the Gospel, where they are ranked with sinners; and nobody likes them anywhere*.'" (Bentham's italics). These letters are written in 1787 and it is true that the reputation of the farmers-general in France was the object of much discontent and would be discussed at the beginning of the French revolution.

The revenue the contractor gets comes from the inmates' labor[65] – this is the same system imagined by Bentham for his schemes for the poor with the National Charity Company.[66] Forced labor is the key to the financial success of the institution. The prison is to be a factory and the inmates are to work there. Bentham's argues that the inmates' work should be agreeable to them.[67]

One can see the dangers of such a situation. We will see how Bentham provides for checks on the behavior of the contractor toward the inmate.

2.2 Contractor's Powers

The contractor is also to be given "all the powers that his interest could prompt him to wish for."[68]

The contractor has power over the inmates. The delineation of this power is dealt with in the Letter XII. First, Bentham establishes the power he does not have. He does not have the power to starve the inmates. The incentive of a contractor is indeed to get as much money as possible from the service. He has no interest in the well-being of the people it serves because he does not fear competition. Inmates are not free to choose the prison they will go to. In addition, in Bentham's scheme, the contractor has the contract for life. There is no incentive for virtue and altruism. That's why he thinks that inmates should have as much wholesome bread[69] and as much water as they wish, but nothing else.

Bentham also grants the contractor a power of correction over the inmates. He is aware that the contractor could abuse this power. However, publicity, and the possibility for the inmates to complain, could be enough to ensure that this power is exercised wisely:

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cloak or reserve upon any of his expedients for increasing his profits, that I would insure them to him for *life*" (Bentham's italics) in M Bozovic, *Jeremy Bentham: The Panopticon Writings* (Verso, 1995) 53.

65 M Bozovic, *Jeremy Bentham: The Panopticon Writings* (Verso, 1995) Letter X, p.54.

66 J Bentham, "Essays on the Subject of the Poor Laws," *The Collected Works of Jeremy Bentham: Writings on the Poor Laws*, ed. Michael Quinn, vol 1 (Oxford University Press, 2001); CF Bahmueller, *The National Charity Company. Jeremy Bentham's Silent Revolution* (University of California Press, 2018) 32.

67 M Bozovic, *Jeremy Bentham: The Panopticon Writings*, 57.

68 Ibid., 52.

69 In Bentham's mind wholesome bread is bad: "Bread, though as bad as wholesome bread can be, they shall have, then, in plenty: this and water, and nothing else." M Bozovic, *Jeremy Bentham: The Panopticon Writings*, Letter XII, 63.

> If, after all, it should be insisted that some power of correction would be absolutely necessary – for instance, in the case of a prisoner's assaulting a keeper or teacher at the time of receiving his food or his instruction (a case which, though never very probable, would be always possible) – such a power, though less necessary here than anywhere else, might, on the other hand, be given with less danger. What tyranny could subsist under such a perfect facility of complaint as is the result of so perfect a facility of inspection?[70]

A correction book is to be kept recording every punishment and the reasons for it. There is apparently a sanction in case the record of a punishment is not written down: the punishment must be considered a "lawless injury"[71] according to Bentham. It is not entirely clear what that means. Does it mean that the inmate can go to court? Another layer of protection can be envisaged according to Bentham: the presence of someone else as a "witness of the mode and quantum of correction."[72]

The powers of the contractors to discipline the inmates is therefore important. The whole equilibrium rests on the checks he imagined. But he makes no reflection on their rights as inmates. He leaves the question of human rights aside, but he excludes the use of physical punishments to discipline the inmates.

2.3 Contractor's Checks

There are two sets of control devices. One is addressed to the guardians, who are also controlled, and the other to the contractor himself.

The institution Bentham establishes is as much a prison for the inmates as it is for the employed: "Another very important advantage […], is, that the *under* keepers or inspectors, the servants and subordinates of every kind, will be under the same irresistible controul with respect to the *head* keeper or inspector, as the prisoners or other persons to be governed are with respect to *them*" (italics are Bentham's).[73] Bentham's words show quite well to what extent the administration he envisages is a disciplinary one, as Foucault would have said, the employees being under the scrutiny of one another.[74] Complete visibility ensures that even the guardian will be under control.

Also, he imagines control devices applying to the company to discipline its behavior. The control of the establishment is ensured by publicity. Bentham argues: "I take for granted as a matter of course, that […] the doors of these establishments will be, as, without very special reason to the contrary, the doors of all public establishment ought to be, thrown wide open to the body of the curious at large—the great *open committee* of the tribunal of the world."[75] It is interesting to note that Bentham acknowledges the public character of the service and this entails responsibility towards the public. The contractor will be under a duty "to disclose, and even to print and *publish* his account – the whole process and detail of his management – the whole history of the prison. I will require him, I say, on pain of forfeiture or other adequate

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[70] Ibid., 64.
[71] Ibid., 64.
[72] Ibid., 64.
[73] Ibid., 45.
[74] M Foucault, *Surveiller et punir. Naissance de la prison* (Gallimard, coll. Bibliothèque des Histoires, 1975).
[75] Ibid., 48.

punishment, to publish these accounts, and that upon oath" (Bentham's italics).[76] The punishment associated with concealment is therefore strong enough to ensure compliance, he thinks. Bentham makes the contractor examinable viva voce upon oath any time.

The control over the contractor is therefore quite strong, especially compared to the current practice of contracted-out services in France. This is a security for the service, because the State can understand the situation of the contractor and the public can see the reasons for the failure or the success. The public, the State, but also prospective contractors can learn from this experience. The purpose of publicity is to enlighten all the stakeholders. Information, in Bentham's mind, improves everyone. The contract here materializes this expectation.

We already saw that it could be in the contractor's interest to ill-treat the inmates. Bentham foresaw this difficulty. We already said that they could have all the bread and water they want. The contract should also contain a sanction, thinks Bentham: "But, besides preventing his starving them or using them ill, there is another thing I should be much inclined to do, in order to make it his interest to take care of them. I would make him pay so much for every one that died, without troubling myself whether any care of his could have kept the man alive."[77] This penalty is meant to force the contractor to treat the inmates with humanity.

The degree of detail of the scheme is impressive. Bentham designed all the incentives possible to control the behavior of the contractor, the guardians, and the inmates. Publicity is key to the good functioning of the contract. There are several areas of uncertainty: do the inmates have remedies against ill-treatment? What is exactly the process of revocation of the contract? What exactly is the price paid by the State? As inmates are working, is the service free for the public purse?

The project seems visionary indeed, but Bentham did not see that the problems which private prisons create are wider. These companies in the United States are incentivized to corrupt judges so they pronounce more prison penalties.[78] Also, they lobby for more punishment.[79] The problem is that the system is unhealthy as a whole. Reports also show that the treatment of inmates is poor.[80]

Despite this, the degree of attention Bentham devotes to the administrative arrangements of the project is unprecedented, with no equivalent in future legal or philosophical thinking.

3. CONCLUSION: LEGACY AND FUTURE RESEARCH

Bentham's legacy in the field of administrative reform is twofold: first, in the ideas he had about the possibility to improve social conditions through reform; second, his followers would be instrumental in creating the new administration of the 19th century, especially the inspectorates. As Arthurs contends:

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[76] Ibid., 52. He applies the same degree of publicity to the National Charity Company: CF Bahmueller, *The National Charity Company. Jeremy Bentham's Silent Revolution*, 188.

[77] M Bozovic, *Jeremy Bentham: The Panopticon Writings*, 64.

[78] This is the kids for cash scandal: I Urbina, "70 Youths Sue Former Judges in Detention Kickback Case" (26 February 2009) *New York Times*.

[79] GI Galinato and R Rohla, "Do Privately-owned Prisons Increase Incarceration Rates?" (December 2020) 67 *Labour Economics*.

[80] See the report by Equal Justice Initiative, available at https://eji.org/issues/prison-conditions/

> New definitions of government responsibilities […] evoked new ideas about government organisation. The Factories Act of 1833 was a pivotal event in the process of rethinking government organisation. Previous factories legislation had failed because it was dependent on enforcement by local justices. Acting under the influence of Benthamite reformers—principally Edwin Chadwick, who was active in many similar enterprises—the royal commission of 1833 recommended the appointment of factory inspectors by the national government with a mandate and extensive power to enforce the proposed new legislation.[81]

The Benthamites were key in the reform of the machinery of administration, laying the foundation for a strong central state to the expense of the local justices of the peace system, who were responsible for the failure of many policies toward the poor. This is a central evolution, attributable to Bentham's legacy in British politics.

The importance Bentham gives to publicity seems greater than that currently provided in the law in many countries. In this sense, he is a visionary. Controlling administrative power through reason giving, access to documents, and access to archives is a modern evolution of administrative law after the Second World War.

This study calls for future research on this very important aspect. We were not able to describe all of Bentham's projects and ideas. This would be an interesting enterprise. Also, it is complicated to understand to what extent Bentham was an innovator in this field because of the lack of studies on the administration at the time. Administrative law was not developed in England until the 20th century and the history of administrative law is also lacking.

It is common wisdom to say that contracting out is a new phenomenon. We tried to show in this study that contracting out is at the centre of Bentham's administrative law. Bentham's administrative law is, in this respect as well as many others, really visionary.

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[81] HW Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985) 94.

7. Utilitarian legal procedures

Francesco Ferraro

1. INTRODUCTION: UTILITARIANISM AND DECISION

To speak of the relationship between utilitarian legal theory and the law of procedure means to address one of the central issues for utilitarianism: namely, whether it is more desirable that the maximization of utility be pursued *directly* or *indirectly*. In the first case, in choosing how to act, the agent takes into account the foreseeable consequences of each action. In the second case, the agent decides how to act by relying on other considerations, such as adherence to certain rules or principles, rather than on an assessment of events in the world that the action will causally bring about. Accordingly, we can distinguish between a direct and an indirect-utilitarian decision procedure.

This dichotomy should not be conflated with the well-known distinction between act and rule utilitarianism, which is not about the decision procedure or the criterion for action, but rather about moral evaluation. In the case of act utilitarianism, what count for moral evaluation (that is, the assessment of the moral qualities) of whatever object, such as an action, an institution, and so on, are the consequences of that very object. For rule utilitarianism, instead, what counts for moral evaluation is conformity or non-conformity of our object to a certain rule.[1] The direct–indirect utilitarianism distinction adopted here makes it perfectly possible and consistent, for instance, to endorse act utilitarianism and at the same time decide how to act not by thinking in advance of how utility would be maximized, but rather by adhering to some general pattern.[2] Sometimes, utilitarians have employed this distinction between their criterion of evaluation and their decision procedure as a shield against some of the most well-known arguments against utilitarianism, such as the repugnancy of its implications if looked at from the standpoint of common-sense morality. Utilitarians have been able to reply, for instance, that oftentimes the best decision procedure (that is, the one which maximizes utility) is simply to comply with some well-tested rules of thumb which are already wide-

[1] There are other versions of utilitarianism which separate the moral evaluation of an object (its moral qualities) from the consequences of that same object: for instance, motive utilitarianism (which associates moral qualities with the consequences of the motive prompting an action) and virtue utilitarianism (which assesses whether the action expresses a certain trait of character which maximizes good consequences). All these versions are often grouped as 'indirect' forms of utilitarianism. See W Sinnot-Armstrong, 'Consequentialism' in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Summer 2019 Edition), available at: https:// plato .stanford .edu/ archives/sum2019/entries/consequentialism/. This terminology will not be followed here and the direct/indirect-utilitarian dichotomy will be used only to refer to the decision procedure.

[2] E Wiland, 'How Indirect Can Indirect Utilitarianism Be?' (2007) 74 *Philosophy and Phenomenological Research* 275, 276–7.

spread in society.[3] At times, even relying on intuition, or acting on well-trusted motives (like deep affection for someone), can be the best decision procedure available in terms of utility maximization. Such a rejoinder also allows to circumvent the objection that utilitarian thinking and decision-making are self-defeating, in the sense that, paradoxically, they hinder the very maximization of utility.[4]

2. DIRECT AND INDIRECT UTILITARIAN DECISION-MAKING

As said above, while the divide between act and rule utilitarianism is one between two comprehensive ethical stances, the distinction between direct and indirect utilitarianism is between two ways of making decisions which could be alternatively adopted by the same decisionmaker, within one and the same ethical framework and without questioning the principles of that very framework. In the case of rule utilitarianism, of course, an indirect decision procedure will *usually* make more sense than a direct one. After all, once we have found out which rule has the best consequences, and the compliance with which would make our act morally justifiable, then following that rule in deciding how to act seems the most reasonable thing to do. But this can be at best an empirical correlation, not a conceptual truth. Think of an agent in situations where a utility-maximizing general rule has not been found or devised yet, because (for instance) a vast number of different candidate rules are available. In such cases, a rule utilitarian could agree that the best thing to do is to establish *as a rule* that the prospective decisionmaker decide according to tentative direct calculations of utility and the expected consequences of that single decision. This course of action could even be generalized, as a necessary step for testing empirically which of the available rules would be the best in similar situations, or for devising a rule in case it is lacking. As for act utilitarians, it has been said above that they could resort to indirect-utilitarian procedures, whenever doing so promises to bring about the best consequences. Among other things, applying pre-existing rules is usually quicker and easier than calculating expected utilities. Calculating is an act in itself and it could require so much time and other resources that its consequences become suboptimal in utilitarian terms. Moreover, the agent could be vulnerable to biases or incompetent.[5] Every point of view is bounded and its limitations could suggest that decisions be made according to rules previously laid out by those who are better situated for anticipating their consequences. The agent herself – if she is a consistent utilitarian – should take into account the boundaries of direct calculations and adhere to fixed patterns when this is the most promising path to utility maximization.[6]

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[3] T Mulgan, *Ethics for a Broken World: Imagining Philosophy After Catastrophe* (Cambridge, Cambridge University Press, 2011) 83–4.

[4] This is a well-known objection at least since DH Hodgson, *Consequences of Utilitarianism: A Study in Normative Ethics and Legal Theory* (Oxford, Clarendon Press, 1967).

[5] E Wiland, 'How Indirect Can Indirect Utilitarianism Be?', 278.

[6] This is why Richard Wasserstrom has put forward a utilitarian two-level decision procedure for the common-law judges, differing from equity (which only takes into account the utilities at stake in the case at hand): the judge should decide by applying a rule which, in turn, would maximize social happiness (if applied to all analogous cases). See R Wasserstrom, *The Judicial*

Of course, one should always give due consideration to what is at stake. It is true that the decisionmaker may find herself faced with the prospect of huge losses of utility if she makes the wrong decision by employing a direct-utilitarian procedure. In this case, adhering to already existing, utility-maximizing rules (if they are available) appears to be the most sensible thing to do, especially when those rules have been widely tested. But what if following a pre-established rule seems to lead to terrible consequences? Sometimes, cases can occur where some relevant circumstances are so unusual that they have never been envisaged in laying down the rule which applies to them. In the eyes of the decisionmaker, those unusual circumstances will impact on the consequences of the decision in such a way that they could turn out very different from what could be expected at the moment of laying down the general rule. Situations of this kind are, for Richard M. Hare, what should prompt decisionmakers to shift from the 'intuitive' to the 'critical' procedure of moral thinking: that is, from adherence to widespread traditional principles and rules to reflection on unusual cases and competing prima facie plausible rules for decision-making.[7]

In these latter cases, one could be tempted to allow the decisionmaker to make her own calculations and to break the rule, if necessary. This is where also a utilitarian ethical framework needs to accommodate the classical Aristotelian concern for *equity* as a correction of pre-established rules of justice[8] – a concern which has been reflected in the history of both Common Law and Continental legal systems, which have progressively integrated rigid rules with more flexible standards, such as that of 'reasonableness'. If we apply these considerations to the legislative role in establishing general rules, we must recognize the obvious fact that the lawmakers' cost–benefit assessments can be proved wrong by unpredictable events and changing social and economic contexts: since the legislators' knowledge of the effects of a law is only probabilistic, an element of 'diachronic contingency' must be presupposed in evaluating legislative rationality.[9] Uncertainty regarding the future, then, should always be taken into account when devising general rules, and one way of neutralizing it is by accepting equitable decisions in the form of direct-utilitarian calculations.

An example by Peter H. Schuck illustrates the different possible strategies to tackle uncertainty when establishing general rules.

> Even if regulators cannot map the future in detail, they can sometimes discern the broad contours of contingency that must be faced and design rules to conform to that dimly perceived topography. Suppose, for example, that an official must regulate a rapidly evolving technology, such as telecommunications. She knows or strongly suspects that the activity will present a very different face in twenty years than it does today. She anticipates that technology, industry structure, market conditions, and consumer preferences will change significantly but she cannot predict with confidence the precise nature of those changes. Unwilling to rely upon highly speculative forecasts, but aware of the uncertainty problem, she has several options. She may decide to proceed incrementally, eschewing

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Decision: Toward a Theory of Legal Justification (Stanford, Stanford University Press, 1961) 138–61.

7 RM Hare, *Moral Thinking: Its Levels, Method, and Point* (Oxford, Clarendon Press 1981) 44–64.

8 Aristotle, *Nicomachean Ethics*, V 1137b 12–29.

9 LJ Wintgens, 'The Rational Legislator Revisited. Bounded Rationality and Legisprudence' in LJ Wintgens and AD Oliver-Lalana (eds) *The Rationality and Justification of Legislation: Essays in Legisprudence* (Heidelberg etc, Springer, 2013) 1–31.

> rules in favor of policymaking through case-by-case adjudication. She may instead promulgate rules containing vague language or multiple, unweighted decision criteria, thereby preserving flexibility for the volatile future. Alternatively, she may devise a more determinate rule to govern what she thinks the future will bring but create an auxiliary administrative process that can provide equitable relief from the rule whenever appropriate. Each of these approaches recognizes the substantial claims that equity may assert against an uncertain future.[10]

The first two options (that is, 'particularistic' case-by-case adjudication and very indeterminate rules) present us with the abovementioned difficulties of direct utilitarian calculations, that is, long and possibly costly decision-making and increased vulnerability to biases and incompetency. The third option allows decisionmakers to depart from the established rule to avoid suboptimal results. However, breaking an already existing rule, supposedly well known and widely followed in society, can be described as an act in itself and *has consequences itself*. There might be widespread expectations that the rule would be followed in all the cases to which it applies. Disappointing such expectations could result in uncertainty and coordination problems.

If the decisionmaker, as in the case of judges and also administrative authorities, acts within a hierarchical organization, further problems may ensue, as the rules are usually imposed authoritatively to subordinates and wilfully disobeying them is insubordination. No organization can last if insubordination is tolerated and widespread. If the organization in question is political in nature, like a state, more problems can arise with regard to power allocation and control. In this case, intermediate decisionmakers, who do not comply with the rules already established at the highest levels of the hierarchy, add an element of arbitrariness to choices impacting on the lives of other members of the organization. On the one hand, they deny the presupposed allocation of power (not only in hierarchical terms, but also as regards competences and role separation). On the other hand, they escape control, since the establishment of a general rule is (usually) public and this makes assessment and discussion possible, at least theoretically.[11] Moreover, in modern democratic states the power to enact general rules usually resides in elected legislators, who respond to their constituents. If those rules are not enforced and decisions are made on different grounds, the shift of power towards unaccountable, or less accountable, decisionmakers is obvious. This is why, for instance, under the US Administrative Procedure Act (APA) governing the procedures of administrative agencies, agency decisions are subject to judicial review, to check (among other things) that they are not against the law, in excess of statutory jurisdiction or without observance of procedure required by law.[12] Even in a Supreme Court decision which some have criticized as presenting the danger of undue deference to administrative agencies' statutory interpretations – specifically, with regard to the expansion of an agency's jurisdiction[13] – the Court has made it clear that when the intent of the Congress is 'unambiguously expressed', it must always be given effect.[14]

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[10] PH Schuck, 'When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy through an Exceptions Process' (1984) 1984 Duke LJ 163, 173–4.

[11] GJ Postema, *Utility, Publicity, and Law: Essays on Bentham's Moral and Legal Philosophy* (Oxford, Oxford University Press, 2019) 283–302.

[12] 5 US Code § 706.

[13] B Schwartz, 'Some Crucial Issues in Administrative Law' (1993) 28 Tulsa LJ 793, 804–11.

[14] *Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*, 467 US 843 (1984).

Now, good organizations normally provide for cases where complying with the rules would bring about unacceptable consequences (that is, unacceptable for the organization itself): they may contemplate, for instance, a 'good reason' clause as an exception to the rules, so that subordinate decisionmakers are excused for breaking rules if and only if they had good reason for doing so. Laying the burden of proof on them could be expedient, in order to preserve the allocation of power and the possibility of controlling them by making them accountable. However, adding the 'good reason' clause would actually change the rules to which it applies. Not only in the general sense that every exception and qualification, when added to a rule, turns it into a different one – this particular clause would empty the rule of all peremptoriness: it would turn it into a rule of thumb, or maybe into a piece of advice. In such a way, rules become non-mandatory 'prudential prescriptions'.[15] They could still be used as 'time and labour saving devices',[16] since they would reduce the costs (widely understood) of decision-making. However, their role would be reduced to bringing to light how previous cases, analogous to the one at hand, have been decided with good outcomes (in utilitarian terms). They would serve to recapitulate previous decisions, so that the decisionmaker could use them as a guide. This is what John Rawls famously called the 'summary view' of rules.[17] Whenever the decisionmaker deems it necessary, she will have to take pains to foresee the consequences of her decisions and directly calculating the expected utility by herself.

A second strategy, however, could be that of keeping rules in all their peremptoriness, that is, as mandatory prescriptions that the decisionmaker cannot dispense with, even when it would seem expedient; but allowing her, at the same time, to suggest an amendment to the pre-existing rules whenever the particularities of the case at hand suggest a different regulation. Thence, while the rules would not be downgraded to simple pieces of advice or summaries of previous decisions, they would be open to constant improvement and reformulation, so that they progressively become more fine-tuned in order to adjust to reality. Such a solution could become at times unpractical, but is surely alluring, because it promises to retain both the advantages of indirect utilitarianism (which derive from what John Harsanyi called *expectation effects*, *incentive effects* and *coordination effects*)[18] and those of direct utilitarianism (essentially, flexibility). Nonetheless, at least three different problems of a practical nature should be solved in order to preserve the desirable effects of mandatory, pre-established regulation. The first problem would be that of making amendments to the rules known enough to the addressees, so that they can form reliable expectations as to future decisions which could impact on their lives. Probably, changes to the rules should not be too swift, frequent and radical. The second problem would be that of disrupting as little as possible the expectations shaped by those rules in their previous form, because, among other reasons, without a certain degree of stability, expectations themselves become impossible to form. In this regard, too, amendments should probably be as slow, infrequent and incremental as possible. The third problem would regard how to decide the very case at hand which prompted a change in regulation. Should the old rules be applied for the last time, so that previous expectations are met, or should the new case be regulated in a new way, in order to avoid those suboptimal results which called for an

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[15] W Twining and D Miers, *How to Do Things with Rules* (Cambridge, Cambridge University Press, 2010) 32, 81.

[16] J Raz, *Practical Reasons and Norms* (London, Hutchinson, 1975) 59.

[17] J Rawls, 'Two Concepts of Rules' (1955) 64 *The Philosophical Review* 3, 18, 19.

[18] J Harsanyi, 'Rule Utilitarianism and Decision Theory' (1977) 11 *Erkenntnis* 25, 35, 36.

amendment? This last problem has been tackled in US courts with the application of so-called prospective overruling, which allows the courts to comply with the *stare decisis* and to safeguard the system's reliability while, at the same time, satisfying the need for flexibility and evolution.[19] In criminal cases, for instance, this means that a defendant cannot be convicted of a crime for conduct which would not have been considered criminal under previous statutory interpretation, which nonetheless will have to be considered superseded for future cases (thereby making punishable the conduct in question). However, this kind of solution has been accused of being an usurpation of legislative power by the courts, by blurring the distinction between adjudicating present issues and rulemaking for the future.[20]

Utilitarians have to address all the above problems and questions when thinking of what the role of adjudication in a legal system should be. As opposed to prospective rulemaking, which is meant to address general problems and hypothetical future cases and is mainly (though not exclusively) a task for legislatures, adjudication is the making of decisions regarding present and real cases and is considered equivalent to a judicial decision, regardless of whether those who carry it out are officially considered judges or whether they are members of administrative agencies (as under the APA).[21]

Judicial decisions, like any kind of decision, are subject to the choice between direct and indirect procedures. Choosing wisely is crucial, because decisions in courts will often have significant consequences on the people's lives. Respecting expectations is of paramount importance, as epitomized by the familiar principle of legal certainty. Nonetheless, expectations themselves can conflict and it is not always clear which ones should be given preference. Sometimes it could be unclear what the expectations involved are. Moreover, in some cases respecting expectations could actually lead to clearly undesirable results.

3. THE JUDGE AS AN INTERPRETER AND DECISION-MAKER

Jeremy Bentham's prescriptive theory of adjudication is the most detailed and comprehensive ever offered by an author belonging to the utilitarian tradition: inside it we can find a tentative answer to all the above mentioned problems of utilitarian decision, as well as an application of both direct and indirect decision procedures, in accordance with the different tasks assigned to the judges.

It is barely worth reminding that Bentham sought to codify all laws into a 'complete code' or 'Pannomion', in order to replace all Common Law and dispense with all kinds of judge-made law.[22] As is well known, he thought that Common Law was inadequate as a way of conveying

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[19] HM Hart and AM Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, The Foundation Press, 1994) 599–620.

[20] BH Levy, 'Realist Jurisprudence and Prospective Overruling' (1960) 109 U Pa L Rev 1, 10–12.

[21] 5 US Code § 551: The APA defines 'rule' as 'the whole or a part' of a statement of 'future effect' and 'adjudication' as the issuing or orders, which, in turn, are all final dispositions which are not rules. See also Edward Rubin, 'It's Time to Make the Administrative Procedure Act Administrative' (2003) 89 Cornell L Rev 95, 106.

[22] See, for instance, J Bentham, *An Introduction to the Principles of Morals and Legislation*, edited by JH Burns and HLA Hart, with a new introduction by F Rosen and an interpretative essay by HLA Hart (Oxford, Oxford University Press, 1996) 6 and 305.

a set of authoritative rules for guiding the citizens' conduct and shaping their expectations, mainly due to the lack of a proper and fixed written expression of those rules. The insufficient publicity of the grounds for judicial decisions made those decisions unpredictable, that is, it hindered legal certainty. A certain degree of legal certainty (in the sense of legal predictability) is necessary to obtain the abovementioned effects of expectation, incentive, and coordination, which are of utmost importance in utilitarian terms. Common Law impaired legal certainty not only because of lack of publicity, but also because of deviations from the *stare decisis*: in Bentham's view, the judges had excessive freedom in not applying precedents by distinguishing the case at hand from older ones.[23] But even if this further cause of uncertainty were curbed by strict adherence to precedents, lack of publicity of the grounds for decision would still make the system suboptimal. A complete code of laws, instead, would guarantee that the citizens could foresee the legal consequences of their conduct. The Pannomion was complete in the sense that it was characterized by 'all-comprehensiveness',[24] that is, it was built upon an exhaustive classification of all the possible mischievous acts to be envisaged as offences. The method of progressive bipartition or 'bifurcate method' would afford exhaustiveness by allowing successive subdivisions into conjunctively exhaustive and mutually exclusive classes.[25] The code would be drafted according to this well-ordered plan, by progressive distinctions based on those differences between mischievous acts which are useful to take into account, in order to differentiate the punishments respectively attached to them. However, the complete code was meant as a dynamic system, not as a deductively established static system, where the solution to all possible cases could be predicted in advance. While the *method* of classification guarantees all-comprehensiveness *a priori*, the *substance* of classification (that is, the precise offences) had to be determined by voluntary distinctions.[26] Moreover, Bentham did not seek deductive exactness at case level and 'mechanical adjudication'. First, as we will see, he was aware of the abovementioned problem of suboptimality of rule-following in cases characterized by unforeseen (though relevant) circumstances. Second, the normative premises of the judicial syllogism would be, under such a system, always the product of interpretation purely understood as the ascription of meaning to authoritative utterances, and Bentham thought that there is never one single correct answer to interpretive problems, and recognized that some-

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[23] J Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, edited by P Schofield (Oxford, Oxford University Press, 2010) (henceforth *Limits*) 193–4; J Bentham, *A Comment on the Commentaries and A Fragment on Government*, edited by JH Burns and HLA Hart (London, The Athlone Press, 1977) 192–205. This is why, in his first writings on the subject, Bentham advocated strict adhesion to the *stare decisis* (GJ Postema, 'Bentham's Early Reflections on Law, Justice, and Adjudication' (1982) 141 *Revue Internationale de Philosophie* 219). Later on, he turned to the project of a Digest of both Common Law and Statute Law materials, before embracing the idea of complete codification of the law from scratch (D Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-century Britain* (Cambridge, Cambridge University Press, 1989) 179–98.

[24] J Bentham, *'Legislator of the World': Writings on Codification, Law, and Education*, edited by P Schofield and J Harris (Oxford, Oxford University Press, 1998) 117.

[25] J Bentham, *Chrestomathia*, edited by MJ Smith and WH Burston (Oxford, Clarendon Press, 1983) 206–42.

[26] F Ferraro, 'Adjudication and Expectations: Bentham on the Role of Judges' (2013) 25 Utilitas 140, 144–5.

times the written expression of a rule does not adequately convey the rule itself – or, in other terms, it does not faithfully represent the original will of those who established the rule.

Let us start with the latter problem. Bentham distinguished between two kinds of power of commanding or 'power of imperation': *de singulis* and *de classibus*. Legislative power is usually *de classibus*, that is, it consists of enacting abstract and general rules, addressing ample classes of acts, things and individuals. In forming those classes, the legislator uses 'the generic names which are furnished by the language'. The judges' power, on the contrary, is a power of imperation *de singulis*, that is, they issue commands regarding concrete cases, specific acts and individuals. This power (which Bentham also calls 'accensitive') allows them to aggregate individual members to the classes established by *de classibus* commands.[27] The power of commanding *de classibus* cannot entirely predetermine the exercise of the power of commanding *de singulis*: 'neither of the two includes the power of doing every thing that is to be done by commanding and countermanding. Let a man possess either of them in the amplest extent there will always be something which he can not do without the other.'[28] Thence, legislation cannot entirely predetermine judicial interpretation and make it mechanical: the wording of statutes may set boundaries to the interpreter, but as narrow as these could be, they will never completely eliminate discretion. In this sense, Bentham is no interpretative formalist and, in his view, the judge can never be Montesquieu's *bouche de la loi*. Moreover, Bentham distinguishes between 'strict' and 'liberal' interpretation and acknowledges the necessity of resorting to the latter when a statute has been 'improvidently penned'. A law is, for him, an 'assemblage of signs' expressing the legislator's will,[29] and 'the words of a legislator are no otherwise to be regarded than inasmuch as they are expressive of his will'.[30] However, in some cases the written expression can fail to adequately convey the intended meaning; if interpreted strictly, that is, according to the common usage of the words employed, and applied accordingly, the law would not serve the ends envisaged by the legislator. Therefore, in such cases a more 'liberal' interpretation becomes necessary, which amounts to applying a new restrictive or extensive provision to the main 'imperative' part of the law.[31] To avoid a new growth of judge-made law out of less-than-strict interpretations, Bentham proposes that judges declare explicitly and report to the legislature when they are interpreting liberally, so that these cases can be scrutinized and amendments made to the code of laws.[32] Liberal interpretation, as an alteration of the law aimed at reconstructing a hypothetical legislative will, is a necessary evil and must be kept under control by the legislature.[33]

It should be pointed out, however, that both the rejection of interpretive formalism and the acknowledgment of the need for liberal interpretation (and progressive amendments to the expression of the legislator's will) are, in Bentham's view, unrelated to the aforementioned problem of suboptimal rule-following in unforeseen cases. In other words, legal interpretation is not where we are presented with a choice between direct and indirect-utilitarian decision procedures. According to the London philosopher, the purpose of interpretation, both strict

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27 *Limits*, 102–4.
28 *Limits*, 104.
29 *Limits*, 24–5.
30 *Comment*, 115.
31 *Limits*, 175–176.
32 *Limits*, 228–9.
33 X Zhai, 'Bentham on the Interpretation of Laws' (2017) 38 The Journal of Legal History 282.

and liberal, is to reconstruct the will of the legislator *at the time the law was enacted*. In the case of strict interpretation, by an ascription of meaning the interpreter reconstructs the actual will of the legislator, as expressed by the words employed in the statute. In the case of liberal interpretation, the interpreter departs from the most common meaning of those words, in order to render the hypothetical will which, in her view, the legislator did not actually entertain, but failed to entertain 'only through inadvertency'. Every departure from the legislator's will, even if prompted by a concern for the welfare of the community, 'is not to interpret the law, but to act against it'.[34] Bentham's proposal for avoiding suboptimality while at the same time preserving the expectation-shaping and expectation-protecting functions of the complete code was that of letting the judges suspend the execution of the law as it is[35] and propose an amendment to the legislature.[36] If approved, the amendment would then be applied to the case at hand.

It is worth remarking that, also for Bentham's disciple John Austin, interpretation was not, strictly speaking, a matter of choosing whether to decide in accordance with an indirect-utilitarian procedure based on rule-following or with a direct procedure, that is, after an assessment of the possible consequences of alternative decisions. For Austin, 'the *genuine* extensive interpretation', which is the equivalent of Bentham's liberal interpretation in that it applies a new extensive provision to the imperative part of the law, 'takes the reason of the law as its index or guide […] as a *means* for discovering or ascertaining the specific and doubtful intention' of the lawgiver. But wherever the judges apply directly the 'reason or principle of the statute' rather than merely trying to ascertain the legislator's will, they are departing from the law and practising a kind of 'judicial legislation disguised with the name of interpretation'.[37] In this latter case, their decisions are not guided by the established legal rules but rather by what has been called equity (in the abovementioned, Aristotelian sense).

However, Bentham also remarked that

> law […] will be found divisible […] into two portions or branches: viz. in the first place, that in which the rule of action is laid down, simply and absolutely, without reference to the functions of any such members of the community, as those whose business it is, under some such name as that of Judges […] to secure the observance of it: this branch may be distinguished by the name of main or substantive: in the next place, that in which a description is given of the course to be taken by those same official persons for securing the observance of, and giving execution and effect to, the several arrangements contained in that same main or substantive branch. This branch may be distinguished by the name of the adjective branch or law of judicial procedure.[38]

While the respect of pre-established substantive law seems to call for indirect-utilitarian decision procedures, adjective law is a different matter, as we will see in the next section.

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[34] *Limits*, 175.

[35] Bentham called this the 'sistitive', 'suspensive', or 'execution-staying function': see J Bentham, *The Constitutional Code*, in *The Works of Jeremy Bentham, published under the superintendence of his executor, John Bowring*, Edinburgh, Tait 1838–43 (henceforth *Works*) Vol 9, 508.

[36] This was called by Bentham the "Eventually emendative function". See J Bentham, *The Constitutional Code*, 502–4.

[37] J Austin, *Lectures on Jurisprudence, The Philosophy of Positive Law* (New York, Holt and Co. 1875) 294.

[38] J Bentham, *'Legislator of the World'*, 191.

4. DIRECT AND INDIRECT UTILITARIANISM IN LEGAL PROCEDURES

Bentham was also the first utilitarian thinker to tackle the problem of decision-making in the sector of procedural or adjective law. Borrowing a tag from William Twining (who applies it specifically to Bentham's views on evidence), we can call him an 'anti-nomian' with respect to adjective law,[39] in the sense that he rejected fixed, pre-established rules. His views on the subject depended on the ends which he ascribed to judicial procedure, that is, the specific ways in which adjective law can be used to maximize utility.

For Bentham, the 'ends of justice', that is, the ends of judicial procedure, are of two kinds: 'direct' and 'collateral'. Direct ends are avoiding 'misdecision' and 'failure of justice': that is, adjective law should maximize the application of the legislator's will, expressed by substantive law – ideally, by a complete code of laws, as said above. Collateral ends are 'prevention of delay, vexation, and expense, in so far as superfluous, or preponderant (viz. over the mischief from misdecision or from failure of justice)'.[40] A 'natural system of procedure' would be one allowing the judges to pursue both direct and collateral ends of justice, as opposed to the 'technical system' epitomized by the English Common Law procedures (which rather pursued the 'ends of judicature', namely, the maximization of the 'sinister interests' of judges and lawyers).[41] All technicalities and rigid procedural rules would stand in the way of both application of the legislator's will and minimization of collateral damages. The natural system of procedure would leave the judges very ample powers in pursuing the ends of justice directly: they would have to balance the utilities of applying substantive law (supposedly issued by the legislator as a body of mandatory rules, aimed at maximizing the happiness of the community) against the disutilities in the shape of delay, vexation and expense for the parties and all those involved in the suit. Bentham also provides examples of such balancing on the judges' part, mainly in the field of evidence, where he rejected fixed rules (especially the exclusionary rules which ruled out, for instance, hearsay and self-inculpating evidence). In his view, the judge should be left free to take into account all the evidence deemed relevant on substantial grounds.[42] The only limitations to such freedom should be those dictated by the collateral ends of justice (assuming that evidence is collected with the purpose of applying substantive law, that is, to pursue the direct ends of justice). In some cases, collecting and examining a certain piece of evidence would be so costly and/or time-consuming that the benefits, in utilitarian terms, of maximizing the application of substantive law would be overweighed.[43] The conflict

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[39] W Twining, *Theories of Evidence: Bentham and Wigmore* (London, Weidenfeld & Nicolson 1985) 66 ff; W Twining, 'Bentham on Evidence' in GJ Postema (ed), *Jeremy Bentham: Moral, Political and Legal Philosophy*, II (Aldershot, Dartmouth 2002) 443 ff. See also O Leclerc, Utilitarianism and the Law of Evidence, in this volume.

[40] J Bentham, *Scotch Reform*, in *Works* Vol 5, 1, 5.

[41] *Scotch Reform* 7; *Principles of Judicial Procedure*, in *Works* Vol 2 1; *Equity Dispatch Court Proposal*, in *Works* Vol 3, 297; *Equity Dispatch Court Proposal*, in *Works* Vol 3 319; *Rationale of Judicial Evidence, Part II*, in *Works* Vol 7 1, 196–334.

[42] See also O Leclerc, 'Utilitarianism and the Law of Evidence', in this volume.

[43] Bentham provides the following example: 'By laying a barrow-full of rubbish on a spot on which it ought not to have been laid (the side of a turnpike road,) Titius has incurred a penalty of five shillings. No man was witness to the transaction but Sempronius; and, in the station of writer,

between direct and collateral ends of justice is omnipresent in judicial procedure and, for Bentham, the latter should not always be sacrificed to the former: it is rather a matter of direct assessment of the utilities involved and the consequences of different courses of action. In each case, it is the judge's responsibility to make such assessment.[44] In this sense, the judge should take into account both the expectable damages of a wrong decision or failure to do justice *and* the actual probability of such wrong decision or failure of justice.

As for the first leg of this test, if the case is criminal, the mischief caused by the alleged offence should be weighed against the mischief caused to the defendant by potential punishment. In civil cases, the judge should make an estimate of the entity of the benefits and burdens at stake for both parties, also taking into account those 'circumstances influencing sensibility' that Bentham enumerates in the *Introduction to the Principles of Morals and Legislation*: that is, those circumstances that make different people more or less sensitive to different sources of pain and pleasure.[45] Think, for instance, of a case where an employee is suing her company, a large corporation, claiming a personal injury for negligence. The judge could consider that the damages requested by the plaintiff might constitute only a negligible loss for the corporation, while they are a considerable sum with respect to the employee's needs. In cases like this, the judge should be more tolerant of the costs and inconveniences involved in the examination of evidence supporting the plaintiff's claim, rather than those involved in evidence called for by the defendant. Regarding the second leg of Bentham's test, that is, evaluation of the actual relevance and usefulness of the evidence for giving appropriate execution to substantive law, the judge is called to a probabilistic assessment, that is, to estimate the risk of an incorrect final decision due to the exclusion of a piece of evidence in question.

What is the utilitarian rationale behind Bentham's stance? In deciding whether to exclude evidence, the judges have to balance the disutilities involved by its exclusion against those caused by its admission – also taking into account that exclusion usually only implies a chance of wrong decision or failure to apply the law, not their certainty. This can clearly be done only by someone who knows the specificities and circumstances of the case at hand: sticking to fixed, peremptory rules would be impractical at best, disastrous at worst. Therefore, this kind of decision should be made on a question of fact, that is, by assessing the circumstances before deciding accordingly, not on a question of law; the legislator should refrain from regulating the matter. Neither statutes nor precedents should tie the judge's hands in this respect. Even the previous decisions of the very same judge should be kept out of the assessment, 'for that, in these cases, the path of precedent is the path of constant error'.[46] More generally, in procedural matters all rules, for Bentham, should be regarded as non-peremptory or non-mandatory and subject to the abovementioned 'good reason' clause: they can be disregarded whenever the decisionmaker has good reasons for it (albeit with the burden of proving it).[47] As said above,

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Sempronius is gone to make his fortune in the East Indies. Should Sempronius be forced, if he could be forced, to come back from the East Indies for the chance of subjecting Titius to this penalty? Who would think of subjecting Sempronius to the vexation?—who would think of subjecting Sempronius, or anybody else, to the expense?' (*Rationale of Judicial Evidence, Part II*, 335–6).

[44] *The Constitutional Code*, in *Works* Vol 9, 463; *Rationale of Judicial Evidence, Part II* 336.

[45] J Bentham, *An Introduction to the Principles of Morals and Legislation*, edited by JH Burns and HLA Hart (London, The Athlone Press, 1970) 51–73.

[46] *Rationale of Judicial Evidence, Part II* 345.

[47] *Principles of Judicial Procedure* 32.

in this way rules become pieces of advice or rules of thumb, that is, prudential prescriptions meant to provide the decisionmaker with guidance on how to achieve a certain objective, which can be dispensed with whenever the objective itself seems to require so. Therefore, in the field of adjective law there are good utilitarian reasons, at least in Bentham's view, for adopting direct-utilitarian decision procedures at case level.

Many of the rules usually derived from the right to a fair trial and the rights of the accused, as recognized in international charters and covenants and national constitutions, would not hold in the Benthamic 'natural' system of procedure.[48] Even a minimal conception of procedural fairness, seen as requiring adversarial proceedings in which the parties are placed on an equal footing and their evidence receives equal consideration, would be ruled out.[49] If the judge reckons that an 'asymmetrical' proceeding, in which, for instance, the evidence called for by one party is examined more accurately than the one called for by another, is better suited for pursuing the 'ends of justice' in the case at hand, then no one should interfere (provided, of course, that good reasons can be offered). Of course, utilitarianism may well adopt a stance which conflicts with well-established and widespread interpretations of basic rights. To explain the reasons behind this position, there is no need to refer to Bentham's well-known opposition to the language of fundamental constitutional rights. Rather, Twining effectively summarized Bentham's view by pointing out that for him, there are no individual rights regarding adjective law, because all rights – as well as legal duties and obligations – pertain to substantive law.[50] Legal procedures are essentially seen as tools for enforcing the substantive rules enacted by the legislator and the duties and rights created by those rules. Following Mirjan Damaška, we could say that this view does not respond to a model of justice which sees the process as a means to resolving a conflict between two parties (dispute resolution), typical of the Anglo-American legal systems. It rather belongs to a tradition which conceives the process as a means to enforcing state policies, typical of Continental systems and reflecting the ideology of an 'activist' role of the state.[51] It is typical of this latter model that procedural rules are flexible instructions, which can be departed from whenever the disadvantages of doing so are outweighed by other policy considerations. No rights properly said are granted to the parties regarding procedures: while in the 'conflict resolution' model the parties use their rights as they deem proper for winning the dispute, and maintain an ample share of control over the process, in the 'policy implementing' model full-fledged procedural rights could pose obstacles to the enforcement of substantive regulation.[52]

Comparing, on utilitarian grounds, the respective advantages and drawbacks of the above two alternative models would probably be too ambitious a task. Even more ambitious, and maybe impossible, would be an assessment of the utilities deriving from the two ideologies on the role of the state which, in Damaška's view, lie behind each model. However, it could still make sense to ask whether an anti-nomian stance such as Bentham's on procedures should

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[48] See, for instance, Art. 6 § 1 of the European Convention on Human Rights.

[49] See, for instance, *Star Cate Epilekta Gevmata and Others v. Greece* App No 54111/07 (ECHR, 6 July 2010).

[50] W Twining, *Theories of Evidence: Bentham & Wigmore* (London, Weidenfeld & Nicolson 1985) 72.

[51] M Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven and London, Yale University Press 1986) 71–96.

[52] M Damaška, *The Faces of Justice and State Authority* 152, 161.

be endorsed on utilitarian grounds. Leaving such ample powers to the judge along with the responsibility to determine how to proceed on a case-to-case basis would affect the citizens' expectations regarding justice. More precisely, it would impair their capacity to form stable and reliable expectations, thereby diminishing overall utility. In order to foresee the legal consequences of a certain act or fact, it is not sufficient to know them in the abstract, by reading and interpreting written substantive law: being able to foresee, at least to a certain extent, *how* that certain act or fact will be ascertained in a court is also of capital importance.

Moreover, what is at stake is not only the need to control the judges' exercise of power, in order to prevent abuses, corruption, and so on. Surely, more freedom in procedures could involve the risk of undesirable and arbitrary judicial behaviour. But Bentham thought that the best checks on such power were external, not internal, to procedure: rather than regulating the process with rigid rules, he reckoned that a number of 'securities' should be devised, as institutional mechanisms meant to guarantee the judges' individual responsibility and their pursuit of the 'ends of justice'. Most of such securities had to do with transparency and publicity, so that public opinion could scrutinize the judges' behaviour and secure their 'appropriate aptitude', both 'moral' and 'intellectual' However, even if the judges, left with ample discretion in pursuing the 'ends of justice', were to exercise their powers scrupulously and with the best intentions, their task would still be extremely difficult. As pointed out by Damaška, the direct assessment of the consequences of departing from flexible, non-mandatory rules of procedure, made in each case to maximize the application of substantial law and minimize collateral damage, is by no means an easy assignment:

> [T]he application of this consequentialist calculus would expand the field of inquiry exponentially, and can present intractable difficulties of solution. Procedural rules of a 'dual' nature are a good illustration. The fact that the manner in which a confession was extracted violates procedural regulation and also falls within the definition of a crime does not necessarily mean that the departure from both procedural and substantive norms was not justified in the concrete constellation of events. Perhaps the state's interest in accurate disposition of a particular case should be ranked so highly that the need for information constitutes an acceptable utilitarian justification for the breach of norms. Obviously, solutions to this consequentialist problem can be of staggering complexity to anyone whose vision does not encompass – as does the vision of Plato's guardian – 'concrete totalities'.[53]

5. RIGHTS ISSUES IN ADJUDICATION: ILLEGALLY OBTAINED EVIDENCE AND ADVERSARIAL VERSUS INQUISITORIAL PROCEDURES

Damaška warns of the risk of arbitrariness, bad judgement and invidious discrimination. However, what sticks out even more is that it is difficult to give separate consideration to the fields of substantive law and of adjective law, as Bentham does, since the two overlap and procedural choices could impact on the protection of rights established by substantive law. While flexibility can be expedient, and often advisable, in civil procedure, it poses considerable problems in criminal procedure. The case of illegally obtained evidence is a striking example: should the judges be allowed to take such evidence into consideration? Of course, extracting evidence against the law is by definition a misdeed and would be subject to punish-

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[53] Ibid., 151.

ment by substantive law; therefore, the use of such evidence in trial would not exculpate those who have obtained it. But still, admitting it to examination could, for a number of reasons, encourage the kind of illegal behaviour which afforded it. This is especially worrying when evidence is obtained through a breach of fundamental rights, such as by means of torture. On the other hand, establishing its inadmissibility under all circumstances could hinder the correct assessment of the relevant facts. Unlike in classical 'ticking-bomb scenarios', the consequences of renouncing evidence such as illegally extracted confessions would hardly be disastrous, because the circumstances of a judicial decision are usually not characterized by a pressing urgency to reach a verdict. Nonetheless, the state interest at stake – understood, in utilitarian terms, in accordance with the greatest happiness of the greatest number – could be considerable enough to push for the most accurate disposition of the case at hand, even if this involves the admission of illegally obtained evidence; for instance, when there is a risk of leaving dangerous criminals on the loose.

Bentham was against exclusionary rules of all sorts, as hindrances to exact fact-finding on the judge's part, and only admitted pieces of advice and non-peremptory rules of thumb in this field as in all adjective law.[54] Still, a utilitarian point of view on the problem need not stick to this position: as Damaška pointed out, it may very well be that the individual judge is not capable of assessing correctly all the relevant utilities at stake, nor the consequences of her decision of admitting or not admitting illegally obtained evidence. The problem is not merely epistemic (ascertaining the truth to apply the law) but also one of minimizing collateral damages, as Bentham himself pointed out. With regard to this latter issue, it could very well be that indirect-utilitarian decision procedures work better, hence peremptory rules should be established. In US criminal procedure, evidence may be excluded from trial on account of the violation of a number of constitutional amendments, and the exclusionary rule *par excellence* applies specifically to evidence obtained in violation of the Fourth Amendment (prohibiting unreasonable searches and seizures). Both primary and derivative evidence are excluded under the rule. Among the arguments in support of the exclusionary rule, the most prominent in the debate are: the defence of constitutional rights; the potential for deterrence (of rights violations by the police); judicial integrity (that is, judicial intolerance of lawbreaking on anyone's part, including police officers); and social cost (in the sense that the cost of excluding evidence has already prompted an increase in police professionalism, so that officers are better trained to respect the Fourth Amendment).[55] The main arguments against the exclusionary rule are: the fact that the rule is not constitutionally required but rather a judicially created remedy for deterrence of unreasonable police searches, which the judges should be free to limit or abolish; its ineffectiveness in deterring the police from violating Fourth Amendment rights; the fact that it requires the court to take the side of defendants instead of alleged victims (thereby decreasing respect for the judiciary); the fact that it poses an obstacle to truth seeking; the protection it grants to those against whom incriminating evidence is actually discovered (while, as said above, it does nothing to protect the innocent who are subject to illegal and fruitless searches); its lack of flexibility (which does not allow to distinguish merely technical violations from blatant and intentional violations by the police); the fact that its application is

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[54] O Leclerc, 'Utilitarianism and the Law of Evidence', in this book.

[55] M Lippman, *Criminal Procedure* (Los Angeles etc., Sage, 2nd edn, 2014) 386–7.

limited to actual criminal prosecution and does not prevent unreasonable searches and seizures when the police do not intend to pursue criminal prosecution.[56]

Of the arguments in support of the exclusionary rule, the most relevant in utilitarian terms seem to be those regarding the already mentioned potential for deterrence of rights violations. Despite Bentham's well-known hostility to constitutionally entrenched rights (which is not confined to the language of natural rights seen as 'nonsense upon stilts')[57] and commonplace assertions of incompatibility between utilitarianism and rights,[58] once rights are constitutionally entrenched they surely give rise to expectations which must be taken into account; their disruption causes relevant disutility, in the forms already mentioned. Being subject to invasions of privacy and other abuses on the part of officers looking for criminally relevant evidence – including, for instance, the police entering our home with no warrant or permission, in search of a suspect who is our overnight guest[59] – would surely foster uncertainty and spread alarm. But the counter-argument according to which the rule is, in fact, ineffective or partial in its deterrent effect on police abuse should also be taken into account, especially if the scarce potential for deterrence is weighed against its substantial potential for hindering truth seeking. The US Supreme Court has taken this path in a series of decisions where it held that the exclusionary rule is not a personal constitutional right but rather a remedy for deterrence and protection of the Fourth Amendment.[60] This 'shift to deterrence' placed centre stage, for future determinations, the question of balancing effective deterrence with the social costs and risks of acquitting possible criminals,[61] which is an example of full-fledged consequentialist reasoning. As a result, a number of exceptions to the exclusionary rule were progressively recognized by the Court. Some of these are based on 'attenuation' of the relevance of the causal connection between the illegal search and the seizure of evidence: for instance, when intervening circumstances weaken such connection, or when a lengthy period of time has passed between the initial illegality and the subsequent evidence it availed (such as the interrogation of a witness). Another notable exception which has been recognized is the police officers' 'good faith', that is, their justified belief – on a number of different grounds – that they were committing no violation of the Fourth Amendment.[62]

The acceptability of such piecemeal judicial legislation as a means for introducing exceptions to the exclusionary rule is questionable, at least with regard to the principle of legal certainty and its utilitarian foundation in expectation utilities and the predictability of official behaviour. Institutional procedures directly addressed at making illegally acting officers accountable would probably be more effective in obtaining deterrence, without getting in the way of correct fact-finding in court. Such procedures could include civil suits for damages, criminal prosecution and administrative procedures. However, the relinquishment of all exclusionary rules regarding illegally obtained evidence could still encourage some police officers

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[56] M Lippman, *Criminal Procedure*, 387.

[57] GJ Postema, *Utility, Publicity, and Law*, 221–46.

[58] S Harwood and DA Habibi, 'Bentham, Rawls and Sen on Law, Justice and Rights', in this book.

[59] For instance, as in *Minnesota v Olson* [1990] 495 US 91.

[60] See, for instance, *United States v Calandra* [1974] 414 US 338.

[61] JJ Tomkovicz, *Constitutional Exclusion: The Rules, Rights, and Remedies that Strike the Balance Between Freedom and Order* (Oxford, Oxford University Press 2011) 18–60.

[62] M Lippman, *Criminal Procedure*, 390–6.

to take a chance and, for instance, extort confessions by illegal means – a crime which is often hard to prove. Rather than resorting to unpredictable judge-made exceptions to a fixed rule of procedure, it would probably be more compatible with a utilitarian model of decision-making to keep a restricted version of the rule, with an absolute ban on some precisely defined kinds of evidence (such as confession under torture), for which the prospective balance between the expected gains (in terms of fact-finding) and losses (in terms of both the actual suffering of those involved and social alarm) is, almost always, on the side of exclusion. For a more fine-tuned exclusionary rule, different levels of protection, adjusted to the gravity of the crime, could also be taken into consideration.

Whether utilitarians should prefer adversarial or rather hierarchical (inquisitorial) criminal procedures is a different, but related, issue, since it also bears on the rights of the defendant and, more generally, on the possible abuse of prosecutorial power, with the alarm and uncertainty that ensue. As said above, symmetry and/or equality between the parties is not a central concern in Benthamic procedure, provided that the 'ends of justice' are pursued in the best possible matter. Still, some of the typical elements of hierarchical procedures could actually hinder adequate fact-finding and lead to wrong convictions, due to the asymmetry in power between the prosecutor and the defendant and to the conflation of the functions of prosecutor, examining magistrate and judge. As is well known and as Damaška reminds us, hierarchical criminal procedures have long prevailed in Continental European legal systems, which traditionally granted more power to the government and emphasized the need for crime control over that of protecting individual liberties against state authorities. In the past decades some of those systems, such as the Italian one, have shifted closer to the Anglo-Saxon adversarial model.[63] This was due to the recognition of ideological incompatibility between the requirements of liberal democracy and some typically inquisitorial procedures, but also to the 'acknowledgment that just decisions are more likely when evidence is formed through a dialectical process, rather than by the solitary research of an "instructive" organ whose evidentiary acquisitions may become sources of prejudice at trial'.[64] The reformed Italian penal procedure code also places strict limits, among other things, on independent police initiative, also by limiting admissibility of evidence, especially when collected outside of prosecutorial supervision (as in the case of statements collected without the presence of a defence attorney, which cannot be recorded nor used, although the police may act on them for continuing the investigation). A codified exclusionary rule regarding illegally collected evidence[65] placed Italy 'perhaps in the lead of continental countries in accepting an exclusionary rule'.[66] From the point of view of fact-finding, the gains are due to the sharper separation between the functions of the judge and those of the prosecutor: the fact that the judge presiding over the *tribu-*

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[63] For an analysis of the 1988 Italian reform of penal procedure, see LJ Fassler, 'The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe' (1991) 29 Columbia Journal of Transnational Law 245. Giulio Illuminati has characterized the new Italian code of procedure as 'accusatorial' rather than adversarial, in that it still aims at implementing criminal policy rather than resolving conflicts, though it does display significant resemblances with Anglo-American procedures (G Illuminati, 'The Accusatorial Process from the Italian Point of View' (2010) 35 NCJ International Law & Commerce Regulation 297).

[64] LJ Fassler, 'The Italian Penal Procedure Code', 246.

[65] Italian Penal Procedure Code, art 191, 1.

[66] LJ Fassler, 'The Italian Penal Procedure Code', 255.

nale previously took part in the pretrial investigation meant that impartiality was not afforded and that the defendant's presumption of innocence was only on paper. Some strict rules now apply to trial, which would not actually square with an ideal direct-utilitarian procedure, because they can pose limits too narrow for the activity of fact-finding: for instance, methods and techniques which could alter and improve the capacity of a witness to remember, as well as her self-determination, can never be used.[67] This kind of limitation, probably inspired by too strict a conception of the principle of human dignity, does not favour the assessment of truth, nor is it a security for the rights of the accused, because the use of forbidden means such as, for instance, hypnosis for extracting witness statements could actually exculpate an innocent person.

6. UTILITARIAN BALANCING

Lastly, it seems expedient to apply legal utilitarianism to the problem of balancing in judicial reasoning. The balancing of principles and fundamental rights, as practised by courts especially in judicial review of laws, has become a central issue for legal theorists in the past few decades.[68] When two or more conflicting norms (principles) seem to apply to a certain case, and there are no other criteria for establishing which norm should prevail (in the sense of dictating the solution to the case), judges metaphorically ascribe 'weight' to each norm and weigh them against one another. This is usually done when different constitutional principles (typically, rights) conflict, so that criteria for the resolution of antinomies, such as chronological or hierarchical, are lacking. Obviously, there is no scale for measuring the respective importance of conflicting principles, so what the judges actually do is give precedence to one of the conflicting principles, without establishing a fixed hierarchy as a result of their decision: that is, the given preference is only relative to the case in question. So, the main problem of balancing seems to be that of justifying a priority among conflicting normative arguments.[69] At least ideally, balancing should tend towards optimization, that is, towards the best possible solution as regards satisfaction of conflicting requirements. This can be understood in terms of Pareto-optimality, that is, a situation in which the fulfilment of one of the requirements cannot be increased without diminishing the fulfilment of another.[70] Now, the main problem of balancing is choosing the 'weight' or relative importance to ascribe to each conflicting principle: the lack of an *ex ante* objective criterion to guide the decision would leave too much room for arbitrariness, although adhering to some requirements of rationality, such as coherence and consistency, would at least limit such arbitrariness and provide some ground for future predictions.

As an aggregative and maximizing form of consequentialism, based on value monism, utilitarianism would seem to lend itself quite naturally to offering an objective criterion for guiding the balancing of different constitutional goods and values and for choosing the

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[67] Italian Penal Procedure Code, art 188.

[68] See, for instance, R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2012).

[69] J-R Sieckmann, *The Logic of Autonomy* (Oxford, Hart, 2012) 45, 90.

[70] Therefore, Pareto-optimality is applied here to normative requirements rather than to the satisfaction of people's preferences (J-R Sieckmann, *The Logic of Autonomy*, 91).

principles which should prevail in each case. The value to be maximized (for instance, social happiness or welfare) could help ascribe 'abstract weight' to the conflicting principles, that is, the importance each has irrespective of both the particular case at hand and the conflict in question.[71] Value monism would allow comparisons between principles. Although, of course, measuring the utilities at stake in each case can be an empirically difficult task, the utilitarian approach would, at least theoretically, help to curb the arbitrariness and irrationality which would otherwise taint balancing as a decision strategy (as opposed to mere subsumption under pre-established factual and normative premises).

However, based on the well-known Rawlsian contention that utilitarianism does not take into account the 'separateness of persons',[72] it has been argued that utilitarian balancing would justify treading upon minority rights, because it takes into account the number of people affected. Taken to the extreme, this would imply that interests of low importance, if shared by enough people, could supersede vital interests shared by very few people.[73] Therefore – so goes the argument – utilitarian balancing should not be applied when fundamental rights are at stake.

As said above, the alleged incompatibility of utilitarianism with rights is a long-standing object of debate.[74] The problems involve not only moral rights but also legal rights, at least when it comes to fundamental constitutional entitlements. Although this issue cannot be tackled here, it can be suggested that relinquishing the language of fundamental rights altogether does not seem a viable option nowadays, even for a very radical and consistent act-utilitarian. Utilitarianism would rather urge rationalization of constitutional balancing by the courts, by referring explicitly, in judicial argumentation, to single all-encompassing values such as happiness or welfare, which could provide solid ground for ascribing abstract weight to conflicting rights and principles. Treading on vital minority interests to pursue the greatest happiness of the majority, although theoretically compatible with utilitarian morality, does not seem viable in practice, since the risk of actually diminishing aggregated happiness – by causing more unhappiness to the affected minority than the happiness produced in the majority, or by shattering expectations and spreading social alarm – would be too high. Utilitarianism as a moral doctrine is meant to address real-world problems, not unlikely theoretical situations and thought experiments. Once again, the adoption of indirect decision procedures, such as adhering to a rule according to which some basic individual rights should never be sacrificed, seems the best solution under a proper conception of utilitarian ethics.

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[71] In this sense, abstract weight is non-relative: relative weight, on the contrary, explains the importance ascribed to each conflicting principle with relation to the other(s), but is determined by the balancing itself and cannot provide a criterion previous to the decision (J-R Sieckmann, *The Logic of Autonomy*, 97).

[72] J Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1971) 29.

[73] J-R Sieckmann, 'Legislation as Balancing', in AD Oliver-Lalana (ed) *Conceptions and Misconceptions of Legislation* (Cham, Springer 2019) 147.

[74] S Harwood and DA Habibi, 'Bentham, Rawls and Sen on Law, Justice and Rights', in this volume.

8. Utilitarianism and the law of evidence

Olivier Leclerc

1. INTRODUCTION

No one has developed a more elaborate utilitarian perspective on the law of evidence than Jeremy Bentham. Although some had discussed the notion of utility before him, in particular Helvétius and Beccaria, only Bentham built an entire moral and political system on utility;[1] he also articulated a coherent utilitarian view of the law of evidence. Bentham actively worked on this from 1802 until 1812, after his suggestion for a new model of penitentiary – the Panopticon – was rejected.[2] As in other matters, the publication of Bentham's works owe much to his disciples and admirers.[3] In 1812 his *Introduction to the Rationale of Evidence* – as compiled by James Mill, and latter known as *Introductory View of the Rationale of Evidence*[4] – failed to find a publisher. Étienne Dumont was later successful in assembling Bentham's notes in a two-volume *Traité des preuves judiciaires* that was published in Paris in 1823[5] and shortly after translated into English.[6] James Mill's plan to publish Bentham in English in 1812 was partly achieved in 1827 by his son John Stuart Mill, who compiled a five-volume work as *Rationale of Judicial Evidence*.[7]

Bentham's contributions on evidence run to several thousand pages and offer detailed discussion on a wide range of topics.[8] He was a fierce critic of contemporary English common law. He attacked the complexity, technicality and incoherence of judge-made law on evidence which, he claimed, only served 'the sinister interest of the judge'.[9] He argued that legal professionals had an inordinate interest in the complexity of the law of evidence and, more broadly, of procedure. As a consequence, truth was sacrificed on the altar of corporatist interests. All

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1 E de Champs, *Enlightenment and Utility. Bentham in French, Bentham in France* (Cambridge University Press, 2015) 43.

2 E Halévy, *La formation du radicalisme philosophique,* vol. 2 (Puf, 1995) 284; ADE Lewis, 'The Background to Bentham on Evidence' (1990) 2 *Utilitas* 195.

3 TH Bowyer, 'Bentham's Publications on Evidence' (1954) IX *The Library* 3, 205.

4 J Bentham, 'Introductory View of the Rationale of Evidence for the Use of Non-Lawyers as well as Lawyers', in J Bowring (ed.), *The Works of Jeremy Bentham*, vol. 6 (William Tait, 1843) [hereafter *Introductory view*].

5 J Bentham, *Traité des preuves judiciaires*, 2 vol. (Bossange Frères, 1823).

6 J Bentham, *A Treatise on Judicial Evidence* (J.W. Paget, 1825) [hereafter *Treatise*].

7 J Bentham, *Rationale of Judicial Evidence, specially applied to English Practice,* 5 vol. (Hunt and Clarke, 1827) [hereafter *Rationale*].

8 See the authoritative outline and discussion by W Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld and Nicolson, 1985), 27.

9 J Bentham*, Rationale*, vol. 4, 13; P Schofield, 'Jeremy Bentham on Utility and Truth' (2015) 41 *History of European Ideas* 1125; HLA Hart, *Essays on Bentham. Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982) 23.

the same, Bentham did not intend to join his efforts to those who sought to bring order to the English law of evidence. Bentham was just as critical of Blackstone, his former teacher in Oxford, whose *Commentaries on the Laws of England* (1765–70) had only 'varnished' 'that curtain of mystery which fiction and formality have spread so extensively over Law',[10] as he was of Gilbert, who attempted the first systematization of the law of evidence on the basis of the best evidence rule.[11] Bentham violently attacked the latter's 'false theory of evidence': 'In the same strain of anility, garrulity, narrow-mindedness, absurdity, perpetual misrepresentation, and indefatigable self-contradiction, runs the whole of this work, from which men are to understand the true theory of evidence.'[12] The violence and exaggeration of his criticism is explained by the fact that Bentham did not aim, as Gilbert,[13] Bathurst[14] and Peake[15] had earlier in the eighteenth century, to describe and recommend marginal improvements to the existing law of evidence; instead, he sought to demonstrate that the principle of utility made possible a profound reassessment of the law of evidence. Utilitarianism was the constant guiding principle in Bentham's analysis of evidence: as Halévy noted, Bentham forged utilitarianism as 'an attempt at Newtonianism applied to the things of politics and morals'.[16]

Bentham's theory of evidence directly follows from the theory of adjudication he put together in the same period. In *Scotch Reform* Bentham laid out the respective ends of the substantive and the adjective branches of the law.[17] While legislation (*law substantive*) ought to be based on utility,[18] he asserted, it needs to be implemented by laws of procedure (*law adjective*). Government measures conforming to the principle of utility would be inefficient if citizens were unable to fulfil their expectations arising from these measures. Therefore, the direct object of rules of procedure is the *rectitude of decision*, that is, the conformity of such rules with the law (substantive).[19] To ensure that they are acting in conformity with the law, judges must consider a legal precept (the existence of a legal rule applicable to the case at hand) and a question of fact. The latter 'is decided by evidence': addressing a question of fact implies that the judge makes sure 'that a given fact existed in a given place, at a given

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[10] J Bentham, *A Comment on the Commentaries and A Fragment of Government*, in JH Burns and HLA Hart (eds), *Collected Works of Jeremy Bentham* (Clarendon Press, 1977) 124. See also JH Burns, 'Bentham and Blackstone: A Lifetime's Dialectic' (1989) 1 *Utilitas* 22.

[11] Lord Chief Baron G Gilbert, *The Law of Evidence* (Rivington et al., 1791).

[12] J Bentham, *Introductory View*, 186–7.

[13] Lord Chief Baron G Gilbert, *The Law of Evidence*.

[14] H Bathurst, *The Theory of Evidence* (Richardson and Lintot, 1761).

[15] T Peake, *A Compendium of the Law of Evidence* (Brooke and Rider, 1801).

[16] E Halévy, *La formation du radicalisme philosophique*, vol. 1, 14. See also: JP Cléro, 'Quelques éléments de la théorie de la preuve dans le *Rationale of Judicial Evidence*' (2019) 11 *Droit & Philosophie*, 79, 91–2.

[17] J Bentham, 'Scotch Reform (1808)', in J Bowring (ed.), *The Works of Jeremy Bentham*, vol. 5 (William Tait, 1843) [hereafter *Scotch Reform*]. See also F Ferraro, 'Utilitarian Legal Procedures' in this volume.

[18] J Bentham's *Treatise on Judicial Evidence* (p.1) echoed Bentham's *Introduction to the Principles of Morals and Legislation* (1780): 'The object of laws, when they are what they ought to be, is to produce, in the highest possible degree, the happiness of the greatest possible number.'

[19] J Bentham, *Introductory view*, 7; J Bentham, *Treatise*, 1; J Bentham, *Rationale*, 210; J Bentham, 'Constitutional Code' (1827), in J Bowring (ed.), *The Works of Jeremy Bentham* (vol. 9, William Tait 1843) 25.

time'.[20] Hence the law of evidence, as a part of the adjective branch of law, is dedicated to the determination of true facts ('Truth, unremittingly and exclusively sought for')[21] that are instrumental to the application of substantive law in a given case: 'Thus, the art of procedure is in reality nothing but the art of administering evidence.'[22] Bentham also identified collateral ends of procedure: rapidity, cheapness, freedom from unnecessary impediments. Conforming to the calculus of utility, the rules of procedure can deviate from the discovery of true facts serving the rectitude of decision in order to avoid 'accessory inconveniences, known under the names of delays, vexations, and expense'.[23] It is therefore up to the legislator to guard litigants against inconveniences such as loss of time, economic loss and anxiety, 'in so far as such inconvenience is either superfluous, or, in comparison with the mischief attached to the injustice resulting from the exclusion of the evidence, preponderant'.[24] Nevertheless, though he admitted that the discovery of true facts can occasionally be superseded by the collateral ends of justice, the rectitude of decisions stands as 'the first care and endeavour of the judge',[25] either because laws are grounded in the principle of utility or, should they not be so grounded, because citizens must see their expectations of the law fulfilled, since otherwise they would experience insecurity.

Bentham epitomized, according to Twining, 'a rationalist model of adjudication',[26] characterized by the belief that the determination of true facts in adjudication is needed, and is (according to some) possible. This belief has been widely adopted by evidence scholars in the Anglo-American world[27] and has extended its influence into Continental scholarship.[28] Though many would not refer explicitly to Bentham, or even less so acknowledge their indebtedness to his views, evidence scholarship has been 'remarkably unsceptical'[29] in respect of the basic tenet that the aim of evidence is the accurate determination of true facts – a view that Bentham articulated in detail. Yet the extent of the Benthamite legacy is not easy to determine. Few, like Wigmore, explicitly place their own work in the context of Bentham.[30] Even the authors who do acknowledge their debt to Bentham do not hesitate to distance themselves from him,[31], underlining the peculiarity of his 'phraseology'[32] and even

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[20] J Bentham, *Treatise*, 9.

[21] J Bentham, *Scotch Reform*, 13.

[22] J Bentham, *Treatise*, 2.

[23] J Bentham, *Treatise*, 2.

[24] J Bentham, *Rationale*, vol. 1, 31.

[25] J Bentham, 'Principles of Judicial Procedure', in J Bowring (ed.), *The Works of Jeremy Bentham* (vol. 2, William Tait 1843) 29.

[26] W Twining, *Rethinking Evidence. Exploratory Essays* (Northwestern University Press, 1990) 73.

[27] J Jackson and S Doran, 'Evidence', in D Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed. (Wiley-Blackwell, 2010) 178.

[28] J Ferrer Beltrán, *Prueba y verdad en el derecho* (Marcial Pons, 2002).

[29] W Twining, *Rethinking Evidence. Exploratory Essays*, 75.

[30] JH Wigmore, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials* (Little, Brown, and Company, 1913) 2.

[31] J Appleton, *The Rules of Evidence Stated and Discussed* (Johnson and Co., 1860) iv; JF Stephen, *Digest of the Law of Evidence* (MacMillan, 1876) 136.

[32] AM Burrill, *A Treatise on the Nature, Principles and Rules of Circumstantial Evidence* (Baker, Voorhis and Co., 1868) 554. Burrill also criticized 'the more emphatic language of

pointing to his mistaken understanding of the law of evidence.[33] Others have remained discreet about their Benthamite affiliation, such as Chamberlayne, who has proposed a reform of the law of evidence along 'crypto-Benthamite lines',[34] together with other proponents of the codification of English law who remained 'hidden disciples'.[35] There are several reasons why specialists in the law of evidence are reluctant to acknowledge a Benthamite legacy. In the first place, Bentham was an extremely consequentialist writer, drawing in unsparing detail the consequences of utilitarian reasoning and unhesitating in his harsh criticism of opponents. Such radical analysis and acid language was hardly appropriate for scholars who agreed with the essence of his views but could live with a greater sense of nuance.[36] Bentham's positions on the exclusion of evidence are, as we shall see, a good example of this: while many agreed with him, few drew all the consequences and pleaded for their outright abolition in the way that he did. Second, Bentham was essentially addressing the legislator, who was in his view responsible for designing a system of proof in accordance with the principle of utility. Closer to judicial practice by virtue of their professional activity, specialists in the law of evidence saw the benefits of existing judicial practice and sought to improve it rather than overhaul it entirely. Thus while many admitted the weaknesses of the English law of evidence, very few shared Bentham's hostility to English common law[37] and his uncompromising criticism of the 'sinister interest of the judge'.[38] James Fitzjames Stephen, while sharing Bentham's ambition to codify English law and also his criticism of the rules of evidence derived from common

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Mr. Bentham' (p.178), his 'figurative language' (p.220), 'his peculiar manner' (p.328) and his 'uncouth' wording (p.570). See also D Schum, *The Evidential Foundations of Probabilistic Reasoning* (Northwestern University Press, 1994) 59: 'Bentham's work suffers on just one account: it is wretchedly difficult to read.'

[33] WM Best, *A Treatise of the Principles of Evidence and Practice as to Proofs in Courts of Common Law*, 2nd ed. (Sweet 1854) vi. See also, regarding Bentham's insufficient knowledge of German law of evidence that he nevertheless 'attacks inordinately', C Mittermaier, *Traité de la preuve en matière criminelle* (De Cosse et Delamotte, 1848) 30.

[34] W Twining, *Theories of Evidence: Bentham and Wigmore*, 122.

[35] G Guyon, '"Lions are not cats". La preuve en droit anglais à l'épreuve de l'œuvre codificatrice de James Fitzjames Stephen (1869–1883)', in B Hervouët (ed.), *L'évolution des modes de preuve. Du duel de Carrouges à nos jours* (PULIM, 2014) 101, 113.

[36] Wigmore expressed the mixed feeling that specialists of the law of evidence might feel when confronted with Bentham's work on evidence. Although, he noted, 'mature experience constantly inclines us to believe that the best results on human action are seldom accomplished by sarcasm and invective', Wigmore acknowledged that 'Bentham's case must always stand out as a proof that sometimes the contrary is true, – if conditions are meet. No one can say how long our law might have waited for regeneration, if Bentham's diatribes had not lashed the community into a sense of its shortcomings' (JH Wigmore, *A Treatise on the System of Evidence in Trials at Common Law, Including the Statutes and Judicial Decisions of All Jurisdictions of the United States*, vol. 1 (Little, Brown & Co, 1904) § 8).

[37] GJ Postema, 'Bentham and Dworkin on Positivism and Adjudication' (1980) 5 *Social Theory and Practice* 347; GJ Postema, *Bentham and the Common Law Tradition,* 2nd ed. (Clarendon Press, 2019) 186; F Girard, 'Bentham et l'esprit du *common law*. Une introduction' (2012) 2 *L'Irascible*, 49.

[38] J Bentham*, Rationale*, vol. 4, 13.

law, illustrates the balance that specialists in the law of evidence sought between criticizing existing law and recognizing the wisdom accumulated in these rules:

> Our earlier writers, from Coke to Blackstone, fell into the error of asserting the excellence of its substance in a fulsome and exaggerated strain, whilst they showed a total insensibility to defects, both of substance and form, which in their time were grievous and glaring. Bentham seems to me in many points to have fallen into the converse error. He was too keen and bitter a critic to recognise the substantial merits of the system which he attacked; and it is obvious to me that he had not the mastery of the law itself which is unattainable by mere theoretical study, even if the student is, as Bentham certainly was, a man of talent, approaching closely to genius.[39]

The objectives Bentham pursued also limited the influence of his work. For Bentham, it was not a question of describing the existing law of evidence or of constructing a detailed system of rules to replace the existing one. Rather, it was a question of reflecting on what a system of evidence that conformed to utility should be – a system in which judges would freely exercise their ability to assess evidence. This point helps us understand the varied reception of Bentham's analyses in evidence scholarship: his analyses could only be of limited interest to evidence scholars interested in the description of the existing law, while his analysis of the psychological and logical aspects of the assessment of evidence might interest specialists in evidential reasoning.

We should therefore analyse the influence of Bentham's utilitarian theory of evidence in the light of the questions and concerns that have animated specialists in the law of evidence since the first third of the 19th century. In the mid-19th century it was Bentham's views on the exclusion of evidence that attracted most attention. Here the inconsistency of English law was obvious to many, and Bentham's radical theories stimulated the reform of English law towards the abolition of contested exclusionary rules. By the end of the century, however, the most flagrant excesses had been corrected and debate subsided considerably. Since then the question of exclusionary rules has been discussed by legal scholars, but Bentham's radical views and their utilitarian justification have lost their centrality. By contrast, Bentham's views on evidential reasoning and the evaluation of evidence were of little interest in his time to scholars seeking to describe and improve the law of evidence, and met with very limited response. Referring to the *Rationale of Judicial Evidence*, Thayer maintained that Bentham 'was engaged in a philosophical discussion and was not writing a law book'.[40] Not until the first third of the 20th century did Bentham's reflections on the evaluation of evidence find an audience, when a new generation of scholars accepted the need to anchor the evaluation of evidence in science.[41] This new development in the theory of evidence has made it possible to rediscover many of Bentham's founding intuitions on the use of forensic psychology, logic and probability. The emergence of 'new evidence scholarship' in the 1970s also contributed to a positive reappraisal of Bentham's contribution to this area, for he had played a pioneering role in these domains. Nevertheless, while the 'science of proof' that emerged in the first third

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[39] JF Stephen, *Digest of the Law of Evidence*, xvii.

[40] JB Thayer, *A Preliminary Treatise of Evidence at the Common Law* (Little, Brown, and Company, 1898) 264, 279.

[41] O Leclerc, 'Can There Be a Science of Proof? A Cross-Atlantic Dialogue (1898–1947)', in V Klappstein and M Dybowski (eds), *Theory of Legal Evidence. Evidence in Legal Theory* (Springer, 2021) 15.

of the 20th century and the 'new evidence scholarship' originating in the 1970s shared with Bentham a greater interest in proof and fact-finding than in the rules of evidence, none of them originated in Benthamite utilitarianism. Moreover, although Bentham emerged as an obvious precursor, his conceptions of psychology or probability now appear very rudimentary given the dramatic scientific advances since the end of the 18th century.

This chapter aims to analyse Bentham's utilitarian critique of the law of evidence. It examines the reconstruction of the law of evidence on the basis of the utilitarian principles that Bentham proposed. The chapter also reviews the influence of utilitarian views on the law of evidence both in Bentham's own time and in subsequent developments in the theory of evidence. The variety of points of view that Bentham took into account is reflected in the way in which evidence scholarship responded to his work. Section 2 shows that, as an analyst of contemporary legal practice, Bentham submitted the English law of his time to fierce criticism, prompting first debate and then the legislative reform of exclusionary rules. As a philosopher, sustained by Hume's logic and Locke's empiricism, he also connected the theory of proof and the theory of reasoning in a novel manner that had important implications for evidence scholarship. Section 3 examines the contribution of Bentham's utilitarianism to forensic psychology, and section 4 highlights its influence on the use of probability in the evaluation of evidence. Section 5 concludes with a balanced appraisal of the diffusion of utilitarian views in evidence scholarship, contrasting the great influence of the issues they raised with the development of competing views that owe little, if anything, to utilitarianism.

2. THE CRITIQUE OF THE EXCLUSIONARY RULES

The bulk of Bentham's thesis on evidence rests on a straightforward critique of the legal rules on evidence that constrain the free evaluation of evidence by judges. These rules, he claimed, prevent the law adjective from achieving the promise of the law substantive. In order to avoid 'the two tables of the law' being in opposition to each other, 'the forms and rules to be avoided are those, which lay a judge under the necessity of giving a judgement contrary to his conviction, and which render procedure the enemy of the law substantive'.[42] This central tenet of Bentham's theory of evidence has famously been labelled by Twining 'the anti-nomian thesis'. Bentham continuously elaborated and reformulated this idea throughout his works.

For Bentham, early 19th-century English procedure seemed to be a complex set of rules and judicial interpretation, far removed from a coherent system and largely indebted to centuries-old developments of the common law.[43] A strict regime of exclusion from testimony had gradually developed to protect jurors. Atheists who were incapable of swearing an oath, persons with an interest in the case, the spouse of the accused, parties to the case: all were declared unable to testify. Nor could the accused persons be heard in relation to their own case. The law of evidence was a complex tapestry, as illuminated by the numerous exceptions

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[42] J Bentham, *Treatise*, 3. See also F Ferraro, 'Utilitarian Legal Procedures' in this book.

[43] GW Keeton and OR Marshall, 'Bentham's Influence on the Law of Evidence' in GW Keeton and G Schwarzenberger (eds), *Jeremy Bentham and the Law* (Greenwood Press, 1948) 79; ADE Lewis, 'The Background to Bentham on Evidence', 196; W Twining, *Theories of Evidence: Bentham and Wigmore*, op. cit., 20; G Guyon, '"Lions are not cats". La preuve en droit anglais à l'épreuve de l'œuvre codificatrice de James Fitzjames Stephen (1869–1883)', 102.

to the prohibition of hearsay.[44] 'Fertile source of injustice and oppression',[45] 'extravagance of argument',[46] 'encouragement constantly applied to the production of all imaginable crimes',[47] these rules had become, Bentham asserted, an obstacle to the establishment of true facts. The principle of utility points to the reasons why such a system emerged and endured. On the one hand, the system of fees paid by litigants to the judges and to the judicial profession at large gave them a financial interest in the preservation of technical and excessively subtle rules. On the other hand, individual evaluation of evidence would create a burden for judges, while the existing 'mechanical system' freed them from the use 'of such expensive instrument as human reason'[48] by excluding certain types of evidence altogether. Hence, the 'technical system' – which Bentham also terms the 'fee-gathering system'[49] – allows for 'a constant opposition between the ends of *justice*, and the ends (the original, and thence the actual ends) of *judicature*'.[50] Bentham opposed a 'natural system' inspired by the simplicity of a supposed 'ancient model' to the existing technical system. 'A kind father in the midst of his family, regulating their differences, is the image of a good judge':[51] he follows common sense, hears all evidence and wisely weighs their merits. Hence, as regard the law of evidence, the natural system is chiefly characterized in negation: 'it is constituted by the absence of those devices, which constitute so many characteristic features of the technical system.'[52] One sentence famously encapsulates the idea: 'Evidence is the basis of justice: to exclude evidence is to exclude justice.'[53] Therefore, even dubious evidence should be admitted, since judges might be able to draw some conclusions from it. There should be no fear that judges would be deceived; their common sense and experience would provide the necessary safeguards. Hence, 'throughout the whole of this work, this practical conclusion is perpetually recurring: Do not exclude any evidence or testimony merely from the fear of being deceived.'[54]

However, the natural system does not leave everything to the discretion of judges. The legislator – 'the legitimate and acknowledged legislator, acting in pursuit of the interests of the community, and the ends of justice'[55] – has a central role in designing legal rules based on utility and guaranteeing their implementation. Therefore, although the natural procedure chiefly excludes evidence, it requires that the legislator provide a specific organization of courts (tribunals distributed across the country as equally as possible, the breaking down of the court into sections) and of procedure (uninterrupted sitting by judges, a case heard from beginning to end by the same judge, publicity, all testimony to be heard orally and subjected

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[44] JH Chadbourn, 'Bentham and the Hearsay Rule – A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence' (1962) 75 *Harv. L. Rev.* 932.

[45] J Bentham, *Principles of Judicial Procedure*, 58.

[46] J Bentham, *Treatise*, 240.

[47] J Bentham, *Rationale*, vol. 4, 490.

[48] Ibid., 177.

[49] Ibid., 155; J Bentham, *Scotch Reform*, 6–7: 'technical, from its nature; fee-gathering, from its object and its cause.'

[50] Ibid., 5.

[51] J Bentham, *Treatise*, 5–6; J Bentham, *Rationale*, vol. 5, 743.

[52] J Bentham, *Scotch Reform*, 8.

[53] J Bentham, *Rationale*, vol. 4, 490.

[54] J Bentham, *Treatise*, 255.

[55] J Bentham, *Scotch Reform*, 7.

to counter-interrogation – on that latter point Bentham praised the superiority of the English legal system over Continental systems),[56] and a professional organization of the judiciary (the 'substitution of salaries to fees, throughout the whole nest of judicial offices').[57] Further, following the principle of utility, Bentham accepted the exclusion of evidence whose production would result in costs, delays or, more generally, vexations substantially greater than its contribution to the discovery of truth. He also conceded that the same holds when the evidence comes from a confession to a Catholic priest[58] or when it conveys state secrets.[59] Finally, Bentham admitted that it is up to the legislator to offer guidance to the judges so that they might properly implement the law substantive, not via evidential rules that were mandatory but via guidelines and rules of practice. These rules would not dictate the decisions of judges as regards the admission of evidence but would provide guidelines aiding them in the evaluation of their probative force.

Bentham's radical criticism of the rules imposed on judges' evaluation of evidence made him an advocate of abolition of the rules of exclusion of evidence. Changes in English legislation quickly followed.[60] Shortly after Bentham's death Parliament ruled that Quakers and members of the Moravian church had capacity to swear an oath (Civil Rights of Convicts Act 1828), latterly extended to Separatists (Separatists' Affirmations Act 1833), and eventually permitted a witness to make a solemn affirmation rather than swearing an oath (Common Law Procedure Act 1854). In addition, many restrictions were removed from the ability to testify. Indeed, the courts could now hear the testimony of persons that 'may or shall have an Interest in the Matter in question, or in the Event of the Trial […], and notwithstanding that such Person offered as a Witness may have been previously convicted of any Crime or Offence' (Evidence Act 1843); the parties (Evidence Act 1851); the husbands and wives of the parties in civil matters (Evidence Amendment Act 1853); and eventually every person charged with an offence and the wife and husband in criminal matters (Criminal Evidence Act 1898). The nature and extent of Bentham's influence on legislation in 19th-century England calls for careful appraisal. These reforms reflected the undeniable success of Bentham's proposals, and his lasting influence on English law of evidence.[61] Referring to the current state

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[56] Ibid., 8.

[57] J Bentham, *Rationale*, vol. 4, 428.

[58] Ibid., 586.

[59] Ibid., vol. 1, 566.

[60] JF Dillon, 'Bentham's Influence in the Reform of the Nineteenth Century' in *Select Essays in Anglo-American Legal History* (Little, Brown, and Company, 1907) 492, 509; FN Judson, 'A Modern View of the Law Reforms of Jeremy Bentham' (1910) 10 *Colum. L. Rev.*, 41; GW Keeton and OR Marshall, 'Bentham's Influence on the Law of Evidence', 79; CJW Allen, *The Law of Evidence in Victorian England* (Cambridge University Press 1997); F Girard, 'Bentham et l'esprit du *common law*. Une introduction', 98; G Guyon, '"Lions are not cats". La preuve en droit anglais à l'épreuve de l'œuvre codificatrice de James Fitzjames Stephen (1869–1883)', 124.

[61] The Evidence Acts 1843 and 1851, as well as the Evidence Amendment Act 1853, were all 'a direct result of Bentham's criticism', for Denman and Brougham, their promoters, both were 'the outstanding advocates of Benthamite theories of law reform': GW Keeton and OR Marshall, 'Bentham's Influence on the Law of Evidence', 83; see also CJW Allen, *The Law of Evidence in Victorian England*, 100. Later, Hart also suggested that the recommendations of the Criminal Law Revision Committee (1972) were 'Benthamite in substance and spirit': HLA Hart, *Essays on Bentham. Studies in Jurisprudence and Political Theory*, 34.

of Anglo-American legal systems, Stein claimed that the 'fulfilment of Bentham's abolitionist prophesy is now closer to a reality'.[62] Nevertheless, criticism of the law of evidence had been 'in the air'[63] in the time of Bentham, and those promoting legislative change did not think of themselves as simply executors of Bentham's plans.[64] In any case, the reforms did not go as far as Bentham had called for, since at no time was there any question of abolishing the exclusion rules as a whole (so that the lawyer–client privilege that Bentham had fiercely criticized was never questioned). Not even James Fitzjames Stephen, 'a devout disciple' of Bentham,[65] went as far as the latter. In line with Bentham, he criticized the exclusion of the testimony of atheists as overlooking 'that fact that the great security against judicial errors lies in the power of exposing or contradicting false evidence, not in preventing false evidence from being given'.[66] Likewise, when drafting the Indian Evidence Law (1872) he made sure that the testimony of parties in a civil trial, and that of the spouse in both civil and criminal trials (art. 120), could be heard.[67] Nevertheless, Stephen was hardly as radical as Bentham and he considered other rules of evidence to be justified. The evolution of the law in the United States has been quite similar. Although legislative reforms have reduced the scope of exclusionary rules, for example in Maine at the initiative of Appleton, 'an ardent and effective disciple'[68] of Bentham, nowhere did they lead to their outright disappearance. Outside the Anglo-American world Bentham's influence on legislation has been even more limited. In Continental legal systems the law of evidence was inherited from Roman law and medieval scholarly doctrines. Hence exclusionary rules do not have a central place in the law of evidence[69] and Bentham's critique was largely irrelevant. For instance, although Bentham's first synthetic work on evidence (1823) was published in France, his proposals have had only a marginal impact on legislative reform in that country.

Given the radical nature of Bentham's criticisms of exclusion rules, they sparked discussion of the possibility and desirability of the legal regulation of evidence. Nevertheless, in time the limitation of exclusionary rules became more a central tenet of evidence scholarship than a genuine legislative policy objective. Among the most enthusiastic supporters, Chamberlayne joined Bentham in flagging 'any rule which excludes probative or constituent facts actually

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62 A Stein, *Foundations of Evidence Law* (Oxford University Press, 2005) 111.

63 W Twining, *Theories of Evidence: Bentham and Wigmore*, 27.

64 CJW Allen, *The Law of Evidence in Victorian England*, 4. Even though Maine asserted, in relation to Bentham, that 'Almost all of his more important suggestions have been adopted by the English Legislature', he also noted that Bentham's views were constantly revised: 'the process of engrafting on the law what to each successive generation seem to be improvements is in itself of indefinite duration, and may go on, and possibly will go on, as long as the human race lasts': H Sumner Maine, *Lectures on the Early History of Institutions* (Henry Holt, 1875) 344.

65 JJA Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought* (Macmillan, 1983) ix; JM Smith, *Fitzjames Stephen. Portrait of a Victorian Rationalist* (Cambridge University Press, 1988) 44.

66 J Fitzjames Stephen, *A General View of the Criminal Law of England* (Macmillan, 1863) 289.

67 J Fitzjames Stephen, *The Indian Evidence Act with an Introduction on the Principles of Judicial Evidence* (Macmillan, 1872).

68 W Twining, *Rethinking Evidence. Exploratory Essays*, 52.

69 M Damaška, *Evidence Law Adrift* (Yale University Press, 1987) 12.

necessary to proof of the proponent's case' as 'scientifically wrong'.[70] McCormick pretended, like Bentham, to be surprised at the survival of certain exclusionary rules in American law ('persistent nuisance', 'fragmentary relics', 'curious survival') and predicted that 'manifestly, the next stage is to abandon the system of exclusion'.[71] Some authors claimed that the law of evidence should give way to epistemological rules alone.[72] Explicitly referring to Bentham, Laudan analysed the existing law of evidence in terms of its capacity to promote or, on the contrary, hinder the discovery of truth.[73] He then treated the rules of evidence as possible obstacles to discovering the truth (the criminal trial is referred to as an 'epistemic engine'): 'The message of this book – that the rules of evidence and procedure and the various principles for distributing errors need to be drastically rethought – is scarcely a new one. Two centuries ago, Jeremy Bentham was trumpeting it to all who would listen.'[74] Nevertheless, no one would claim that evidence should be admissible in all cases. Thayer's reconstruction of the law of evidence linked admissibility and logical relevancy (that is, the logical capacity to prove).[75] Hence, any relevant evidence must be admissible and, conversely, irrelevant evidence is not admissible unless a legal provision provides otherwise – this rule was later adopted in the United States by the Federal Rules of Evidence (rule 402). Most specialists in the law of evidence, including those mentioned above, would admit that *some* exclusionary rules are needed and justified, while qualifying how this would be done.[76] The possible justification for exclusionary rules is a debated topic, including extra-epistemic reasons (certain values or interests justify the law giving precedence to considerations other than the search for the truth, such as respect for privacy, fundamental rights, procedural fairness)[77] as well as epistemic ones (the exclusion of redundant, overly complex or prejudicial evidence can actually serve fact-finding).[78] This debate has been recently revived by Stein's claim that in allocating the risks of error in trial, the law of evidence encompasses decisions of a non-epistemic nature within adjudicative fact-finding.[79] This contention breaks with the Benthamite assumption that morality is separated from epistemology, and that fact-finders engage in a purely epistemic

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[70] C Chamberlayne, 'The Modern Law of Evidence and Its Purpose' (1908) 42 *American L. Rev* 757.

[71] CT McCormick, 'Tomorrow's Law of Evidence' (1938) 24 *A.B.A*. J. 507.

[72] S Sentís Melendo, *La prueba* (EJEA, 1979).

[73] L Laudan, *Truth, Error and Criminal Law* (Cambridge University Press, 2006).

[74] Ibid., 232.

[75] JB Thayer, *A Preliminary Treatise of Evidence at the Common Law*, 265.

[76] See, eg, Learned Hand, 'Discussion of the Improvement of Technical Rules of Evidence' (1923) 10 *Proceedings of the Academy of Political Science in the City of New York* 101.

[77] M Taruffo, *La prueba de los hechos*, transl. J. Ferrer Beltrán, (Trotta, 2002); M Damaška, *Evidence Law Adrift*, 12; J Jackson and S Doran, 'Evidence', 181; J Ferrer Beltrán, 'La preuve est libre, ou presque : une théorie quasi-benthamienne de la preuve', in M Bozzo-Rey and G Tusseau (eds), *Bentham juriste* (Economica, 2011) 329, 337.

[78] M Damaška, *Evidence Law Adrift*, 14; F Schauer, 'In Defense of Rule-Based Evidence Law – and Epistemology Too' (2009) *Episteme* 295; S Haack, *Evidence Matters* (Cambridge University Press, 2014) 22, 39–46; KM Ehrenberg, 'Less Evidence, Better Knowledge' (2015) 60 *McGill LJ* 1.

[79] A Stein, *Foundations of Evidence Law* (Cambridge University Press, 2005). See also JC Bayón, 'Epistemología, Moral y Prueba de los hechos: Hacia un Enfoque no Benthamiano' (2008) *Analisi e diritto* 15.

activity when they determine the facts of the case (which explains that the impact of moral preferences on fact-finding should be kept to a minimum). As the evaluation of evidence implies that fact-finders determine whether evidence is sufficient not only quantitatively but also qualitatively – a decision that involves a risk of error, as Stein argues – adjudicative fact-finding is inherently moral. Therefore, he concludes, 'the regulation of adjudicative fact-finding needs to be tightened rather than relaxed'[80] (it is for example justified to exclude additional evidence that would create an unacceptable risk of error).[81]

3. THE PSYCHOLOGICAL CAUSES OF FALSITY AND TRUTH IN TESTIMONY

Bentham was equally opposed to rules limiting the judge's evaluation of the evidence and to discretionary evaluation in fact-finding. He sought in the comprehension of human nature and in rational analysis the 'true safeguards, that should be raised round evidence and judgement'.[82] Judges need to be able to identify the psychological causes of truth or falsity in testimony, as testimony can lead to both truth and mendacity (hence the inappropriateness of systematic exclusionary rules): 'to weigh evidence against evidence, to weigh particular evidence against general probability, requires a proportionate skill in the science of psychology.'[83] Therefore, he provided a detailed description of human behaviour based on a systematic application of the principle of utility, seeking to guide the evaluation of the trustworthiness of testimony.[84] The accuracy and completeness of testimony depends, he asserted, on the moral disposition of witnesses (willingness to tell the truth, attention to accuracy), their intellectual faculties (memory, judgement, imagination, ability to express ideas correctly) and their perception of the facts they describe. Each of these elements is subject to possible error, the causes of which judges must be aware. Judgement, for example, can be affected by haste, ignorance or false opinion. Similarly, perception of the facts may be altered by the particular circumstances in which they were perceived. For instance, the sense of sight can be affected by the position of the witness, which might be more or less favourable to a good view of the scene being recounted. This led Bentham to analyse what conditions for the *collection* of testimonies might favour their trustworthiness.[85] Internal conditions dictate that the testimony itself be accurate and thoughtful, not prepared in advance, nor guided by ill-intentioned leading questions.[86] External conditions relate to the material conditions in which the testimony was given: following examination and cross-examination, in a public manner, so that the shame that witnesses would feel if their lie were discovered deters them from deliberately stating an untruth.[87]

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[80] Ibid., 118.
[81] Ibid., 123, 131.
[82] J Bentham, *Treatise*, 3.
[83] J Bentham, *Rationale*, vol. 3, 383–4.
[84] J Bentham, *Treatise*, 20; J Bentham, *Rationale*, vol. 1, 150.
[85] J Bentham, *Treatise*, 49; J Bentham, *Rationale*, vol. 1, 273. See also J Florence, 'Bentham psychologue' in P Gérard, F Ost and M Van de Kerchove (eds.), *Actualité de la pensée juridique de Jeremy Bentham* (Publications des Facultés universitaires Saint-Louis, 1987) 392.
[86] J Bentham, *Rationale*, vol. 1, 293.
[87] Ibid., 422.

Bentham's analysis has been significantly extended in evidence scholarship. In the early 20th century, authors such as Gross in Germany,[88] Wigmore in the United States[89] and Gorphe in France[90] investigated the impact of psychology on the evaluation of testimony, and how errors of perception affect its quality. It is striking how close to Bentham's their views are. Like him, they consider the qualities that influence the ability of a witness to give trustworthy testimony (moral, intellectual, age, emotional, psychic, imagination, experience), the impact of the conditions under which they perceived the facts (sensory perception, material conditions of observation, face recognition, memorization) and the conditions under which testimony was presented before judges (possible leading questions, the witnesses' state of mind and seriousness at the hearing, assurance and spontaneity of statements).

However, although these authors followed Bentham's interest in forensic psychology, they did so from a very different starting point. Following Helvétius, Hume and Locke, Bentham asserted that the immediate data of experience, based on universal common sense and on personal observation, have primacy over intuitionism and innate ideas. Experience is hence 'the foundation of all our knowledge, and of all our reasoning'.[91] Bentham's conception of psychology is a good example of his reliance on personal experience, and the possibility of gaining knowledge through the senses:

> that there exists in man a propensity to believe in testimony is matter of fact – matter of universal experience […] The existence of the propensity being thus out of dispute, then comes the question that belongs to the present purpose – is it right to give way to this propensity? […] To [that] question the answer is – Yes; it is right to give way to this propensity: the propriety of doing so is established by experience. By experience, the existence of the propensity is ascertained; by experience, the propriety of acting in compliance with it is established. Established already by experience – by universal experience – it may be still further established by direct experiment, should any one be found willing to be at the charge of it.[92]

From a utilitarian perspective the propensity to believe in testimony is explained by the fact that lying involves effort, work done by the mind; to avoid this pain, we are inclined to tell the truth, unless a particularly strong motive diverts us.[93] Furthermore, the fear of appearing a liar in the eyes of others (popular sanction)[94] and the fear of religious sanction deter us from lying.[95]

Hence Bentham's analyses of the reliability of testimony were based solely on universal experience and common sense. For instance, he asserted, without any further justification: 'Ten persons looking at the same scene, at the same quarrel, in a state of confusion, will see objects very differently';[96] 'there is a remarkable difference in different persons in the

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88 H Gross, *Criminal Psychology. A Manual for Judges, Practitioners, and Students,* transl HM Kallen (Little, Brown & Co., 1911) 187.

89 JH Wigmore, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials*, 312.

90 F Gorphe, *La critique du témoignage* (Dalloz, 1924) 54.

91 J Bentham, *Rationale*, vol. 1, 131.

92 Ibid., vol. 1, 110. See also Ibid., vol. 1, 284: the securities for testimonial trustworthiness are deduced 'from the established order of things, and from that alone'.

93 J Bentham, *Treatise*, 29; *Rationale*, vol. 3, 342–3; Ibid., vol. 5, 712–13.

94 J Bentham, *Treatise*, 31.

95 Ibid., 34.

96 Ibid., 22.

faculty of recognizing the features of the human countenance';[97] 'everyone knows the errors of precipitation'.[98] Bentham's empirical epistemology is widespread in evidence scholarship. John Henry Wigmore, for instance, regarded 'general experience' to be a basis for evidential reasoning just as much as logic and psychology.[99] More recent discussion of the role of personal experience and common sense in inference is yet another illustration of the enduring influence of Bentham's perspective.[100] Nevertheless, if some specialists in the law of evidence share these assumptions, they do so from a completely different starting point. Social psychology emerged as a new field of research with a particular interest in forensic psychology in the early 20th century. This emerging scientific domain thus offered new resources for analysing evidence afresh on the basis of experimental psychology – and so quite separately from Bentham's universal experience. While Gross, Wigmore, Gorphe and others underlined the finesse of Bentham's observations and the relevance of the topics he addressed, the epistemological foundations of their analyses differed profoundly from Bentham's. Most of the material they employed is taken from studies and experiments carried out by psychologists and criminologists, in addition to experiments carried out by judges in their offices.[101] The breadth in the sources introduced by these authors is in stark contrast with Bentham's insistent reliance upon common sense and universal experience.

Bentham's work on the trustworthiness of testimony was certainly remarkable, since he was among the first to consider the psychological foundations of a rational analysis of evidence. Unsurprisingly, this aspect of Bentham's work was not taken up by his contemporaries, who mostly focused on designing a systematic view of the law of evidence. His work found a new relevance and topicality almost a hundred years later when evidence scholars grew interested in forensic psychology and rediscovered many of the issues addressed by Bentham. However, the science of proof emerging at that time was less an act of adherence to Benthamite utilitarianism than a sign of the diffusion into law of evidence of the positivism that had by the later 19th century suffused the social sciences. After the Second World War, interest in forensic psychology declined among specialists in the law of evidence. Although forensic psychology remains an active field of research today, it does not arouse much interest among those engaged in evidence scholarship.

4. INFERENCE AND PROBABILITY IN THE EVALUATION OF EVIDENCE

Bentham's exceptional analytical impetus opened the way to an influential reconsideration of the categories proper to the law of evidence. Yet the influence of his theories of inference and probability should be appraised with some caution, for they neither attracted immediate attention in his own time, nor were ever fully accepted by evidence scholars. According to

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[97] Ibid.

[98] Ibid., 24.

[99] JH Wigmore, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials*.

[100] T Anderson, D Schum and W Twining, *Analysis of Evidence* (Cambridge University Press, 2005) 265.

[101] O Leclerc, 'Can There Be a Science of Proof? A Cross-Atlantic Dialogue (1898–1947)'.

Bentham, evidence establishes a relationship between two terms:[102] the fact to be proven, which he called the *principal fact* (*factum probandum*); and probative facts, which he termed *evidentiary facts* (*factum probans*). Book V of the *Rationale of Judicial Evidence* exposes the architecture of this construction. Bentham opposes direct and circumstantial evidence. Direct evidence refers to the situation where testimony relates to the principal fact. Circumstantial evidence is however indirect: the fact that has been perceived by the witness is not the principal fact, but another fact that is related to the principal fact, such that the existence of the latter can be inferred from that of the former.[103] Hence direct and circumstantial evidence differ with regard to the mental processes they involve. In direct evidence the judge must only infer from the witnesses' assertion the existence of the main fact – only one inference is implied, of a general nature, from the evidence (the testimony) to the fact (stated by the witness). On the contrary, circumstantial evidence requires an additional inference – a 'special' inference – from that *evidentiary fact* to the *principal fact*. Although these distinctions had already been discussed by others,[104] Bentham's analysis permanently shaped the theory of the law of evidence.[105] Contrary to the prevailing view, as exemplified in Blackstone,[106] that testimonial evidence is stronger than circumstantial evidence since it does not imply a presumption, Bentham was aware of the possible limits of testimonial evidence, and saw both direct and circumstantial evidence as possibly leading to either truth or mendacity.[107]

The Benthamite theory of circumstantial evidence extends to the appreciation of evidence. While judges may decide that a disputed fact is proven on the basis of a single direct piece of evidence, they can rarely rely on only one piece of circumstantial evidence. Judges' evaluation of the evidence implies that they evaluate the effect of the probative force of all circumstantial evidence available:

> As there are facts – evidentiary facts – by the force of which, a fact, considered in the character of a principal fact, is probabilized; so it will generally happen that there are others by which the same fact is disprobabilized: – the existence of it rendered more or less improbable. When a principal fact

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[102] 'Evidence is a word of relation […)] By the term evidence, considered according to the most extended application that is ever given to – it, may be, and seems in general to be, understood, – any matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact: a persuasion either affirmative or disaffirmative of its existence': J Bentham, *Rationale*, vol. 1, 19.

[103] J Bentham, *Treatise*, 12; J Bentham, *Rationale*, vol. 3, 7–8.

[104] See for instance, T Starkie, *A Practical Treatise of the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings*, vol. 1 (J & WT Clarke, 1842) 13.

[105] AM Burrill, *A Treatise on the Nature, Principles and Rules of Circumstantial Evidence*; J Fitzjames Stephen, *The Indian Evidence Act with an Introduction on the Principles of Judicial Evidence*, 38: 'all evidence is either direct or circumstantial'; JH Wigmore, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials*, 6; D Schum, *The Evidential Foundations of Probabilistic Reasoning*, 205.

[106] A Welsh, 'Burke and Bentham on the Narrative Potential of Circumstantial Evidence' (1990) 21 *New Literary History*, 607, 609.

[107] BJ Shapiro, '*Beyond Reasonable Doubt' and 'Probable Cause'. Historical Perspectives on the Anglo-American Law of Evidence* (University of California Press, 1991) 217; J-M Schramm, *Testimony and Advocacy in Victorian Law, Literature, and Theology* (Cambridge University Press, 2000) 56.

> is thus probabilized, it is by the probative force of the evidentiary fact: by the strength of the inference by which, the existence of the evidentiary fact being affirmed, the existence of the principal fact is inferred.[108]

The judge must thus, according to Bentham, assess individually whether each piece of evidence 'probabilizes' or 'disprobabilizes' the principal fact. The judge's final decision results from a balancing of all the elements that contribute to making the main fact more probable against those that, on the contrary, make it less probable. Bentham argued that ordinary language does not lend itself well to the expression of the judge's degrees of belief because it offers only a limited number of gradations. Conversely, 'the language of mathematicians'[109] allows degrees of persuasion to be divided, 'like a scale, with a fixed point, from which we set out to settle the ascending and descending degrees'.[110] Bentham articulated the image of a scale composed of ten degrees:

> it has a positive side, inscribed with the degrees of positive belief (that is affirmative to the fact in question); and a negative side, inscribing with the degrees if negative belief (that is, denying the same fact); at the bottom of the scale is 0, denoting the absence of all belief either for or against the fact in question.[111]

Such a scale can be useful, Bentham argued, to witnesses as well as to judges, giving formal expression of their persuasion as regard to evidentiary facts or to the principal fact ('just as, in speaking of the temperature indicated by the thermometer, we say, that the mercury is ten degrees above Zero').[112] He then argued for the opportunity presented by such an instrument – 'Does justice require less precision than chemistry?'[113] – while acknowledging that its use should remain optional, reserved for certain particularly critical situations (division of votes between several judges, assessment by appellate judges of testimony heard in the trial court, expert testimony).

Bentham's attention to probabilities in the analysis of evidence is all the more remarkable since, in his time, the vast majority of jurists paid very little attention to the contribution of probabilities to the analysis of a judgement.[114] Despite his acknowledgement that the scale of the degrees of belief is not intended to be used in all matters, this aspect of Bentham's work drew considerable criticism. It is remarkable that Dumont himself, who edited Bentham's papers, expressed his scepticism on this subject in a footnote. In his view, the reasoning developed by those promoting probability in relation to wagers and insurance cannot be applied *mutatis mutandis* to the assessment of the credibility of witnesses (indeed, he noted,

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[108] J Bentham, *Rationale*, vol. 3, 13.
[109] J Bentham, *Treatise*, 41.
[110] Ibid., 41.
[111] Ibid., 41.
[112] Ibid., 42.
[113] Ibid., 43.
[114] LJ Daston, 'Mathematics and the Moral Sciences: The Rise and Fall of the Probability of Judgments, 1785-1840', in H. N. Jahnke and M. Otte (eds), *Epistemological and Social Problems of the Sciences in the Early Nineteenth Century* (D. Reidel Publ., 1981) 287; LJ Daston, *Classical Probability in the Enlightenment* (Princeton University Press, 1988) 342.

'testimony turns on past events; wagers turn on future events').[115] The scale of degrees of belief thus offers a false certainty which, practically, is beyond the court's reach. True security, in contrast, comes from judges' free assessment of the testimony, rather than from statements by witnesses of their own degree of conviction. Dumont's point of view was far from isolated. Bentham's proposal has been greeted with considerable reservation by most specialists in the law of evidence.[116] Bonnier went as far as to consider that the 'testimoniometer' proposed by Bentham was no less arbitrary than the arithmetic of evidence inherent in the old system of legal proof.[117] The gap between Bentham and the jurists of his time could not be greater. Their central tenet could be rendered as 'Positive or negative persuasion cannot be resolved in figures'.[118] Bentham's position remained isolated for a long time.

It was not until the early 20th century that the reluctance of specialists in the law of evidence to engage with logic and probability faded. Bentham had provided a solid foundation for modelling evidential reasoning in cases where there is a large body of evidence ('mass of evidence' in Bentham's language) and where establishing conviction about the existence of the principal fact involves a sequence of inferences from a collection of evidentiary facts. On this basis, Wigmore developed a chart representing testimonial and circumstantial evidence, as well as the networks of inferences and the probative force attached to each of them.[119] This line of thinking was revived in the 1980s by Twining, Anderson and Schum,[120] opening it to important developments in graph theory and the automated analysis of evidential reasoning. There can be no doubt that these developments involve a far more sophisticated analysis of probability than that available when Bentham was writing. Bentham's distinctions and analyses do however provide a preliminary framework, as these authors acknowledge. Furthermore, during the 1970s specialists in the law of evidence pointed out the inconsistencies and errors in the judicial use of probabilities,[121] emphasising the valuable contribution made by Bayesian probability in guiding the evaluation of evidence.[122] While others opposed the damaging con-

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[115] J Bentham, *Treatise*, 46.

[116] W Wills, *An Essay on the Principles of Circumstantial Evidence*, 4th ed. (Butterworths, 1862) 9–10; T Starkie, *A Practical Treatise of the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings*, 554; C Mittermaier, *Traité de la preuve en matière criminelle*, 353; WM Best, *A Treatise of the Principles of Evidence and Practice as to Proofs in Courts of Common Law*, 81.

[117] E Bonnier, *Traité théorique et pratique des preuves en droit civil et en droit criminel*, 2nd ed. (A Durand, 1852) 262.

[118] Ibid., 263.

[119] JH Wigmore, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience and Illustrated in Judicial Trials*, 744.

[120] Anderson, D Schum and W Twining, *Analysis of Evidence*. The first American edition published in 1991 by Anderson and Twining had the subtitle *How to Do Things with Facts Based upon Wigmore's Science of Judicial Proof* (Little, Brown, and Company, 1991).

[121] See the emblematic *People v Collins* in the United States ([1968] 438 P 2d 33).

[122] MO Finkelstein and WB Fairley, 'A Bayesian Approach to Identification Evidence' (1970) 83 *Harv. L. Rev.* 489; R Eggleston, *Evidence, Proof and Probability* (Weidenfeld & Nicolson, 1978); P Tillers and ED Green (eds), *Probability and Inference in the Law of Evidence: The Uses and Limits of Bayesianism* (Kluwer Academic Publ., 1988).

sequences of what they claimed would be 'trial by mathematics',[123] the Bayesian analysis of evidence has undergone spectacular development, together with the probabilistic analysis of the standards of proof in Anglo-American legislation.[124]

In retrospect, Bentham appears to be a precursor of the probabilistic assessment of evidence. However, if Bentham did correctly identify these possibilities, his own conception of probability and the way he foresaw its use in trials remains a subject of discussion. Moreover, inconsistencies have been demonstrated in Bentham's theory of probability.[125] On the one hand, Bentham admits that the degree of probative force of the testimony is assessed by each judge according to what that judge believes to be the 'established course of nature'.[126] A subjectivist conception of probability of this kind seems difficult to reconcile with the empirical epistemology and critique of intuitionism that Bentham otherwise adopted. On the other hand, Bentham's theory of probability is itself still discussed. Indeed, while Bentham suggested the use of a scale representing degrees of belief, he admitted that it would only be useful in certain circumstances. In some passages Bentham is also quite critical of the use of numbers to express degrees of probative force: 'this scientific formula would be more specious than useful'.[127] Therefore, some would argue that Bentham adhered to a Bayesian theory of probability[128] as he admitted the possibility of expressing degrees of persuasion in numerical terms and the need for judges to form their convictions by taking into account all available evidence. Others would rather insist on Bentham's adherence to a non-mathematical theory of probability to call him a Baconian.[129] These discrepancies can be explained by probability

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[123] LH Tribe, 'Trial by Mathematics: Precision and Ritual in the Legal Process' (1971) 84 *Harv. L. Rev.* 1329.

[124] SE Fienberg and MJ Schervish, 'The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and for Legal Decisionmaking' (1986) 66 *B.U.L. Rev*. 771; LJ Cohen, 'The Role of Evidential Weight in Criminal Proof', in P Tillers and ED Green (eds), *Probability and Inference in the Law of Evidence: The Uses and Limits of Bayesianism* (Kluwer Academic Publ., 1988) 113; David Kaye, 'Do We Need a Calculus Weight to Understand Proof Beyond a Reasonable Doubt?' in P Tillers and ED Green (eds), *Probability and Inference in the Law of Evidence: The Uses and Limits of Bayesianism* (Kluwer Academic Publishing, 1988) 129; BJ Shapiro, 'Beyond Reasonable Doubt: The Evolution of a Concept', in Y Batsaki, S Mukherji and J-M Schramm (eds), *Fictions of Knowledge. Fact, Evidence, Doubt* (Palgrave Macmillan, 2012) 19.

[125] G Postema, 'Fact, Fictions, and Law: Bentham on the Foundation of Science', in W Twining, *Facts in Law* (Franz Steiner, 1983) 37; W Twining, *Theories of Evidence: Bentham and Wigmore*, 55; JP Cléro, 'Une nouvelle approche de la preuve en éthique et en droit: l'*Introduction aux Principes de morale et de législation* et le *Rationale of Judicial Evidence*', in JP Schandeler and N Vienne-Guerrin, *Les usages de la preuve d'Henri Estienne à Jeremy Bentham* (Hermann, 2014) 41; JP Cléro, 'Quelques éléments de la théorie de la preuve dans le *Rationale of Judicial Evidence*'; G Postema, *Utility, Publicity, and Law. Essays on Bentham's Moral and Legal Philosophy* (Oxford University Press, 2019) 202.

[126] J Bentham, *Rationale*, vol. 3, 283.

[127] J Bentham, *Treatise*, 181.

[128] JP Cléro, 'Une nouvelle approche de la preuve en éthique et en droit: l'*Introduction aux Principes de morale et de législation* et le *Rationale of Judicial Evidence*', 50; JP Cléro, 'Quelques éléments de la théorie de la preuve dans le *Rationale of Judicial Evidence*', 96.

[129] G Postema, 'Fact, Fictions, and Law: Bentham on the Foundation of Science', 38; W Twining, *Theories of Evidence: Bentham and Wigmore*, 55.

theory being at an early stage in Bentham's time. Moreover, some authors have sought to restore coherence to Bentham by showing that his resolutely subjectivist position was nevertheless compatible with a rational analysis of belief based on his theory of fictions,[130] and that the idea that belief is expressed on a scale of degrees is compatible with both a subjective and an objective conception of probability.[131] However, in contemporary debate over probabilistic analysis of evidence, the distinction between Bayesian and Baconian theory (that is, assessing the probability of an event in numerical terms or using comparative grades of reliability) has become more pronounced.[132] Since he could not clearly take sides in a debate that was yet to take place, Bentham cannot be enlisted to serve either side, and so cannot be considered a precursor for either side.

5. CONCLUSION

Bentham proposed an articulate and far-reaching theory of evidence that is still praised as 'the most developed in the history of legal thought'.[133] His theory of evidence, although often meandering and repetitive, is marked by a remarkable coherence, articulated as it is by the principle of utility which, according to Bentham, should guide morals as well as legislation. In this field as in others, Bentham benefited from the help of disciples interested in diffusing the master's thought – disciples such as James Mill and his son John Stuart Mill, or Etienne Dumont, who became the inventor of 'Benthamism'.[134] This allegiance did not persist after Bentham's death. At the beginning of the 20th century a writer like Wigmore, who recognized the extent of his debt to Bentham, did not hesitate to deviate from him. This resulted in some dilution of the utilitarian legacy in the field of the law of evidence.

Bentham's influence is therefore a contrasting one. It is obvious with regard to the critique of exclusionary rules of evidence. Bentham's views – hostile in principle to the rules of exclusion – are now widely shared by specialists in the law of evidence, although, unlike Bentham, they generally admit that exclusionary rules are, in certain circumstances (on which they may disagree), justified. Furthermore, other aspects of Bentham's theories have opened up important areas of research, such as the psychology of proof and the probabilistic assessment of evidence. However, in these domains Bentham's proposals appear today largely outdated: his empirical conception of psychology has been replaced by a science of proof based on experimental psychology; his theory of probability has been vigorously contested by Bayesian theories of proof. Bentham's analysis of psychology and probability only prompted limited interest in his contemporaries, and it was not until the 20th century that evidence scholars resumed interest in it. But neither field of research developed in a utilitarian perspective. Hence the apparent paradox that Bentham's utilitarian theory of evidence is now seen as a precursor to numerous problems in the theory of evidence, but the foundation of very few of them.

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[130] G Postema, 'Fact, Fictions, and Law: Bentham on the Foundation of Science', 56.

[131] W Twining, *Theories of Evidence: Bentham and Wigmore*, 60.

[132] LJ Cohen, *The Probable and the Provable* (Oxford University Press, 1977).

[133] J Jackson and S Doran, 'Evidence', 177.

[134] C Blamires, *The French Revolution and the Creation of Benthamism* (Palgrave Macmillan, 2008) 2; E Halévy, *La formation du radicalisme philosophique*, vol 2, 300.

9. Utilitarian business ethics and company law

Andrew Gustafson

If one were to judge utilitarianism's influence in the field of business ethics on the basis of finding articles which provide "A Benthamite Approach to Business Ethics" or "A Benthamite Approach to" price gouging, insider trading, big data ethics, employee layoffs, and the like, one would have to conclude that Bentham and utilitarianism in general has not had much influence at all in the field of business ethics research.[1] Yet utilitarianism dominates business decision-making. Multiple empirical research studies from the early 1980s through to 2009 have claimed that once you leave academia and enter corporate America, "Generally, practitioners still rely heavily on the utilitarian ethical philosophy when making business decisions."[2] So academic business ethicists do not talk about the utilitarian approach to business ethics often, but utilitarian business ethics is the predominant approach of most practitioners—a peculiar riddle which we will here explain.

Bentham's influence on US law in general has been indirect, but nevertheless we can trace utilitarian elements in the American system of law and jurisprudence. Bentham's direct influence on corporate law in particular is not always obvious, but utilitarian concerns arise in the field, as we will see. In the United States, most of the utilitarian influence on law is indirect and filtered, and John Stuart Mill's thinking perhaps had more influence than Bentham's; but utilitarian effects and tendencies can be seen nonetheless, even in many recent decisions impacting businesses and corporate affairs.

1. GENERAL INTRODUCTION TO AMERICAN RESPONSES TO UTILITARIANISM

On the one hand, it might seem like America would have been ripe for Bentham and the radical Philosophical Radical's thinking from great Britain, especially when it came to laissez-faire government, clear rule of law, an egalitarianism which respected the rights of each individual,

[1] The only broad exceptions to this known to the present author are A Gustafson, "A Utilitarian Approach to Business Ethics" [2013] *Business and Society Review*; A Gustafson, "Utilitarianism and Business Ethics," *Ethical Issues in Business: A Philosophical Approach*, 8th ed., ed. P Werhane and T Donaldson (2006).

[2] The research has shown this from the early 1980s up until almost 2010. See D Fritzsche and H Becker, "Linking Management Behavior to Ethical Philosophy—An Empirical Investigation" (1984) 27/1 *The Academy of Management Journal* 166–75; S Premeaux and R Wayne Mond, "Linking Management behavior to Ethical Philosophy" (1993) 12/5 *Journal of Business Ethics* 345–57; S Premeaux, "The Current Link Between Management Behavior and Ethical Philosophy" (2004) 51 *Journal of Business Ethics* 269–78; S Premeaux, "The Link Between Management Behavior and Ethical Philosophy in the Wake of the Enron Convictions" (2005) 85/1 *Journal of Business Ethics* 13–25.

universal suffrage, and democracy. King points out: "In its objects at least Benthamism was not out of tune with the aspirations of many Americans."[3] Bentham felt so warmly toward the young American country that he wrote to Andrew Jackson that he felt himself to be "more of a United States man than an Englishman."[4]

Despite Bentham's warm feelings towards the United States, there was great resistance to utilitarianism in the United States generally. As James Crimmins has pointed out:

> Critics of utilitarianism in the United States were many and formidable. They challenged utilitarian moral theory because it was a secular and godless doctrine, because it gave priority to the expedient in place of rights, and because it was premised on a narrow and contested view of human nature. However, many of the same critics readily acknowledged the value of utilitarian principles in legal philosophy and government.[5]

But even great resistance and criticism still shows influence, and Crimmins rightly points out that even if most of the responses to utilitarianism in the US were negative, the sheer number of them demonstrated that utilitarianism was being widely considered by American academics and politicians.[6] Paul Palmer, writing in 1941, claimed that Benthamism had only a "slight" impact, and was a tough sell in a country which found atheism repugnant, found expediency to be a crude basis for morality, and founded itself on Lockean inalienable rights which were in the eyes of utilitarians apparently "nonsense on stilts" (interestingly, Palmer excludes other utilitarians such as Paley and Mill from this broad negative assessment of this dour assessment of utilitarian influence)[7]. Americans tended to look to Locke and his views on natural rights and natural law to justify private property, inalienable rights, and other such things which Bentham of course would have rejected.[8] And as Palmer points out, the few lonely (and generally unpopular) Benthamites in the US never made inroads into American thinking and "were either epigoni or […] apostates" who "founded no Utilitarian Club; they established no Westminster Review. Consequently, it is not surprising that they made but few conversions to the [Benthamite] faith."[9] Utilitarian ethics had plenty of critics in the United States. Ralph Waldo Emerson spoke for many American academics when he wrote of "The stinking

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[3] P King, *Utilitarian Jurisprudence in America: The Influence of Bentham and Austin on American Legal Thought in the Nineteenth* Century (Garland Publishing, 1986) 140.

[4] Jeremy Bentham to Andrew Jackson, 14 June 1830, ed. J Spencer Basset, *Correspondence of Andrew Jackson*, IV (Washington, 1929) 146.

[5] J Crimmins, "Introduction," *Utilitarians and Their Critics in America 1789–1914* (2005) V1, lviii.

[6] Ibid., lviii.

[7] P Palmer, "Benthamism in England and America" (1941) 35/5 *The American Political Science Review* 856, 859.

[8] Interestingly, despite the obvious differences with regard to natural law, Samuel Hollander points out some interesting connections between Locke and utilitarian thinking in part I of his book *A History of Utilitarian Ethics: Studies in Private Motivation and Distributive Justice, 1700–1875* (Routledge, 2020).

[9] P Palmer, "Benthamism in England and America," 865. Perhaps one outlier was Richard Hildreth, one of the few American utilitarians of the 1800s, who promoted the idea of not having a centralized bank and instead allowing the free market to determine monetary value and policy in his book *The History of Banks* (1837).

philosophy of the utilitarians!"[10] and stated "I had rather not understand in God's world than understand thro' and thro' in Bentham's."[11]

Despite this almost virulent response to Bentham's utilitarianism as a basis for ethics, Bentham's general approach to thinking about law was a good fit for American appreciation for simplifying and directness. In Martha Nussbaum's words, "Bentham has a way of making life seem simpler than it is," and this is part of the draw of, as well as the drawback, of his thought.[12] No doubt his thinking was in that sense akin to the United States because he exemplified the virtues which attracted him to the American experiment. As H.L.A. Hart puts it,

> Bentham seems to have discerned that there were and would continue to develop in American life powerful trends corresponding to virtues which he possessed himself and valued most in others: a certain homespun simplicity; enlightened benevolence; youthful energy and inventiveness; a hard-headed self-reliance, a suspicion of pop, pretence, snobbery, and social hierarchy, and a compassion for human suffering.[13]

Yet if his goal was simplification of the law, Americans found his writing style offputting. In a letter to John Quincy Adams, James Madison wrote: "It is unfortunate that he [Bentham] has not added to his merits a style and manner of conveying his ideas which would do more justice to their profoundness and importance."[14] Beyond the hurdle of style and his American disciples, Bentham's desire to produce a code which would eliminate judges from making random dog-law style judgments[15] set up some tension, as it seemed that the consistency of a set code was at odds with the flexibility that arises from judicial precedent which was typical in the US. Some Americans, such as Postema, see this code-centric focus as an inevitable failure of Bentham's project in the US,[16] while British scholars like Dinwiddy more charitably thought that Bentham intended to construct a system of positive law "which combined within itself determinacy with flexibility" and that judges were simply not to have latitude to make judgments on "which deviated from the provisions of the Pannomion."[17]

Bentham's legal thought certainly had influence and resonance in the US. As Darwin's evolutionary thinking of the late 19th century took hold, many law schools such as Harvard adopted a more evolutionary notion of how law develops and progresses which led to the adoption of legal positivism as promoted by Austin.[18] Bentham's democratic and egalitarian

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[10] E Waldo Emerson and F Waldo Emerson (eds), *Journals of Ralph Waldo Emerson*, Vol. 2 (Boston and New York, 1909–14), 455.

[11] RL Rusk (ed.), *Letters of Ralph Waldo Emerson*, Vol. 1, (New York, 1939) 450.

[12] MC Nussbaum, "Mill between Aristotle & Bentham" (Spring 2004) 133/2 *Daedalus* 62, 60–8.

[13] HLA Hart, "Bentham and the United States of America" (Oct. 1976) 19/3 *The Journal of Law & Economics* 547–67, 564.

[14] H Gaillard, *The Writings of Madison V. VIII* (G Putnam Sons, 1908) 400–2.

[15] D Aflange, "Jeremy Bentham and the Codification of Law" (Nov 1969) 55/1 *Cornell Law Review* 65.

[16] GJ Postema, *Bentham and the Common Law Tradition* (Oxford University Press, 1986) 454.

[17] J Dinwiddy, 'Adjudication under Bentham's Pannomion' in *Bentham: Selected Writings of John* Dinwiddy ed. W Twining (Stanford University Press, 2004) 162.

[18] Of course, recent questions have been raised regarding Bentham's positivism. See M Lobban, "John Austin and Bentham's Of the Limits of the Penal Branch of Jurisprudence," *The Legal*

ideals also found favor in the United States, if not due directly to his influence. Palmer, quoting A.M. Schlesinger, wrote that "many of the ideals of political democracy for which Bentham strove were already incorporated in the form of statutes and constitutions in the United States […] [so] it is not surprising that his doctrines were chiefly influential in America in the field of juristic science."[19] Of course, Bentham had offered to the US—as he had to almost every country he was able to—that he was more than willing to help them to codify their laws, and the US had refused (five years after his offer). As Hart points out, "If the democracy of America had refused his offer to draft its code of laws, it still remained for him, in spite of its professed ideology of natural rights, the greatest and most successful embodiment on earth of the principles of utility."[20] In 1900 Charles N. Gregory pointed out many of the effects and influences of Bentham on law in the US, including that testimony cannot be excluded on the ground of religious opinions of the witness, and receiving testimony of witnesses who had previously been convicted of a crime, registration of real property, allowance of usury, opposition of death penalty, required state-funded education of children, freedom in bequeathing property, and voting by ballot.[21]

Mill and Paley's ideas found more favor in the United States—Paley because he was a theist, and Mill because his utilitarian arguments for liberty and diversity resonated with the American ideals. Paley's philosophical, theological, and even legal ideas had a strong impact particularly in the first half of the 19th century, and as Wilson Smith puts it, "The books on moral philosophy and natural theology by William Paley were once as well known in American colleges as were the readers and spellers of William McGuffey and Noah Webster in the elementary schools." Smith goes on to claim that "a temperate brand of utilitarianism was once the implement of American idealists"[22] and argues that Paley strongly influenced our ethical concepts, and perhaps was the basis for the American pragmatists' concept of truth. Paley was cited at the 1787 ratifying convention in Philadelphia in support of a "confederate republic" and was held up by various professors at the time for his views on the power of the state to make laws, property rights, and other legal matters. Paley attracted Americans with his style; as Wilson says:

> The plain, often blunt, prose and the homely, sometimes childish, illustrations offered an ethical system which could be understood by students and laymen who had struggled in vain with previous works. The work of a Bishop Law, perhaps even of a Bishop Butler, was lost in philosophical underbrush; Paley kept his book well weeded, free from entangling scriptural passages, verbosity, and dogma.[23]

Philosophy and Influence of Jeremy Bentham, ed. G Tusseau (Routledge, 2014) 150; P Schofield, 'Jeremy Bentham and H.L.S. Hart's "Utilitarian Radition in Jurisprudence",' in *Jurisprudence: An International Journal of Legal and Political Thought*, Vol. 1.2 (2010) 147–67.

[19] P Palmer, "Benthamism in England and America," 870, quoting from Introduction (p.5) to HG Lundeen, "The Influence of Jeremy Bentham on English Democratic Development" (University of Iowa Studies, no date).

[20] HLA Hart, "Bentham and the United States of America," 567.

[21] CN Gregory, *Bentham and the Codifiers* (Forgotten Books, 2018) 349.

[22] S Wilson, "William Paley's Theological Utilitarianism in America" (July 1954) 11/3 *The William and Mary Quarterly* 402–24, 402.

[23] Ibid., 405.

But although his works were staple reading at American universities in the early 1800s, by mid-century they had lost their popularity.[24]

Mill argued against slavery and provided his opinions during the Civil War, attributing the general unrest of the period "to the spread of commercial society, coupled with the refusal of the landed aristocracy to relinquish its hold on political and moral authority."[25] According to Compton, Mill feared the growing influence of the commercial or middle class in the USA "because of its single-minded focus on the art of 'money-getting' and its lack of interest in the cultivation of higher faculties."[26] Mill's utilitarian moral theory generally faced a great deal of resistance in the United States. Although his was not as coldly calculating as Bentham's, and he made room for theism in his thought, utilitarian ethics did not ever gain widespread popularity in the United States. His political liberalism, however, did. "John Stuart Mill is the great unsung hero of American constitutional liberalism as it took shape in the latter half of the twentieth century" and "is to modern constitutional liberalism what John Locke was to the classical liberal tradition which shaped the first century of American constitutionalism," according to John Lawrence Hill.[27]

Despite the influence of utilitarians upon law and ethics in the US, after Rawls' very influential work *A Theory of Justice* in 1971 and the flurry of criticisms of utilitarianism which followed from thinkers such as David Lyons,[28] Bernard Williams,[29] and Robert Nozick,[30] as well as Ronald Dworkin's heavy critique of legal positivism,[31] H.L.A. Hart wrote:

> It may be that the epoch which Bentham thus opened is now closing: certainly among American political and legal philosophers utilitarianism is on the defensive, if not on the run, in the face of theories of justice which in many ways resemble the doctrine of the unalienable rights of man; and there are now new forms of old theories holding that there are important conceptual connections between law and morality obscured by the positivist tradition.[32]

Writing in 1979, Posner agrees with this assessment of the wane of utilitarianism's influence in American law. He says that while until the 1960s most legal scholarship tended to

> reflect the utilitarian-pragmatic attitudes that dominated American thought […] the legal scholar of today is more likely to view the legal system through the lens of one of the humanities or social

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[24] Ibid., 420.

[25] JW Compton, "The Emancipation of the American Mind: J.S. Mill on the Civil War" (2008) 70/2 *Review of Politics* 221–44, 223.

[26] Ibid., 224. See JS Mill, "State of Society," *Essays on Politics and Society*, in Collected Works, Vol. 18 (1977) 101.

[27] JL Hill, "The Father of Modern Constitutional Liberalism" (2018–19) 27/2 *William & Mary Bill of Rights Journal* 431, 432.

[28] D Lyons, "Rawls Versus Utilitarianism" (Oct 5, 1972) 69/18 *The Journal of Philosophy* 535–45.

[29] See B Williams, "A Critique of Utilitarianism" in JJC Smart and B Williams, *Utilitarianism: For and Against* (Cambridge University Press, 1973) 75–150.

[30] See Nozick's argument about the "experience machine" in R Nozick, "The Examined Life" in *Anarchy, State, and Utopia*, ch. 10 (Basic Books, 1974).

[31] R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978).

[32] HLA Hart, "Bentham and the United States of America," 547.

> sciences. If he approaches the system from a philosophical perspective, he will probably reflect the low esteem in which philosophers today hold utilitarianism.[33]

Posner claims that as utilitarianism has lost its hold in legal studies, its use in economics and welfare economics in particular has been gradually increasing towards the end of the last century. Yet, despite these dour assessments, we can see that some of the key concerns of utilitarian thinking—freedom of speech, anti-paternalism, and even codification of rules and punishments to clarify the law—can be clearly seen in contemporary legal developments in the past 30 years in the United States, and remain at the center of very lively debates in law and ethics.

2. CONTEMPORARY LEGAL ISSUES AND UTILITARIANISM

When it comes to specific US corporate laws and regulations meant to get corporations to comply with the law, the Federal Sentencing Guidelines which were and have developmentally been established since the late 20th century by the United States Sentencing Commission[34] were a quintessential example of developing a systematic and comprehensive set of requirements and correlating punishments, using a carrot-and-stick approach to get companies to comply. Originally designed to try to help provide consistent regular punishments for like crimes, the spirit of the reform of the Sentencing Guidelines was to eliminate inconsistency, opaqueness, judicial caprice, and random decision-making, and to level the judicial arena so that everyone would face similar requirements and punishments. The systematic detail and clear consequences for various levels of offense and behaviors are a model of the sort of legal reform project Bentham would have supported and endorsed. While the guidelines did not apply only to corporate or white-collar crime, they were especially formative in the early development of corporate compliance programs and business ethics initiatives.[35]

Mill's *On Liberty* is frequently referred to in a number of legal debates in the US especially, and his influence in that respect has been immense.[36] He has been referred to as the "Father of Modern Constitutional Liberalism" and, according to John Lawrence Hill,

> It took more than a century, but many of the central ideas of *On Liberty* and some of his other works slowly percolated into our political ideals, and ultimately, into our constitutional tradition […] Mill is to modern constitutional liberalism what John Locke was to the classical liberal tradition which shaped the first century of American constitutionalism.[37]

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[33] R Posner, "Utilitarianism, Economics, and Legal Theory" (Jan 1979) 8.11 *Journal of Legal Studies* 103–40, 107.

[34] See www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf.

[35] OC Ferrell, D Thorne LeClair, and L Ferrell, "The Federal Sentencing Guidelines for Organizations: A Framework for Ethical Compliance" (1998) 17 *Journal of Business Ethics* 353–63.

[36] Editors, "Limiting the State Police Power: Judicial Reaction to John Stuart Mill" (1970) 37/3 *University of Chicago Law Review* 627.

[37] JL Hill, "The Father of Modern Constitutional Liberalism," 432.

This is displayed in his influence on Supreme Court Justices Samuel Warren, Holmes, Brandeis, Black, and Douglas.[38] The influence of Mill has grown over time, particularly since the 1990s in Supreme Court decisions regarding free speech. Although the First Amendment was signed in 1791, prior to Mill's birth, Mill is frequently brought up as a source of support for the amendment. which says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The First Amendment has been used in many significant cases applying to business in recent years. A very live issue as of late has been the individual's freedom of speech with regard to their social media. In a recent case, *Mahanoy Area School District v B.L.*,[39] it was found that a cheerleader who made a short profane Snapchat post off campus on a weekend had her First Amendment rights to free speech violated when her high school disciplined her for her Snapchat post. Yet in a case just two years earlier, in Longoria v San Benito Independent Community School District,[40] that cheerleader (M.L.) lost the case and it was determined that her posts on Twitter did violate the "cheerleader constitution" she had agreed to by signing upon becoming a cheerleader at her school. But such decisions also reach into the commercial sphere when it comes to employees' rights to express themselves freely on social media. For example, Wendy's restaurant fired an employee for saying disparaging things about Wendy's on her social media, on the grounds that their employee manual specifically said the employees could be fired for disloyalty to the company. The National Labor Relations Board ruled against Wendy's and NRLB General Counsel even released a memorandum giving direction to companies to help them revise their handbooks so as not to overstep their limits on employees' personal speech on social media.[41]

The court has also applied free speech protections to companies. The Supreme Court referred to free speech as the basis of its commercial speech decisions in *44 Liquormart Inc. v Rhode Island*, in which a liquor store won against Rhode Island, which had prohibited liquor advertising—companies have a right to free speech, which includes advertising.[42] A similar decision was made in *Greater New Orleans Broadcasting Association v United States*, which struck down a prohibition on television and radio advertisements for private casino gambling (in a state where gambling was legal).[43] Free speech was further invoked to support internet speech in *Ashcroft v Free Speech Coalition*.[44] In the 2010 *Citizens United* ruling it was ruled

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[38] E Kasper and T Kozma, "Absolute Freedom of Opinion and Sentiment on All Subjects: John Stuart Mill's Enduring (and Ever-Growing) influence on the Supreme Court's First Amendment Free Speech Jurisprudence" (2020) 15/2 *UMass Law Review* 2–53.

[39] Mahanoy Area School District v B.L., 141 S. Ct. 976 No. 20-255 (US Supreme Ct. 2021).

[40] Longoria v San Benito Independent Consolidated School District, No. 18-41060 (5th Cir. 2019).

[41] See NLRB Memorandum GC 15-04 (March 18, 2015), available at http://static.ow.ly/docs/GC%2015_04%20Report%20of%20the%20General%20Counsel%20Concerning%20Employer%20Rules.pdf_36Fc.pdf.

[42] 44 Liquormart Inc. v Rhode Island, 517 U.S. 484 No. 94-1440 (1996).

[43] Greater New Orleans Broadcasting Association v United States, 527 No. 94-30732 U.S. (1999).

[44] Ashcroft v Free Speech Coalition, 535 U.S. 234 (2002).

that labor unions and corporations can directly contribute to election funds, the ruling being made that all forms of political speech, even that which is sponsored by corporations during elections, fell under the First Amendment protections.[45] This has been a huge change, allowing major corporations to wield their economic influence in elections, and has had far-reaching consequences as outside groups have gotten involved in local elections and the money spent on running campaigns has in some cases tripled.[46]

Fairly recently, there have been cases involving whether or not Christian business owners (in this case a bakery owner) who oppose gay marriage on religious grounds, personal conscience, and on the basis of free speech must, for example, bake a gay couple's wedding cake.[47] Religious freedom might also be supported by utilitarian arguments in Mill's *On Liberty* for cases such as Our Lady of Guadalupe School v Morrisey-Berru,[48] where the court ruled that employers have religious freedom in the way they choose or treat employees, and *Burwell v Hobby Lobby Stores*, where it was ruled that employers like Hobby Lobby (a national chain of craft stores, employing 28,000 employees) with religious and conscientious objections to contraception did not have to pay for it for employees.[49]

Beyond freedom of speech or freedom of religion issues, Mill is often a source of inspiration for anti-paternalism when it comes to public policies. American scholars frequently interpret this strong anti-paternalism of Mill as being rooted in a belief that as a matter of character development, it is best that people should themselves be most responsible for preventing harm to themselves, and not be coddled and cajoled by the state to do so.[50] These sorts of issues have exploded in the wake of the Covid-19 pandemic. Many Americans have resisted mask-wearing policies. Some have refused to follow airline requirements to wear masks on planes, or restaurants' or other private establishments' rules to wear masks, as well as local public mandates, on the basis of liberty. The arguments that mask-wearing must be required for the good of the many have been countered by arguments that people should be free to take their own risks if they are fully informed of the situation, and governments should not be allowed to mandate what a person wears, including a mask. Mill's *On Liberty* has been referenced in the popular press discussions of these public policies, with articles such as "Life, Liberty, and the Pursuit

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[45] Citizens United, 558 U.S. 310 (2010).

[46] K Evers-Hillstrom, R Arke and L Robinson, "A Look at the Impact of Citizens United on its 9th Anniversary" (1/21/2019) *Open Secrets*, available at www.opensecrets.org/news/2019/01/citizens-united/.

[47] Lee v Ashers Baking Company Ltd and others [2018] UKSC 49. See A Al-Refaei, "Is a Wedding Cake a Form of Speech?" (May 30, 2018) *University of Cincinnati Law Review*.

[48] 591 U.S. ____ (2020).

[49] 573 U.S. 682 (2014).

[50] DE Miller argues for this, as did the American libertarian scholar AJ Nock. See D Miller, *J.S. Mill: Moral, Social and Political Thought* (Polity Press, 2010) 152; and AJ Nock, "On Doing The Right Thing" in *"On Doing the Right Thing" and Other Essays* (Harper, 1928) 172–3.

of Spitting on Other People,"[51] and personal liberty has frequently been invoked even by states denying cities the authority to issue mask mandates.[52]

Some have suggested that certain places or services should be off limits for those who have not been vaccinated, and that a vaccination passport or some such ID should be mandatory for people to fly on planes, use public transport, or be in public without a mask, for example. The critical responses to such suggestions have typically been based in arguments that people should be allowed privacy with regard to their health and what medicines or vaccines they are or are not taking, and that such restrictive ID requirements are a stepping-stone to more serious overreach by the government into our personal lives. But so far companies are allowed to require employees to be vaccinated, and employees have lost in most lawsuits protesting required vaccinations by employers.[53]

Prior to the Covid-19 pandemic there had already been a few articles written on a Millian approach to such public health issues. Jose and McLoughlin suggest, for example, that Mill's opposition to the Contagious Diseases Acts in England in the 1860s was due mostly to its unfair impositions on women due to the particular way the law was designed and enforced, not because of restrictions on people to protect people from diseases.[54] Others have engaged Mill, challenging his anti-paternalism in light of public health concerns.[55] Others have more recently utilized a utilitarian approach to outline a response to the pandemic.[56] It should be noted, however, that in introducing utilitarianism as an ethical approach to help give direction, the authors found it necessary to provide the following explanation: "Utilitarianism is now often used as a pejorative term, meaning something like 'using a person as a means to an end', or even worse, akin to some kind of ethical dystopia. Yet utilitarianism was originally conceived as a progressive liberating theory where everyone's well-being counted equally."[57] As an example of what they do not want the US to become, critics point to China.[58] China has more camera surveillance on its citizens per capita than any country in the world—almost five times as many as the US—many ostensibly for the purpose of guaranteeing quarantine on its

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[51] M Gessen, "Life, Liberty, and the Pursuit of Spitting on Other People" (May 26, 2020) *New Yorker*. See also: S Lehigh, "On Freedom, Face Masks, and Government: What Would John Stuart Mill, the Great Philosopher of Individual Liberty, Say About Face-Covering Requirements During the Coronavirus Pandemic?" (Updated May 7, 2020) Boston Globe.

[52] "State Rejects Douglas County's Request to Issue Mask Mandate" (August 25, 2021) AP News, available at https://apnews.com/article/health-coronavirus-pandemic-7af2092209b8bc61f3ea5d1e8c22063b.

[53] "Can Employers Make COVID-19 Vaccinations Mandatory?" *National Law Review* (Monday, August 2, 2021).

[54] Jim Jose and KCasey McLoughlin, "John Stuart Mill and the Contagious Diseases Acts: Whose Law? Whose Liberty? Whose Greater Good?" (May 2016) 34/2 *Law and History Review* 249–80.

[55] L.O. Gostin and K.G. Gostin, "A Broader Liberty: J.S. Mill, Paternalism and the Public's Health" (2009) 123 *Public Health* 214–21.

[56] Julian Savulescu, Ignmar Persson, and Dominic Wilkinson, "Utilitarianism and the Pandemic" (2020) 34 *Bioethics* 620–32.

[57] Ibid., 621.

[58] Kristin Tate, "Coming Soon: America's Own Social Credit System," *The Hill* (Aug 3, 2021).

citizens.[59] China's argument is that the surveillance is for the common good of society, as is the social credit system which keeps track of people's habits and behaviors, including jaywalking, social media posts, and shopping habits, using such information to determine whether or not individuals may travel, send their children to university, or get a pet.[60]

3. UTILITARIANISM AND CONTEMPORARY BUSINESS ETHICS

There has been very little application of the utilitarian theory in the applied field of business ethics. Where utilitarianism typically shows up in business ethics literature is as a foil against which other ethical theories are presented as superior—and this especially in most all of the business ethics textbooks. Typically, business ethicists turn to Kantian deontology or Rawlsian analysis or even virtue ethics to provide a moral foundation for resolving business ethics quandaries. Utilitarianism receives so little notice as a normative basis for business ethics that in one of the premier books recently written on normative ethical theories for business ethics, there was not even an essay devoted to a utilitarian approach.[61] And while there have been books in the field of business ethics written on Kantian business ethics[62] and social contract business ethics[63] and Aristotelian business ethics,[64] no book has dealt with utilitarian business ethics per se. But there are some exceptions to this. While there has been some positive attention paid to the notion of "utilitarianism" as a basis for business ethics,[65] it has mostly been critical.[66] Quite

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[59] Robert Brandl, "The World's Most Surveilled Citizens," ToolTester (Feb 3, 2021). www.tooltester.com/en/blog/the-worlds-most-surveilled-countries/

[60] Kendra Schaefer, "The Apps of China's Social Credit System," *Trivium User Behavior* (Oct 14, 2019). https://ub.triviumchina.com/2019/10/long-read-the-apps-of-chinas-social-credit-system/

[61] J Smith (ed), *Normative Theory and Business Ethics* (Rowman and Littlefield, 2009).

[62] N Bowie, *Business Ethics: A Kantian Approach,* (Blackwell, 1999).

[63] T Donaldson and TW Dunfee, *Ties that Bind: A Social Contracts Approach to Business Ethics* (Harvard Business School Press, 1997); L Sacconi, *Contract of the Firm: Economics, Ethics, and Organisation* (Springer, 2000).

[64] E Hartman, *Organizational Ethics and the Good Life* (Oxford University Press, 1996); Ed Hartman, *Arriving Where We Started: Aristotle and Business Ethics* (Springer, 2020); A Sison, *Business Ethics: A Virtue Ethics and Common Good Approach* (Routledge, 2018).

[65] See A Gustafson, "In Defense of a Utilitarian Business Ethic" (Fall 2013) 118/3 *Business and Society Review* 325–60, and also W Starr, "Codes of Ethics—Towards a Rule-Utilitarian Justification" (1983) 2(2) *Journal of Business Ethics* 99-106.

[66] R Audi, "Can Utilitarianism Be Distributive? Maximization and Distribution as Criteria in Managerial Decisions" (2007) 17/4 *Business Ethics Quarterly* 593–611; T Beauchamp and N Bowie, *Ethical Theory and Business*, 6th ed. (Prentice-Hall, 2001); N Bowie and R Simon, *The Individual and the Political Order* (Rowman & Littlefield, 1998); E Hartman, *Organizational Ethics and the Good Life* (Oxford University Press, 1996); RW McGee, "Applying Ethics to Insider Trading" (2008) 77/2 *Journal of Business Ethics* 205–17; RB McKay, "Consequential Utilitarianism: Addressing Ethical Deficiencies in the Municipal Landfill Siting Process" (2000) 26(4) *Journal of Business Ethics* 289–306; M Valasquez and FN Brady, "Natural Law and Business Ethics" (March 1997) 7/2 *Business Ethics Quarterly* 83–107; M Valasquez, C Andre, T Shanks,

frequently utilitarianism is equated with cost–benefit analysis or profit maximization, or even free market economics.[67] At times utilitarianism is reduced to preference utilitarianism—the view that the source of both morality and ethics in general is based upon subjective personal preference.[68] Some have portrayed utilitarianism as a "rational actor" model.[69]

One might ask, "Why is utilitarianism not used in the field of business ethics?" If there is anyone in particular to blame for utilitarianism's failure to win over business ethicists, it is likely economists such as Jevons, Edgeworth, and Marshall, who suggested and developed the notion of a utilitarian economics. Jevons, in his 1871 *Theory of Political Economy*, applied the reasoning of utilitarianism to economics. From that point on, a utilitarian moral assessment of a utilitarian economic or business activity seemed somewhat superfluous. Of utilitarian economics, Jevons wrote, "The theory which follows is entirely based on a calculus of pleasure and pain; and the object of Economy is to maximise happiness by purchasing pleasure, as it were, at the lowest cost of pain."[70] Jevons, fully aware of the difficulty of measuring units of pleasure, also was fully convinced that "it is the amount of these feelings [of pleasure or pain] which is continually prompting us to buying and selling, borrowing and lending, laboring and resting, producing and consuming; and it is from the quantitative effects of the feelings that we must estimate their comparative amounts."[71] Since Jevons (and Walras and Menger), and with later development by ordinalists such as Robbins, Hicks, and Samuelson,[72] this view of economics has become standard, and so the logic of utilitarianism and marginal utility has become quite associated with neoclassical economics itself. In turn, most business ethicists have come to associate utilitarianism with economics, or more simply, to associate utilitarianism with an amoral approach to business decision-making based simply on economic factors. The distinction between utilitarian ethics and economics is frequently blurred or simply lost on many business ethics analyses. Business ethics textbooks frequently criticize the utilitarian defense of free markets,[73] and John Boatright rightly points out that when utility is defined

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and MJ Meyer, "Calculating Consequences: The Utilitarian Approach to Ethics" (1989) 2(1) *Issues in Ethics*, available at www.scu.edu/ethics/practicing/decision/calculating.html.

67 J Desjardins, *An Introduction to Business Ethics* (McGraw Hill, 2003).

68 See W Rabinowicz and J Österberg, "Value Based on Preferences" (1996) 12/1 *Economics and Philosophy* and also FN Brady, "A Defense of Utilitarian Policy Processes in Corporate and Public Management" (1985) 4/1 *Journal of Business Ethics* 23–30. I am not going to spend time in this chapter making these arguments to distinguish Mill from preference utilitarianism, but I would simply point to Mill's discussion of competent judges (JS Mill, *Utilitarianism*, ed. R Crisp (Oxford, 1998) 2.8.1) which seems to assume a broadly universal understanding among humanity in general to be able to distinguish higher from lower pleasures.

69 J McCracken and B Shaw, "Virtue Ethics and Contractarianism: Towards a Reconciliation" [1995] *Business Ethics Quarterly*.

70 W Jevons, *The Theory of Political Economy* (Macmillan and Co, 1871) 27.

71 Ibid., 13–14.

72 Regarding Jevons' influence on the marginalist revolution, see I Steedman, "Jevons' Theory of Political Economy and the 'Marginalist Revolution'" (Spring 1997) 4/1 *The European Journal of the History of Economic Thought* 43–64. Regarding the ordinal revolution, see P Hennipman, "A Tale of Two Schools: Comments on a New View of the Ordinalist Revolution" (1987) 135 *De Economist* 141–62.

73 See J Desjardins and J McCall, *Contemporary Issues in Business Ethics*, 5th ed. (Thomson and Wadsworth, 2005).

as human welfare or the satisfaction of desires or preferences, in such formulations, "utilitarianism is recognizable as the ethical foundation for neoclassical economic theory and welfare economics"; he goes on to say, "When utility is interpreted as preferences for goods, it can be expressed mathematically, and in that form utilitarianism becomes the basis for marginal analysis in neoclassical economics."[74]

Besides the general portrayal of utilitarianism as mere economic decision-making, utilitarianism's popularity is not helped by its commonplace reputation that utilitarianism dismisses the rights of individuals for the greater good[75] and this view that utilitarianism does not maintain concern for the individual finds support when contemporary utilitarians like Peter Singer argue that "once we abandon those doctrines about the sanctity of human life […] it is the refusal to accept killing that, in some cases, is horrific."[76] For many in the United States, the concept "Utilitarian" does bring images of Soylent Green to mind for some (the dystopian 1973 film where deceased humans were made into food for the rest of society for the greater good), or the tragic decisions of various despots and ideologues throughout history, such as Trotsky, who argued for the murder of the Czar's children, claiming that "A means can be justified only by its end […] From the Marxist point of view, which expresses the historical interests of the proletariat, the end if justified if it leads to increasing the power of man over nature and to the abolition of the power of man over man."[77] One of the early fans of Bentham in the US, Thomas Cooper, developed some of the most sophisticated utilitarian arguments in favor of the slave trade in his 1826 *Lectures on the Elements of Political Economy*.[78] Not only has utilitarianism been used to support slavery in the US; it has been used to support apartheid in South Africa,[79] hostile liquidating buyouts,[80] and a variety of other business behaviors which many would consider immoral.[81] Figures such as Pope John Paul II, who supported capitalism of the west over communism in his own country of Poland, essentially said that utilitarianism is inhumane:

> *Utilitarianism* is a civilization of production and of use, a civilization of "things" and not of "persons." A civilization in which persons are used in the same way as things are used. In the context of a civilization of use, woman can become an object for man, children a hindrance to parents, the family an institution obstructing the freedom of its members.[82]

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[74] J Boatright, *Ethics in Finance* (Blackwell, 1999) 55.

[75] R McGee, "Applying Ethics to Insider Trading" (January 2008) 77/2 *Journal of Business Ethics* 205–17.

[76] P Singer, *Practical Ethics* (Cambridge University Press, 1993) 175.

[77] L Trotsky, *Their Morals and Ours* (Pathfinder, 1938) 48.

[78] T Cooper, *Lectures on the Elements of Political Economy* (Columbia, 1826).

[79] VM Valasquez, C Andre, T Shanks and MJ Meyer, "Calculating Consequences: The Utilitarian Approach to Ethics."

[80] Almeder and Carey, "In Defense of Sharks: Moral Issues in Hostile Liquidating Takeovers" (1991) 10/7 *Journal of Business Ethics* 471, 471–84.

[81] D Coombe, "'Don't take it personally' Is Terrible Work Advice" (March 29, 2016) *Harvard Business Review*, available at https://hbr.org/2016/03/dont-take-it-personally-is-terrible-work-advice.

[82] Pope John Paul II, *Letter to Families*, 1994, www.vatican.va/content/john-paul-ii/en/letters/1994/documents/hf_jp-ii_let_02021994_families.html.

Utilitarianism is frequently seen to be simply concerned with production and use value, considering persons simply as things.

Much (not all) of the more recent business ethics literature utilizing a utilitarian approach comes from management scholars, not philosophers or political scientists or legal scholars. More often than not the approach is as such: some business ethics issue is brought forth, and then a Kantian, virtue ethics, utilitarian, and perhaps even social contract approach is briefly applied—none taking more than a paragraph. For example, one typical abstract announces that "We begin by investigating the main ethical approaches to benevolence—virtue ethical, utilitarian, and deontological" and three paragraphs cover that ground quickly.[83]

But there are some genuine attempts to uniquely apply utilitarianism to business. For one recent example, "Partial Utilitarianism as a suggested Ethical Framework for Evaluating Corporate Mergers and Acquisitions" attempts to do an ethical analysis of mergers and acquisitions in terms of a quasi-utilitarian ethical approach.[84] "Shareholder Wealth Maximization and Social Welfare: A Utilitarian Critique" provides a critique of the standard shareholder-wealth-maximization model of the firm rooted in a utilitarian approach.[85] Jones and Felps follow up with a subsequent article in which they develop their utilitarian based alternative to shareholder theory, rooted in recent happiness studies to inform utilitarian calculus.[86] In "Upping the Stakes: A Response to John Hasnas on the Normative Viability of the Stockholder and Stakeholder Theories," Daniel Palmer argues that utilitarian considerations count in favor of stakeholder theory over stockholder theory.[87] John Danly argues that Milton Friedman's position that "the social responsibility of business is to increase profits" depends on four distinct utilitarian arguments, but despite this (or perhaps because of it), Friedman's theory has significant weaknesses.[88] In "Future Generations and Business Ethics" Jeurissen and Keijzers argue that future generations should be considered in a utilitarian calculus of stakeholders' happiness, and if the happiness of future generations is in fact counted, it will certainly affect our government and market decisions.[89] David Lea's very interesting article "From the Wright Brothers to Microsoft: Issues in the Moral Grounding of Intellectual Property Rights" provides a grounding for intellectual property rights relying on Locke and H.L.A. Hart, basing his arguments not only on utilitarian concerns relating to human welfare, but also appealing to issues of individual autonomy and private control.[90] A utilitarian analysis

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[83] G Mercier and G Deslandes, "Formal and Informal Benevolence in a Profit-Oriented Context" (August 2020) 165/1 *Journal of Business Ethics* 125–43.

[84] N Collett, "Partial Utilitarianism as a Suggested Ethical Framework for Evaluating Corporate Mergers and Acquisitions" (October 2010) 19/4 *Business Ethics: A European Review*.

[85] T Jones and W Felps, "Shareholder Wealth Maximization and Social Welfare: A Utilitarian Critique" (April 2013) 23/2 *Business Ethics Quarterly* 207–38.

[86] T Jones and W Felps, "Stakeholder Happiness Enhancement: A Neo-Utilitarian Objective for the Modern Corporation" (July 2013) 23/3 *Business Ethics Quarterly* 349–79.

[87] D Palmer, "Upping the Stakes: A Response to John Hasnas On the Normative Viability of the Stockholder and Stakeholder Theories" (Oct 1999) 9/4 *Business Ethics Quarterly* 699–706.

[88] J Danley, "Polestar Refined: Business Ethics and Political Economy" (Dec 1991) 10/12 *Journal of Business Ethics* 915–33.

[89] R Jeurissen and G Keijzers, "Future Generations and Business Ethics" (Jan 2004) 14/1 *Business Ethics Quarterly* 47–69.

[90] D Lea, 'From the Wright Brothers to Microsoft: Issues in the Moral Grounding of Intellectual Property Rights' (Oct 2006) 16/4 *Business Ethics Quarterly* 579–98.

has been used to consider the risks of corporate political donations, suggesting a donation cap is a better approach than a complete ban in most cases.[91] The entire triple-bottom-line approach in the field of management and business ethics, which assesses a business decision's impact on the 'three bottom lines": profit, people, and the planet (financial, social, and environmental) has been referred to as a utilitarian approach by some.[92]

What is or is not rightly referred to as utilitarian in the business literature is the focus of '"Utilitarian Traits and the Jaus-Headed Model: Origins, Meaning, and Interpretation."[93] There is no doubt that there are a wide variety of uses of the term 'utilitarian' in management literature in particular. Some even oppose "utilitarian" and "normative" organizational identity, as though utilitarianism was not a normative ethical theory.[94] Brady and Wheeler and others have developed a *Measure of Ethical Viewpoints* in the Organizational Behavior Literature which identifies "utilitarian" individuals as having seven traits: *innovative, resourceful, effective, influential, results-oriented, productive,* and *a winner*.[95] Some even oppose "utilitarian" and "normative" organizational identity, as though utilitarianism was not a normative ethical theory.[96] The empirical research frequently engages ethical theory, such as when an empirical study of business managers revealed that "practitioners still rely heavily on the utilitarian ethical philosophy when making business decisions."[97] Of course, there are more articles which attempt to use a utilitarian approach in one sense or another, but it is a fairly small, and so manageable, field of study to delve into.

4. POSSIBLE APPLICATIONS OF UTILITARIANISM FOR FUTURE BUSINESS ETHICS RESEARCH

The long list of articles published in the broadly business ethics field just cited provides in effect an extensive list of starting points for utilitarians to make an impact in the field by applying utilitarian approaches to various issues and also clarifying the utilitarian decision-making

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[91] S Leong, J Hazelton and C Townley, "Managing the Risks of Corporate Political Donations: A Utilitarian Perspective" (2013) 118 *Journal of Business Ethics* 429–45.

[92] D Schuler, A Rasche, D Etzion, and L Newton, "'Guest Editors' Introduction: Corporate Sustainability Management and Environmental Ethics" (April 2017) 27/2 *Business Ethics Quarterly* 213–37.

[93] P Mudrack and ES Mason, "Utilitarian Traits and the Janus-Headed Model: Origins, Meaning, and Interpretation" (2019) 156 *Journal of Business Ethics* 227–40.

[94] R Stevens, N Moray, and J Bruneel, "The Social and Economic Mission of Social Enterprises: Dimensions, Measurement, Validation and Relation" (2015) 39(5) *Entrepreneurship Theory and Practice* 1051–82.

[95] FN Brady and GE Wheeler, "An Empirical Study of Ethical Predispositions" (1996) 15/9 *Journal of Business Ethics* 927–40 ; P Mudrack and ES Mason, "Utilitarian Traits and the Janus-Headed Model: Origins, Meaning, and Interpretation," 228, 233.

[96] R Stevens, N Moray, and J Bruneel, "The Social and Economic Mission of Social Enterprises: Dimensions, Measurement, Validation and Relation."

[97] S Premeaux, "The Current Link Between Management Behavior and Ethical Philosophy" (2004) 51 *Journal of Business Ethics* 269–78. See also his earlier article with R Wayne Mondy, "Linking Management Behavior to Ethical Philosophy" (1993) 12 *Journal of Business Ethics* 349–57.

which is part and parcel of business practice more often than not. It could also be useful to the management field to have someone with knowledge of the literature and utilitarianism to help sort out the confusions which have arisen in light of the multiple meanings of utilitarianism which are used. But there are other promising avenues of research and development which could be pursued.

One powerful movement within management theory where utilitarianism's vision of the greater happiness has potential to provide helpful insights is the field of "Humanistic Management" developed by Michael Pirson, among others. As Clause Dierksmeier explains, "Humanistic management, in short, aspires to use business as a means for the end of improving each and every individual's conditions in the interest and service of their unconditional dignity."[98] If a utilitarian-inspired management process seeks to provide the greatest happiness for the most through business practice, along with Mill's concern for the liberty and dignity of each individual, then it seems that humanistic management, with its focus on improving everyone's conditions and the dignity of each person, would be a good comparable theory to align with and develop the apparent symmetry.[99]

Stakeholder theory is undoubtedly the primary lens through which business ethics has thought about business management in the past 20–30 years. Yet, despite the fact that work has been done on constructing a Kantian approach, a virtue ethics approach, a Rawlsian approach, and even a pragmatist approach to stakeholder theory, no one has to this point worked on a utilitarian approach to stakeholder theory. This seems strange, given that stakeholder theory promotes management to manage with all stakeholders in mind—stakeholders being "any group or individual who can affect or is affected by the achievement of the organizations objectives."[100]

Peter Singer's utilitarianism has been little used in business ethics discussions. Singer's approach to utilitarianism which takes into account all sentient beings could extend the list of stakeholders to be considered to non-human sentient beings—animals. His "effective altruism" could also be the source of some interesting critical analysis of the use of resources by companies and corporations.[101]

Another interesting project would be a development of the distinction Jevons himself made between a higher and lower calculus, the higher being ethical and the lower being economic. He refers to it in his *Theory of Political Economy* when he writes:

> It is the lowest rank of feelings which we here treat [in economics]. The calculus of utility aims at supplying the ordinary wants of man at the least cost of labor […] A higher calculus of moral right and wrong would be needed to show how he may best employ that wealth for the good of others as well

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[98] C Dierksmeier, "What is 'Humanistic' About Humanistic Management?" (2016) *Humanistic Management Journal* 28, 9–32.

[99] For an example of a very incomplete attempt in this direction, see A Gustafson's "Business for the Greater Good: A Utilitarian Perspective on Humanizing Business" in M Dion, E Freema, and S Dmytriyev, *Humanizing Business: What the Humanities Can Say to Business* (Springer, 2021).

[100] E Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge University Press, 1984).

[101] P Singer, *The Most Good You Can Do: How Effective Altruism Is Changing Ideas About Living Ethically* (Yale University Press, 2015).

> as himself. But when that higher calculus gives no prohibition, we need the lower calculus to gain us the utmost good in matters of moral indifference.[102]

This is a starting point for developing a clear distinction between economic utilitarianism and ethical utilitarianism for business ethics.

In the current climate of "woke-corporate culture"—in which companies feel pressure to show public support for particular social issues, such as LGBTQ issues or the "Black Lives Matter" movement, for example, to show that they are 'awake' to such social issues—there are certainly a lot of important applications of how companies should engage and be proactive when it comes to socially concerned causes which concern the greatest happiness of the many. But in such a pluralistic and diverse world, how do we effectively defend the rights and concerns of the diverse but small groups in company culture in a way which balances the good of the many as well? For example, in today's climate, a company voicing support for trans individuals might upset some lesbians—these are public relations quagmires for companies today. Perhaps *On Liberty* can give us some help with thinking about this through decision-making in such situations to get to the greater happiness of the many.

In the business ethics literature, there is a debate between a "compliance-based approach" and an "integrity approach." The compliance-based approach relies on rewards and punishments to get people to act correctly. Many of the early ethics programs at companies in the US were based on the rules and punishments given in the Federal Sentencing Guidelines. This approach relies on external sanctions. The integrity approach attempts to achieve ethical behavior by helping form and shape employees' inner conscience. So, some promote this internalist approach to ethical motivation, suggesting that helping employees to internalize moral values and ethical principles through moral imagination and other means is the best way to develop ethics programs.[103] Others feel that both approaches are essential.[104] Both Bentham and Mill had visions of bringing about a world in which people would coordinate their actions to bring about the greatest happiness, but they differed in how they thought this vision should be motivated. Both clearly identified the externalist approach to getting people to do the right thing typically involves external punishments and rewards—such as fines, jail, and publication of offenses to harm reputation in the realm of law, and demotions, promotions, salary increases or decreases, or celebration of achievements and other such motivational efforts in business ethics. Bentham's Panopticon is perhaps an iconic example of his externalist focus. But Mill acknowledged this as well, and when speaking of external sanctions, Mill recommends that "laws and social arrangements should place the happiness, or […] the interest of every individual, as nearly as possible in harmony with the interest of the whole."[105] This we attempt to do through taxation, equal opportunity legislation, tax incentives for innovations, Federal Sentencing Guidelines (which gave clear uniform punishments for various crimes), or the Sarbanes–Oxley Act (which mandated strict reforms to regulations and imposed new

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[102] W Jevons, *The Theory of Political Economy*, 27.

[103] S De Colle and P Wehane, "Moral Motivation Across Ethical Theories: What can We Learn for Designing Corporate Ethics Programs?" (Sept 2008) 81/4 *Journal of Business Ethics* 751–64.

[104] D Redin, R Calderon, and R Pinero, "Can Compliance Restart Integrity? Toward a Harmonized Approach: The Example of the Audit Committee" (April 2018) 27/2 *Business Ethics: A European Review* 195–206.

[105] JS Mill, *Utilitarianism*, 2.18.

penalties on accountants, auditors, and corporate officers who broke the rules), and so on—we try to provide incentives for people and companies to do what is in the public interest through external sanctions. There can of course also be positive incentives, such as awards, or ethical responsibility lists published by organizations or magazines such as *Business Ethics Magazine*. But external codes and rules alone do not change personal or corporate character—culture formation is essential.

The internalist approach attempts to affect a person's conscience. The law has little means of affecting one's conscience per se, but when it comes to ethics, the training of one's sentiments, desires, expectations, and imagination it can make a difference. Bentham says at the very beginning of his *Introduction to the Principles of Morals and Legislation* that the means of the utilitarian system is to "rear the fabric of felicity by the hands of reason and of law"—in other words, we will bring about the happy state of affairs by means of reason first of all—which makes perfect sense since his utilitarianism was an attempt to provide an empirical scientific basis for ethics, and then also by means of law. The force of law—rules and codes and punishment for the violation of those laws—was going to bring about the goal of the utilitarian society.

Mill does of course acknowledge the power of the externalist forces of law and punishment to induce correct behavior, but Mill has a much more robust and developed theory of moral motivation. Rather than a "fabric of felicity" supported by reasoning and enforced by law, Mill suggests that the education of our moral feelings and sentiments might provide a strong internalist motivation towards the goal of the utilitarian society—although he acknowledges the important of external sanctions (particularly the opinions of others, and shame as a motivator) as well. Mill claims that everyone, from time to time, has temporary feelings of concern for others, particularly when they are cooperating on some project, and he believes that

> Consequently, the smallest germs of the feeling are laid hold of and nourished by the contagion of sympathy and the influences of education; and a complete web of corroborative association is woven round it, by the powerful agency of the external sanctions. This mode of conceiving ourselves and human life, as a civilization goes on, is felt to be more and more natural […] In an improving state of the human mind, the influences are constantly on the increase, which tend to generate in each individual a feeling of unity with all the rest; which feeling, if perfect, would make him never think of, or desire any beneficial condition for himself, in the benefits of which they are not included.[106]

Mill's vision was to draw people into a shared of vision of happiness. In our contemporary pluralistic, globalized, and divisive world of divergent opinions, Mill's vision appears utopian and perhaps even Pollyanna-ish. It may seem easier to establish corporate compliance and ethical business practice through law and surveillance, as Bentham seems to suggest; but Mill suggests another approach, one which believes it possible for people to incorporate the concerns of others as part of their own happiness:

> So long as they are co-operating, their ends are identified with those of others; there is at least a temporary feeling that the interest of others are their own interests. Not only does all strengthening of social ties and all healthy growth of society, give to each individual a stronger personal interest in practically consulting the welfare of others; it also leads him to identify his *feelings* more and more with their good, or at least with an ever greater degree of practical consideration for it. He comes, as

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[106] JS Mill, *Utilitarianism*, 3.10, 44–57.

> though instinctively to be conscious of himself as a being who *of course* pays regard to others. The good of others becomes to him a thing naturally and necessarily to be attended to, like any of the physical conditions of our existence.[107]

Here, in high relief, we see the key choice within utilitarianism itself when it comes to achieving the greatest happiness principle: will it be achieved primarily through threat and coercion, or through habituation and value formation?

5. CONCLUSION

A utilitarian approach to economic decision-making, rooted in neoclassical economics, dominates business practices. It is assumed as the basis of many of the attempts by government (such as the Sentencing Guidelines) to get compliance from companies. Utilitarianism and utilitarians have certainly helped shape law in America, which has had ripple effects in company law and legal decisions of the court involving corporations and their rights and obligations. There is plenty of interesting work to be done teasing out how a utilitarian ethics might differ from a utilitarian economics, as well as applying a utilitarian business ethics in relevant pressing concerns of business today.

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[107] Ibid., 3.10, 30–40.

10. Jeremy Bentham and the genesis of law and economics: an alternative narrative

Dina I Waked

1. INTRODUCTION

Bentham's desire to become the Newton of the Moral World is a similar goal to that of the law-and-economists, who have been driven by a desire to place the moral and normative aspects of the legal discipline in economic *science*. In 1918, Wesley C. Mitchell noted that

> Bentham dealt not only with many branches of jurisprudence – criminal law, evidence, procedure, codification, international law, constitutional law – but also with economics, psychology, penology, pedagogy, ethics, religion, logic and metaphysics. Yet all his books read as one. They work out a single idea in diverse materials. They apply the sacred principle of utility whether the subject matter be colonies or Christianity, usury or the classification of the sciences, the crimes of judges or the reformation of criminals.[1] […] What did distinguish Bentham from other utilitarians, what made him the leader of a school, what keeps his work instructive to this day, was his effort to introduce exact method into all discussions of utility. He sought to make legislation, economics, ethics into genuine sciences.[2] […] Bentham hoped to become 'the Newton of the Moral World'.[3]

In the law-and-economists' attempts at grounding law in the *science* of economics and its *scientific* tools and methods, one would assume that they would look to Bentham for guidance, inspiration and influence. This assumption is far from correct. The law-and-economists have continued to diminish the role they *reluctantly* carved out for Bentham, placing it in the smallest possible confines. In unpacking the relationship between Bentham and the law-and-economists, I unravel forgotten connections, different narratives and possibly an altogether alternative *Law and Economics*. The currently realized versions of Law and Economics and those that could be only imagined – I argue – have their genesis in Bentham's work.

Bentham can be accredited with three moves that are central to the law-and-economics movement. First, his utilitarian framework of pleasure and pain can be easily considered a prototype of the cost–benefit-analysis (CBA) at the heart of the law-and-economics methodology. Second, in universalizing the utilitarian framework to every human action, Bentham can be

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1 WC Mitchell, 'Bentham's Felicific Calculus' (1918) 33(2) *Political Science Quarterly* 161, 162.

2 Ibid., 163.

3 Ibid., 164, quoting from É. Halévy, *La Formation du Radicalisme Philosophique*, vol I (1901) 289, 290 ('Among the mass of his papers left to University College Halévy has found this passage: "The present work as well as any other work of mine that has been or will be published on the subject of legislation or any other branch of moral science is an attempt to extend the experimental method of reasoning from the physical branch to the moral. What Bacon was to the physical world, Helvetius was to the moral. The moral world has therefore had its Bacon, but its Newton is yet to come."').

argued to have brought the economic approach to what mainstream law-and-economists call the *non-economic legal fields*. In that sense, Chicago Law and Economics did not add much except to follow in Bentham's footsteps. Third, Bentham developed a much-forgotten felicific calculus that measures pleasure and pain in monetary terms. This move is totally ignored by law-and-economists, particularly by Richard Posner, who in 1979 wrote a famous piece replacing the 'unmeasurable' Benthamian utilitarian framework. Posner developed a measurement he called *wealth-maximization* that measures utilities in monetary terms – a move Posner argued necessary to allow certainty and render utilitarianism 'measurable'.[4]

These three moves place Bentham as a forerunner of most of the acclaimed law-and-economic methodologies – using the CBA, brining economics to non-economic legal fields and using money as a unit of measuring utilities. It is baffling not only that Bentham is not accredited with any of these moves, but that he is only remembered for his work on crime and punishment and its relationship with Gary Becker's work.

This chapter provides an alternative narrative of the relationship between Bentham and the law-and-economics movement. It is a trial in discerning the minor role to which Bentham is relegated in the mainstream Law and Economics literature – only acknowledging his influence on Gary Becker's work. It also tries to unpack why and how mainstream law-and-economists destroy the Benthamite utilitarian framework and replace it by wealth-maximization, while failing to demonstrate that wealth-maximization has its origin in Bentham's felicific calculus. In doing that, it hopes to shed light on Bentham's role in law-and-economics while rewriting an alternative narrative of his impact thereupon. In recrafting this alternative narrative, we get to question whether Bentham's felicific calculus had been understood and further developed at the time he wrote it, an alternative, more progressive law-and-economics could have been possible today. His felicific calculus could have allowed the survival of the *interpersonal comparison of utility* and therewith the progressive economists' redistributive agenda. These are issues further explored in detail below.

After this introductory section, the chapter is organized as follows. Section 2 discusses the role law-and-economists have carved out for Bentham, particularly with regard to his influence on Gary Becker's work; section 3 develops the cost–benefit analysis (CBA) and traces its origins in Bentham's work; section 4 discusses the Benthamite felicific calculus and his use of money as a measurement of pleasure and pain; section 5 explains the effects of the felicific calculus on the interpersonal comparison of utility; and section 6 draws some conclusions.

2. BENTHAM AND MAINSTREAM LAW AND ECONOMICS

Although Law and Economics can be understood to mean many different things, more often than not it is understood to refer to a specific movement that originated in the 1960s in the United States. It frequently refers to the work produced by scholars particularly at Chicago University law school and its department of economics, and hence is often called Chicago Law and Economics. The hallmark of this Law and Economics movement is its reliance on cost–benefit analysis (CBA), a method that introduces an opportunity cost approach while ground-

[4] R Posner, 'Utilitarianism, Economics and Legal Theory' (1979) 8 *Journal of Legal Studies* 103.

ing decision-making in efficiency analyses. If an action, decision, rule or law is set to increase the benefit of those gaining from such an action, decision, rule or law by more than it costs those who suffer from it, this action, decision, and the like is set to be efficient. This efficiency criterion is named Kaldor–Hicks efficiency after two economists writing in the 1930s to argue for this cost–benefit methodology.[5] This approach, using CBA, or efficiency analytics, is at the heart of the economic analysis of law. Instead of deciding on alternatives based on other normative grounds, such as social justice, fairness, and so on, the CBA promises a method that is objective, neutral and value-free; the best of what economics has to offer law.[6]

According to Richard Posner, what he and his peers have done is expand 'the application of economics to an ever-increasing range of legal fields, including those at once so fundamental and apparently noneconomic as torts, criminal law, family law, procedure, and constitutional law'.[7] Posner explains that until the 1960s, the economic analysis of law was synonymous with the economic analysis of antitrust law.[8] He clarifies that the hallmark of the 'new' Law and Economics is the application of the theories and empirical methods of economics to the legal system across the board – 'to common fields such as torts, contracts, restitution, admiralty, and property'.[9] The main theory and empirical method of economics applied to the legal field is the CBA as a decision-making tool.

Cooter and Ulen have similarly argued that

> until recently, law confined the use of economics to antitrust law, regulated industries, tax and some special topics like determining monetary damages. In these areas, law needed economics […] Beginning in the early 1960s, this limited interaction changed dramatically when the economic analysis of law expanded to the more traditional areas of law, such as property, contracts, torts, criminal law and procedure, and constitutional law […] Economics has changed the nature of legal scholarship, the common understanding of legal rules and institutions, and even the practice of law.[10]

The widespread claim is that, until the Chicago group grounded law on an economic scientific basis, both disciplines existed separately with very few interactions, especially in the above-mentioned *noneconomic* fields, including property and contract. Most mainstream law-and-economists are oblivious to the economists that introduced economics into legal analysis and merged legal discourses with economic study long before the Chicagoans did so in the 1960s.[11]

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5 See eg J Hicks, The Foundations of Welfare Economics (1939) 49 *Economic Journal* 696; N Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939) 49 *Econ. J.* 549.

6 See D Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique' (1981) 33 *Stanford Law Review* 387, 415; DI Waked, 'Development Studies Through the Lens of Critical Law and Economics: Efficiency and Redistribution Revisited in Market Structure Analyses in the South' (2014) 5(4) *Transnational Legal Theory* (for a critique of the CBA).

7 R Posner, *Economic Analysis of Law*, 3rd ed (1986).

8 Ibid., 19.

9 Ibid.

10 R Cooter and T Ulen (2011) *Law and Economics* 1–2.

11 See eg R Posner, *Economic Analysis of Law*, 19 ('The new law and economics may be dated somehow arbitrarily from the beginning of the 1960s, when Guido Calabresi's first article on torts and Ronald Coase's article on social cost were published').

Nonetheless, only very few economists – one of whom being Jeremy Bentham – are credited to have paved the way for Chicago scholars some 200 years later. The mainstream account of the history of Law and Economics carves out a place for Bentham as follows:

> The economic view may be said to have originated mainly with writings on crime by Beccaria (1767) and, especially, Bentham (1789). *Bentham developed in significant detail the idea that legal sanctions may discourage bad conduct and that sanctions should be employed when they will effectively deter but not when they will fail to do so (as with the insane).* Curiously, however, after Bentham, the economic approach to law lay largely dormant until the 1960s and 1970s. In that period, Coase (1960) wrote a provocative article on the incentives to reduce harms engendered by property rights assignments; Becker (1968) authored an influential article on crime, casting into modern terms and extending Bentham's earlier contributions; Calabresi (1970) published an extended treatment of liability rules and the accident problem; and Posner (1972) wrote a comprehensive textbook and a number of articles, as well as established the *Journal of Legal Studies,* in which scholarship in economic analysis of law could be regularly published. Since that time, economic analysis of law has grown fairly rapidly [*emphasis added*].[12]

As can be seen from the quote, Steven Shavell – like many other mainstream law-and-economists – acknowledges Bentham as some sort of forefather to the economic analysis of law, but then goes on to confine his role to developing the idea of imposing legal sanctions as deterrence of bad conduct. In this sense, Bentham's role is reduced to being a forerunner to Gary Becker's work on crime and punishment. This reductionist account of Bentham ignores not only the breadth of his influence, but also the depth of the law-and-economics movement's indebtedness to him.

In mainstream Law and Economics, Bentham is credited as a forefather of Gary Becker's work on crime and punishment. Becker cites Bentham's *Introduction to the Principles of Morals and Legislation* where Bentham develops that a crime is committed only when the pleasure anticipated from committing the crime increases the expected pain. So, to deter a crime, the punishment must impose sufficient pain that, when added to the other anticipated pain, is more than the expected pleasure from committing the crime – and not more than that. Bentham wrote, that 'to prevent, in as far as it is worthwhile, all sorts of offences; therefore, *the value of the punishment must not less in any case than what is sufficient to outweigh that of the profit of the offence.*[13] […] *The punishment ought in no case be more than what is necessary to bring it into conformity with the rules here given*' [emphasis in original].[14]

This idea is at the heart of what Becker went on to write in the 1960s and what ultimately led him to win a Nobel prize in economics in 1992. Becker, like Bentham before him, developed an economic model to argue that a person commits an offence if the expected utility to him

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[12] S Shavell, *Foundations of Economic Analysis of Law* 4 (2004). The quote refers to the following titles: C Beccaria, *On Crimes and Punishment* (1767); J Bentham, *An Introduction to the Principles of Morals and Legislation* (1789); R Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law & Economics* 1; GS Becker, 'Crime and Punishment: An Economic Approach' (1968) 76(2) *Journal of Political Economy* 169; G Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 *Yale Law Journal* 499; G Calabresi, *The Cost of Accidents* (1970); RA Posner, 'A Theory of Negligence' (1972) 1 *Journal of Legal Studies* 29.

[13] J Bentham, *An Introduction to the Principles of Morals and Legislation* (1780) Chapter XIV Rule 1.

[14] Ibid., Chapter XIV Rule 5.

exceeds the utility he could get by using his time and other resources in other activities, which is its opportunity cost.[15] Becker argued that if the aim was simply deterrence then the probability of conviction could be raised close to 1 and punishments could be made to exceed the gain – this would reduce the number of offences. Yet, an increase in probability increases the social cost of offences through its effect on the cost of combating offences. So, he concluded, the optimality condition in crime and punishment is that *crime would not pay*.[16]

In reading Becker and Bentham writing 200 years earlier, a striking similarity is easily discerned; a similarity that led Posner to argue that although 'Becker and his successors added a great deal [to the economic theory of crime and punishment], but the core is clearly and comprehensively stated in Bentham's *Introduction*'.[17] Nonetheless, although acknowledging this indebtedness, Posner goes on to state that '[e]ven though Bentham was a famous economist and the economic character of his analysis of crime and punishment is unmistakable despite the slightly archaic vocabulary, and even though Bentham's theory has influenced the design of the criminal justice system in England and the United States, no economist before Becker, so far as I have been able to determine, had expounded an economic theory of crime and control'.[18]

He goes on to argue that he has it on good authority, from Becker himself,

> that when he began thinking about the economics of crime, he was unaware of Bentham's discussion of it. He became aware of that discussion while he was working on his article, but he no longer remembers whether any of the points in the article were suggested to him by it, although a few of the citations to Bentham in it suggest that they may have been. So this turns out to be an uncertain case of Bentham having influenced by inspiration the economic analysis of law.[19]

Not only does this account reduce the influence of Bentham on Law and Economics to merely inspiring the work of Gary Becker on crime and punishment; it even minimizes *this* influence. Arguing that Becker developed these ideas alone, is baffling, given both the citations in Becker and the similarity with Bentham's work.

3. PAIN–PLEASURE CALCULUS AND THE COST–BENEFIT ANALYSIS

Although mainstream law-and-economists acknowledge their debt to Bentham's crime and punishment work, his more significant impact on the cost–benefit analysis – central to their economic analysis of law – is strangely ignored. Nonetheless, few contest that Bentham is considered the father of utilitarianism. Although he was not the first utilitarian, his universality of utility calculations in human decisions set him apart from other utilitarians. Bentham's most cited paragraph from his *Introduction to the Principles of Morals and Legislation* is: '[n]ature

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[15] GS. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76(2) *Journal of Political Economy* 169.

[16] Ibid.

[17] RA Posner, 'Bentham's Influence on the Law and Economics Movement' (1998) 51 *Current Legal Problems* 425, 432–3.

[18] Ibid., 431-432.

[19] Ibid., 432.

has placed mankind under the governance of two sovereign masters, *pain* and *pleasure* […] They govern us in all we do, and all we say, in all we think.'[20] His utility analysis, comparing pleasure and pain at every decision-making process, brings his utilitarian framework into economic as well as non-economic fields.

Grounding human decisions in this pleasure–pain calculus is akin to the cost–benefit analysis – the hallmark of the law-and-economics approach. No one says it better than Posner himself, who argued that

> [a]nother name for pain […] is cost, and for pleasure, benefit; so, Bentham is claiming that all people, all the time, in all their activities, base their action (and words, and thoughts) on *cost-benefit* analysis. Bentham spent much of his life reiterating, elaborating, and instantiating this claim. This claim could be thought the foundation of the economics of non-market behavior, which is to say the investigation by economists of behavior that occurs other than in explicit markets.[21]

He goes on to acknowledge that 'Bentham may be taken to have invented non-market economics'.[22] Despite this acknowledgement, Posner blatantly argued that 'until Gary Becker's Ph.D. dissertation in the 1950s, the subject of which was the economics of racial discrimination, the promise of Bentham's claim for the universality of the economic model of human behavior has been essentially ignored'.[23]

Posner explains that Bentham's universality of the economic model of human behaviour has been forgotten and ignored partly because Bentham did not have 'a clear identity as economist'.[24] Becker on the other hand did. While it might be understandable that Bentham's work lay unstudied and his work forgotten over the years, it is rather perplexing how he could have been deliberately ignored by the law-and-economists who claim to be *the first* to have applied economics to non-market economic analysis – something Bentham clearly developed first. A possible explanation for why Bentham's identity as an economist was overlooked by the law-and-economists is that Bentham's work was first collected to emphasize his writings on legal theory. His economic writings were only collected and published by Werner Stark in three volumes in 1952–4 under the title *Jeremy Bentham's Economic Writings*.[25]

Another surprising feature in the relationship between Bentham and the law-and-economists is how Posner went on to critique and replace Bentham's utilitarian framework with his own wealth-maximization framework, which in essence is not that different from Bentham's work. Richard Posner introduced his wealth-maximization methodology in an article he wrote in 1979 titled 'Utilitarianism, Economics and Legal Theory'.[26] This piece has dealt a blow to Bentham's utilitarianism by the law-and-economists. In this article Posner severely criticized the use of utilities, such as Bentham's measurement using pleasure and pain, to engage in a cost–benefit analysis. Posner set out to change this dominant framework. His aim was to debunk the utilitarian framework and replace it with wealth-maximization as the calculus

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[20] J Bentham, *An Introduction to the Principles of Morals and Legislation*, chapter I.
[21] RA Posner, 'Bentham's Influence on the Law and Economics Movement', 434.
[22] Ibid.
[23] Ibid.
[24] Ibid., 436.
[25] W Stark, *Jeremy Bentham's Economic Writings*, Volumes 1–3 (1952–4).
[26] R Posner, 'Utilitarianism, Economics and Legal Theory'.

needed for any cost–benefit analysis.[27] He argued that wealth-maximization is achieved when goods and other resources are in the hands of those who value them most – and someone values a good more only if he is both willing and able to pay more in money or its equivalent to have it.[28]

According to this Posnerian approach, instead of using pleasure and pain, everything is measured and valued depending on how much *wealth* one is both willing and able to spend on it. A rich and a poor person who equally desire a policy will yet be in unequal positions, given the measurement focuses on both the willingness *and* ability to pay. It will therefore always be more favourable to the desires of the rich than those of the poor.

To legitimate his measurement, Posner explained that using the utilitarian framework leads to a series of questionable outcomes and thus proposed that instead of utility, economic analysis of law should rely on his wealth-maximization criteria. He argued that, among others, the utilitarian framework is uncertain; it is not clear whose happiness to count in designing policies to maximize the greatest happiness.[29] Similarly, he argued that the utilitarian framework suffers from a boundary problem and is unclear regarding whether the aim is to maximize average or total happiness.[30] Most importantly, according to Posner, it lacks a method of calculation, as happiness poses serious measurement problems.[31] He also argued that 'rights in

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[27] Ibid., 119 ('I said earlier that the economist, when speaking normatively, tends to define the good, the right, or the just as the maximization of "welfare" in a sense indistinguishable from the utilitarian's concept of utility or happiness. That is why the welfare economist is often just an applied utilitarian. But for my normative purposes I want to define the maximand more narrowly, as "value" in the economic sense of the term or, more clearly I think, as "wealth." In the remainder of this paper the term "economic," when used normatively, is meant to be limited to the sense of enhancing wealth').

[28] Ibid., 199 ('Wealth is the value in dollars or dollar equivalents (an important qualification, as we are about to see) of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up. The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money—in other words, that is registered in a market').

[29] Ibid., 113 ('Should American policy be to maximize the happiness of Americans, with foreigners' happiness given a zero weight? Or is a more ecumenical perspective required? And how about the unborn? To include them in the population whose happiness is to be maximized may yield different policies on abortions, adoptions, homosexuality, savings, and other issues than if only the currently living count in the happiness census. Whether to include foreigners or the unborn is not an issue that utilitarianism can resolve directly, yet again it seems that if maximizing utility is to be taken seriously the broadest possible conception of the relevant population is indicated').

[30] Ibid., 113 ('The problem of foreigners and the unborn is related to the old dispute among utilitarians over whether the utilitarian goal should be to maximize average or total happiness. If the poorer half of the population of Bangladesh were killed, the standard of living of the remaining half, and for all one knows their subjective happiness as well, would rise because of the higher ratio of people to land and other natural resources. However, the total happiness might well be less').

[31] Ibid., 113–14 ('Another difficulty with utilitarianism is the lack of a method for calculating the effect of a decision or policy on the total happiness of the relevant population. Even if attention is confined to the human population, there is no reliable technique for measuring a change in the level of satisfaction of one individual relative to a change in the level of satisfaction of another. Some utilitarians have faith in the eventual discovery of a psychological metric that will enable happiness to be measured and compared across persons (and animals?), but in the two centuries that

a utilitarian system are strictly instrumental goods. The only final good is the happiness of the group as a whole',[32] and finally, he stated that the utilitarian approach commits a moral monstrosity, as utilitarians are ready to sacrifice the innocent individual on the altar of social need.[33]

Having deconstructed the utilitarian framework used to measure costs and benefits, he constructed his wealth-maximization as a more robust and viable alternative that arguably does not suffer from the shortcomings he attributed to the utilitarian framework. The wealth-maximization principle accepts that the initial distribution of rights and entitlements are to their natural owners. Also, it assumes that free markets enable those rights to be assigned from time to time to other users. Moreover, it implies that legal rules stimulate the operations of the market when the costs of market transactions are prohibitive. And finally, it takes as given that a system of legal remedies is in place for deterring and redressing invasions of rights.[34]

Wealth-maximization entails that the market is the forum that sets the prices of not only goods and services but also rights. In the case when there is no market to determine the prices for the issue in question (such as for marriage or custody), Posner offers the concept of the *hypothetical market* – where the court can make a reasonably accurate guess as to the allocation of resources that would maximize wealth.[35] This affirms the centrality of the market-based approach, the language of market economics referring to all exchange situations, where anything of value is traded on terms (or shadow prices) that make individual actions mutually consistent (reaching equilibrium under a perfect competitive market model).

Posner's insistence upon reliance on the market stems from his firm belief in the efficiency of the marketplace, given that it is the forum where participants *freely* contract and exchange. This, according to the neoclassical economic theory, leads to equilibrium – in the absence of market failure. Posner, and other Chicagoans that bought into the wealth-maximization criteria, have ignored that some market transactions, although appearing to be *free*, are indeed *coerced.* A labourer struggling to make ends meet will often accept wages that are lower than if they were to bargain while having sufficient resources to cover their daily subsistence and

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have elapsed since Bentham announced the felicific calculus no progress toward the discovery of such a metric has been made').

[32] Ibid., 116.

[33] Ibid., 116 ('"Moral monstrousness" is in fact a major problem of utilitarianism. Two types of monstrousness may be distinguished. One stems from the utilitarian's refusal to make moral distinctions among types of pleasure. Suppose that A spends his leisure time pulling wings off flies, while B spends his feeding pigeons, and that because A has a greater capacity for pleasure he derives more happiness from his leisure time than B does from his. Putting aside the unhappiness of the fly – which, if we could measure happiness, would probably be found trivial – the consistent utilitarian would have to judge A a better man than B, because A's activity adds more to the sum of happiness than B's').

[34] Ibid., 126–7.

[35] Ibid., 120 ('The market, however, need not be an explicit one. Even today, much of economic life is organized on barter principles; the "marriage market," child rearing, and a friendly game of bridge are some examples. These services have value which could be monetized by reference to substitute services sold in explicit markets or in other ways. […] nonexplicit market, which may be called the "hypothetical" market').

beyond.[36] It is naïve to assume that a labourer and a factory owner are both equally free in their bargaining. Both are coerced in one way or the other – one more than the other, but neither is free.[37]

Among several critiques of the application of a cost–benefit analysis using Posner's wealth-maximization, ignoring the initial set of endowments, both factors and entitlements, is the most important. Ignoring the initial endowment often favours the status quo, usually rich-friendly rules, and allows the law in force to become the baseline.[38] It thereby furthers the current income inequalities and perpetuates them further, as each entitlement is allocated not only to those who are most *willing* to acquire that entitlement, but also to those who are *able* to acquire this entitlement. This means that the poor will not only be unable to bargain for these entitlements but will never be able to acquire them, hence perpetuating their poverty further.

At the same time, this leads to a general indeterminacy problem, since every choice about an entitlement affects wealth and hence one's further ability to value an entitlement.[39] Each initial setting of entitlement background affects the outcome which is decided in the context of other entitlements. Thus, ignoring this initial setting is bound to favour the status quo.[40] This circularity argument has also been central to Dworkin and Coleman's critiques of the wealth-maximization approach.[41]

Despite the varying critiques levied against this system,[42] wealth-maximization has become central in the economic analysis of law. This is to the detriment of alternatives that were not implicated in entrenching inequality. And as far as this chapter is concerned, wealth-maximization has forever changed the relationship of Law and Economics to Bentham. It has ensured his role is peripheral; acknowledged only as a theoretical precursor to Becker's take on criminal law and economics. It has also meant that only a certain version of 'Posnerian' law and economics became mainstreamed.

The following section illustrates how Bentham, especially his felicific calculus, was much more sophisticated than the law-and-economists have given him credit for. To some extent, one could argue that if Bentham's felicific calculus had been explored further as a measurement of pleasure and pain, it might have rendered Posner's wealth-maximization criteria obsolete. After all, Posner destroys the Benthamite framework of utilitarianism to make space for his own measurement, all the while ignoring that Bentham, some 200 years earlier, had

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[36] See RL Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470.

[37] Ibid. See also D Kennedy, 'The Stakes of Law, or Hale and Foucault!', in *Sexy Dressing Etc. Essays on the Power and Politics of Cultural Identity* (1993) 83.

[38] D Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique' (1981) 33 *Stanford Law Review* 387, 415.

[39] Ibid., 422.

[40] Ibid., 426 ('Since the wealth effect generated by the initial setting of the entitlement in question tends to make that setting appear to be the efficient one at the conclusion of the analysis, it is sometimes described as introducing a bias in favor of the status quo (or as "Panglossian," since it suffuses that all settings are always efficient in this most efficient of all possible worlds)').

[41] R Dworkin, 'Is Wealth a Value?' (1980) 9 *Journal of Legal Studies* 191; J Coleman, 'Efficiency, Utility and Wealth Maximization' (1980) 8 *Hofstra Law Review* 509.

[42] See DI Waked, 'Development Studies Through the Lens of Critical Law and Economics: Efficiency and Redistribution Revisited in Market Structure Analyses in the South' (2014) 5(4) Transnational Legal Theory.

developed a very similar measurement, albeit more inclusive and nuanced. Unfortunately, this Benthamite calculus went forgotten, buried deep in archives at UCL. Had these archives and Bentham's measurements of pleasure and pain been developed over the course of these 200 years, we could have had – I argue – a more just and egalitarian cost–benefit-analysis in place. We would also have, more certainly, recast Bentham in the spotlight of Law and Economics. The next sections explore these issues in more detail.

4. BENTHAM'S FELICIFIC CALCULUS

Bentham explains that pleasure and the avoidance of pain are the ends that the legislator has in view – so he must understand their value.[43] He goes on to illustrate how the values of pleasure and pain are to be considered. These elements became known as the felicific calculus, which is Bentham's quantification system of pain and pleasure. Bentham's predecessors, such as Hobbes, Hutchinson, Beccaria, Hartley and Maupertuis, have all explored the measurement of pleasure and pain.[44] Yet, none developed such an elaborate calculus as Bentham's hedonistic or felicific calculus. Bentham distinguishes seven elements of pleasure and pain, whereas his predecessors identified only two or four elements.[45] For Bentham these seven ingredients or dimensions of value of pleasure and pain were intensity, duration, certainty or uncertainty, propinquity or remoteness, fecundity, purity and extent.[46]

The meaning of these terms is found in the second edition of Bentham's *Introduction*, published in 1823 as follows:

> *Intense, long, certain, speedy, fruitful, pure –*
> Such marks in pleasures and in pains endure.
>
> Such pleasure seek, if *private* by thy end:
>
> If it be *public,* wide let them *extend.*
> Such *pains* avoid, whichever be thy view:
> If pains *must* come*,* let them *extend* to few.[47]

Bentham clarifies that to apply this calculation to the interests of a community affected, the following steps need to be taken, starting with

> any one person of those whose interests seem most immediately affected by it: and take an account,
> (1) Of the value of each distinguishable *pleasure* which appears to be produced by it in the *first* instance.
> (2) Of the value of each *pain* which appears to be produced by it in the *first* instance.

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[43] J Bentham, *An Introduction to the Principles of Morals and Legislation*, chapter IV sec I.

[44] D Baumgardt, *Bentham and the Ethics of Today with Bentham Manuscript Hitherto Unpublished* (1966) 224.

[45] Ibid., 227.

[46] J Bentham, *An Introduction to the Principles of Morals and Legislation*, chapter IV. sec II.

[47] J Bentham, *An Introduction to the Principles of Morals and Legislation*, 2nd ed. (1823) Chapter IV sec 2, note.

(3) Of the value of each pleasure which appears to be produced by it *after* the first. This constitutes the fecundity of the first *pleasure* and the *impurity* of the first pain.
(4) Of the value of each pain which appears to be produced by it after the first. This constitutes the *fecundity* of the first *pain*, and the *impurity* of the first pleasure.
(5) Sum up all the values of all the *pleasures* on the one side, and those of all the pains on the other. The balance, if it be on the side of pleasure, will give the *good* tendency of the act upon the whole, with respect to the interest of that *individual* person; if on the side of pain, the bad tendency of it upon the whole.
(6) Take an account of the *number* of persons whose interests appear to be concerned; and repeat the above process with respect to each.[48]

These pages of Bentham's *Introduction* are well known, frequently used and often cited. What is, however, hardly known is that Bentham actually reverted to money as a possible way to measure pleasure and pain. He introduced money as a measurement for the value of pleasure and pain in an unpublished manuscript from approximately 1782 found at Bentham MSS, University College, London, Portfolio 27, Folder 5 sheet 32 pp I f on *Value and the principles of the moral calculus*. A small part was published by E. Halévy in his *La formation du radicalisme philosophique* in 1901.[49] The complete text is published in Appendix IV in David Baumgardt's 1966 book titled *Bentham and the Ethics of Today: With Bentham Manuscript Hitherto Unpublished*.[50]

In these unpublished pages, Bentham wrote that 'the idea of considering happiness as resolvable into a number of (individual) pleasures, I took from Helvetius: before whom […] it can scarcely be said to have had a meaning'.[51] Bentham had found that *money* would be a universal mode of accounting for happiness and pain.[52] He goes on to unfold the *instrument* of pleasure as anything that goes under the name of a *possession*.[53] He defines that this possession can be real or fictitious – and in the margin of the pages of this unpublished manuscript, he writes 'Money the only current instrument of pleasure'.[54]

He further explains:

> Possessions that are real entities are all of them to be found among the several (bodies) substances, that surround us: the value whereof, that is their aptitude (capability) of producing pleasure is measured by that one sort of them which being the pledge and representative of almost all the rest (others) is a means of acquiring them at any time, I mean *money*. Possessions that are fictitious entities, are (either) power (condition) (or) and reputation. Money is also, directly or indirectly a means of acquiring even these. […] Money there is the only current possession, the only current instrument of pleasure […] Now then money being the current instrument of pleasure, it is plain by uncontroverted experience that the quantity of actual pleasure follows in every instance in some proportion or other the quantity of money.[55]

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[48] J Bentham, *An Introduction to the Principles of Morals and Legislation*, chapter IV sec V.
[49] É. Halévy, *La Formation du Radicalisme Philosophique*.
[50] D Baumgardt, *Bentham and the Ethics of Today with Bentham Manuscript Hitherto Unpublished*.
[51] Ibid., 557.
[52] Ibid.
[53] Ibid., 558.
[54] Ibid.
[55] Ibid.

In the margins, he further explains that 'in small sums, the quantity of pleasure is nearly as the quantity of money'.[56] And then he adds that 'we may measure with the utmost exactness any such pleasure as is produced (producible) by money, that is any such pleasure as in general it lies within the province of the legislator to bestow […] As pleasure is given by giving money, so is pain by taking it away.'[57]

At first it might seem that for Bentham, *money* is the object of the pleasure or the pain itself and thus can be measured accordingly. But he goes on to explain that even in situations where pleasure or plain is produced by another cause, 'money though not the cause may be the measure; if not the direct one, yet an exact and proper one, and the only one such pain or pleasure will admitt [sic] of'.[58]

This instrumental use of money as a measurement, he elaborates, is to allow the 'use of a common measure […] to enable the person who speaks to communicate to any one he is speaking to the same idea of the quantity of anything he is speaking of as he himself conceives. A common measure must therefore be some instrument the name of which suggests upon being mentioned to both parties the idea of the same quantity.'[59] He elaborates on this with an illustrative example:

> You tell me S^{t} Paul's is bigger than the Pantheon: I agree with you that it is so. This agreement does not hinder our ideas of the proportion of those two bodies from being very different. You may think S^{t} Pauls [sic] ten times as big as the other building: I may think it is not more than half as big again: You may tell me that S^{t} Pauls [sic] contains two millions of cubic feet; the Pantheon but half a million. If I agree with you in this or our ideas of the bigness of the respective buildings are now the same. We have found a common measure for them viz: a foot ruler an instrument the use of which is familiar to both of us, and which through the medium of our senses presents us with such ideas of quantity as by experience we always find to be alike […] If then, speaking of the quantity (the respective quantities) of various pains and pleasure [sic] and agreeing in the same propositions concerning them we would annex the same ideas to these propositions, that is if we would understand one another, we must make use of some common measure. The only common measure the nature of things affords is money. How much money would you give to purchase such a pleasure? 5 Pounds and no more. How much money would you give to purchase another pleasure? 5 Pounds and no more. The two pleasures are (must as to you be reputed) equal. How much money would you give to purchase immediately such a pleasure? 5 Pounds and no more. How much money would you give to exempt yourself (immediately) from such a pain? 5 pounds and no more. The pleasure and pain must be reputed equivalent.[60]
>
> The Thermometer is the instrument for measuring the heat of the weather: the Barometer the instrument for measuring the pressure of the Air. Those who are not satisfied with the accuracy of these instruments must find out others that shall be more accurate, or bid adieu to Natural Philosophy. Money is the instrument for measuring the quantity of pain or pleasure. Those who are not satisfied with the accuracy of this instrument must find out some other that shall be more accurate, or bid adieu to Politics and Morals. Let no one (man) therefore be either surprised or scandalized if he find me in the course of this work valuing every thing in money. […] The *pleasure* resulting from any act to the agent may be stiled the *profit of* that act. The *pain* resulting from it, the *loss by* that act.[61]

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[56] Ibid.
[57] Ibid., 559.
[58] Ibid., 560.
[59] Ibid.
[60] Ibid., 561.
[61] Ibid., 562.

Bentham did not try to go any further in elaborating the use of money to convert pleasure and pain into measurable and comparable units.[62] This is evident from the fact that he does not use money as a measurement for pleasure or pain in any of his subsequent writing. Nonetheless, unearthing these pages clearly demonstrates that Bentham had developed a measurement of pleasure and pain – or cost and benefit – not that different from that which seemed revolutionary when Posner wrote about it in 1979. Using money as a measurement has therefore its origin in Bentham after all. What is, however, worth mentioning is that in Bentham's explanation of money as a measurement there is no trace of the ability to pay – only the willingness to pay – which constitutes the valuation. This is an important difference from the thought which Posner went on to develop later. Although these pages illustrate yet another forgotten influence of Bentham on the law-and-economics movement, the fact these pages were never completely published definitely contributed to the fact that they remained unknown. The partial publication of these pages was done in a rather confidential way. Ignoring this Benthamite valuation, I argue, has significantly changed the nature of welfare economics generally, and particularly the welfare policies that rested on the concept of the interpersonal comparison of utilities. This will be discussed next.

5. THE INTERPERSONAL COMPARISON OF UTILITY

The interpersonal comparison of utilities was a central tool and method for the redistributive projects and policies of progressive economists and jurists writing at the turn of the century. This method relied on the concept of diminishing marginal utility, which was born with the *Marginalist Revolution*. This Marginalist Revolution owed its existence to economists writing from England, Austria and Switzerland in the final third of the 19th century, which ultimately led to a rejection of Classical Economics.[63] The economists that were credited with this move and are therefore the first to be called *marginalist* economists included William Stanley Jevons (1835–82),[64] Carl Menger (1840–1921)[65] and Léon Walras (1834–1910).[66] At, astonishingly, the same time, they all introduced the concepts of marginalism: *marginalist utility* and *diminishing marginal utility* – hence the name Marginalist Revolution.[67]

Diminishing marginal utility refers to the decrease in satisfaction the more units are produced or consumed – it became known as an economic *law* that entailed that the first unit of consumption of a good or service yields more utility than the second and subsequent units. Utility thereby decreases with every additional unit of consumption, production or ownership. Although total utility increases with additional units, each additional unit of the good brings about an ever-smaller increase in marginal utility, until the increase becomes equal to zero

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62 A Brunon-Ernst, *The Felicific Calculus*, conference talk (January 2014).

63 HD Kurz, *Economic Thought: A Brief History* (2016) 57.

64 S Jevons, *Theory of Political Economy* (1871).

65 C Menger, *Die Grundsätze der Volkswirthschaftslehre* (1871).

66 L Walras, *Éléments d'économie politique pure* (1874).

67 Utility in economics refers to the satisfaction or benefit derived by consuming or producing a product or service; while *marginal utility* refers to the additional satisfaction received when consuming or producing an additional good or service.

and thereafter negative.[68] The Marginalists used a hedonistic calculus, based on Bentham's felicific calculus – of evaluating an action by the amount of pleasure and pain it produces – to determine the exact utilities in question.[69] It is interesting to note that Bentham was very close to having developed the concept of marginalism and had indeed incorporated some sort of diminishing marginal utility in his pleasure–pain calculus.[70] This is discernable from his writing in *Pannomial Fragments* in 1838, as follows:

> I. Case or state of things the first.—The quantities of wealth in question, considered as being in a quiescent state, actually in the hands of the two parties in question: neither entering into, nor going out of the hands of either.
> 1. Cæteris paribus,—to every particle of the matter of wealth corresponds a particle of the matter of happiness. Accordingly, thence,
> 2. So far as depends upon wealth,—of two persons having unequal fortunes, he who has most wealth must by a legislator be regarded as having most happiness.
> 3. But the quantity of happiness will not go on increasing in anything near the same proportion as the quantity of wealth:—ten thousand times the quantity of wealth will not bring with it ten thousand times the quantity of happiness. It will even be matter of doubt, whether ten thousand times the wealth will in general bring with it twice the happiness. Thus it is that,
> 4. The effect of wealth in the production of happiness goes on diminishing, as the quantity by which the wealth of one man exceeds that of another goes on increasing: in other words, the quantity of happiness produced by a particle of wealth (each particle being of the same magnitude) will be less and less at every particle; the second will produce less than the first, the third than the second, and so on.
> 5. Minimum of wealth, say £10 per year—greatest excess of happiness produced by excess in the quantity of wealth, as 2 to 1:—magnitude of a particle of wealth, £1 a year. On these data might be grounded a scale or table, exhibiting the quantities of happiness produced, by as many additions made to the quantity of wealth at the bottom of the scale, as there are pounds between £10 and £10,000.[71]

As this quote shows, Bentham's analysis points in the direction of marginalism and the diminishing marginal utility – although he does not introduce the marginal concept as such.[72] This has led scholars such as Nathalie Sigot to trace Bentham's influence on the economists credited with the Marginalist Revolution, such as Stanley Jevons. She has written: 'Jevons resorted to the Benthamian calculus in order to deal with "Pleasure and pain as Quantities" on which his theory was to be based.'[73] Although one can clearly see marginal utility and diminishing marginal utility analyses in Bentham's work, as illustrated in the quote above, the marginalist

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[68] HD Kurz, *Economic Thought: A Brief History*, 61.

[69] B Seligman, *Main Currents in Modern Economics* (Transaction Publisher, 1990) 262 ('But basic to value was utility and this in turn was rooted in Benthamite pleasure-pain psychology').

[70] A Brunon-Ernst, *The Felicific Calculus*, conference talk (January 2014).

[71] J Bentham, *Pannomial Fragments* (1838) chapter IV, sec. 5.

[72] See TW Hutchison, 'Bentham as an Economist' (1956) 66(262) *The Economic Journal* 288, 291 ('Bentham criticizes Smith not for the distinction itself but for the way in which he formulates it, and for illustrating it by the paradox of water and diamonds. Bentham himself re-solves this paradox on lines which clearly point in the direction of the marginal utility theory, that is, by invoking the plenty or scarcity of the supply').

[73] N Sigot, 'Jevon's Debt to Bentham: Mathematical Economy, Morals and Psychology' (2002) 70(2) *The Manchester School* 262, 265 (citing WS Jevons, 'A Brief Account of a General Mathematical Theory of Political Economy' (1866) Communication at the British Association,

turn would only be associated with economists writing at the turn of the 19th century. To many, Bentham's role as a predecessor to these concepts is unknown.

After the Marginalist Revolution, progressive economists frequently utilized the concept of diminishing marginal utility. They used it to compare individuals' marginal utility, in what became known as the interpersonal comparison of utility. This allowed them to argue in favour of forced redistribution from the rich to the poor. For example, Arthur Pigou, who was writing at the time with the spirit of utilitarianism and its basic philosophical postulate, the greatest good for the greatest number,[74] contended that a more even distribution of income would enhance welfare.[75] Therefore, income transfer from the rich to the poor would improve welfare, provided that the national dividend itself was not reduced. He argued that such transfers would mean much less to the wealthy than to the poor. He supported this postulation with the *theory of diminishing marginal utility*: given that income is subject to diminishing marginal utility, transfers of income from the rich to the poor would enhance total welfare by increasing the poor's satisfaction more than the rich's dissatisfaction.[76] An extra dollar is worth less to a millionaire than to a poor person. Accordingly, taking a dollar – or a hundred – from the rich millionaire would displeasure him less than the pleasure the poor person would gain from receiving the extra dollar(s). Again, we find in Bentham a precursor to this analysis, which he, however, qualifies by the fact that – in relative terms – the pain of a loss is greater than the pleasure brought about by a gain.[77]

This sort of analysis, comparing the pleasure of the rich and the poor, was central to the progressive agenda and the work of the progressive institutional economists and legal Realists. Their redistributive policies were grounded on this method, known as *interpersonal comparisons of utilities.* This method could, together with the theory of *diminishing marginal utility,* allow them to advocate a progressive agenda of redistribution from the rich to the poor. Although this method of interpersonal comparison of utility allowed them to develop their progressive policies, it was ultimately responsible for the demise of their influence.

By the 1930s, a group of positivistic economists gave neoclassical economics a much-needed revival, and forever cast the writings of the progressive and institutionalist economists outside of the economic *science*. This group of economists were often called *the ordinalists*. They held that interpersonal comparison of utility was impossible, as they saw that utilities cannot be quantified and compared. Since utilities cannot be measured and compared, they can only be ordered – hence the term ordinalists. They were responsible for what became known as the Ordinalist Revolution. They were, therefore, credited with the demise of the interpersonal

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Journal of the Statistical Society of London; reprinted in WS Jevons, *The Theory of Political Economy*, 5th edn (1965) 301–14).

74 B Seligman, *Main Currents in Modern Economics*, 478.

75 Ibid., 480.

76 AC Pigou, *Economics of Welfare*, 4th ed (1932) 96.

77 J Bentham, *Principles of the Civil Code*, in *The Works of Jeremy Bentham*, ed. J Bowring, vol 1 (1838–43) 307 ('For, 1st, The sum lost, bearing a greater proportion to the reduced fortune than to the increased fortune, the diminution of happiness for the one will be greater than the increase of happiness to the other. In a word equality would be violated by an opposite distribution. […] Mankind in general appear to be more sensible of grief than pleasure from au equal cause. For example a loss which would diminish the fortune of an individual by one quarter, would take more from his happiness than would probably be added by a gain which should double it').

comparison of utility, a fundamental concept that progressive economists relied upon to support their wealth redistribution policies. This made their theory and subsequent applications oblivious to wealth redistribution, which used to be central to questions of fairness and equity in welfare analyses.

One of the main arguments for the demise of the interpersonal comparison of utility was the fact that it was impossible to measure utilities. Utilities could only be ordered but never measured and compared. This led to the rise of the Kaldor–Hicks efficiency standard which was developed – separately – by Nicholas Kaldor and John Hicks.[78] Kaldor in 1939 wrote to illustrate the balancing of efficiencies using the example of the Corn Laws, which were promulgated between 1773 and 1815 to set barriers to wheat imports in order to protect British landlords and agriculture. Kaldor discussed the benefits of free trade compared with the losses to the landlords, arguing that '[i]t can no doubt be shown that the gain to the community as a whole exceeded the loss to the landlords'.[79] In overcoming Pareto optimality's more restrictive requirement of making everybody better off without making any one worse off, Kaldor argued that '[t]here is no need for the economist to prove – as indeed he never could prove – that as a result of the adoption of a certain measure nobody in the community is going to suffer'. To then introduce his own 'potential Pareto' efficiency criteria, he states:

> In order to establish his case [the economist], it is quite sufficient for him to show that even if all those who suffer as a result are fully compensated for their loss, the rest of the community will still be better off than before. Whether the landlord, in the free-trade case, should in fact be given compensation or not, is a political question on which the economist, qua economist, could hardly pronounce an opinion. The important fact is that, in the argument in favour of free trade, the fate of the landlords is wholly irrelevant: since the benefits of free trade are by no means destroyed even if the landlords are fully reimbursed for their losses.[80]

Nicholas Kaldor and John Hicks' work on the potential Pareto efficiency standard cemented the Ordinalist Revolution and the death of interpersonal comparisons of utilities, which were deemed no longer grounded in economic scientificity.[81] Their writings and the Kaldor–Hicks efficiency criterion further changed welfare economics. According to this welfare criterion, any change in policy will produce winners and losers, thus necessitating the comparison of the gains of some with the losses of others so that '[o]nly if the increase in total income is sufficient to compensate for such losses, and still leaves something over to the rest of the community, can it be said to be justified without resort to interpersonal comparisons'.[82]

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[78] J Hicks, 'The Foundations of Welfare Economics' (1939) 49 *Economic Journal* 696.

[79] Ibid., 549.

[80] Ibid., 551.

[81] Ibid.

[82] N Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939) 49 *Economic Journal* 549, 551 and footnote 1 ('This principle, as the reader will observe, simply amounts to saying that there is no interpersonal comparison of satisfactions involved in judging any policy designed to increase the sum total of wealth just because any such policy could be carried out in a way as to secure unanimous consent. An increase in the money value of the national income (given prices) is not, however, necessarily a sufficient indication of this condition being fulfilled: for individuals might, as a result of a certain political action, sustain losses of a non-pecuniary kind – eg, if workers derive satisfaction from their particular kind of work, and are

This led to distributional policies, which were founded on the interpersonal comparison of utility, forever being left out of the science of economics and welfare. It solidified the efficiency discourse, which was now realistically feasible in its potential Pareto form rather than Pareto's unrealistic version. What became the Kaldor–Hicks efficiency standard dominated the new welfare discourse. According to this standard, an alternative is deemed desirable when the gains to the 'winners' would outweigh the losses to the losers to the extent that the winners could compensate the losers and still come out ahead without actual compensation being necessary. This way to argue the net benefit of a policy provides a measure of the capacity of an economy to satisfy preferences that does not require interpersonal comparisons or any judgment concerning the justice of different distributions.[83]

The rise of the Ordinalists, and the subsequent switch from interpersonal comparisons of utility to first Paretianism and then Kaldor–Hicks efficiency as the basis for welfare economics, meant that very few involuntary wealth transfers could be said to increase welfare on acceptably scientific or economic grounds.[84] Thus, any attempts at involuntary redistribution could no longer be supported on scientific premises. While involuntary transfer became unacceptable, voluntary market exchanges were always considered superior, as they were efficiency enhancing, provided that no third parties were affected by the transaction.[85] Hence, strong economic support was given to liberty of contract.

How is this related to Bentham? I argue that, had Bentham's felicific calculus been taken more seriously, had his measurement of pleasure and pain using money been mainstreamed since the 1780s, maybe the death of the interpersonal comparison of utility would have not happened as smoothly by the 1930s. Maybe this would have altered the Posnerian wealth-maximization being mainstreamed, using both the willingness *and* the ability to pay. Maybe the supremacy of the efficiency discourse would have been different. Maybe the interpersonal comparison of utility would have survived – in one form or another – and maybe welfare economics would have been radically different from what it became. Maybe this would have meant that more redistributive policies would have been possible, and maybe this would have had a substantial effect of income inequality and social justice. Whether Bentham would have supported the use of his felicific calculus for these sorts of progressive redistributive policies is another matter – worth a separate study on its own. But it can briefly

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obliged to change their employment, something more than their previous level of money income will be necessary to secure their previous level of enjoyment; and the same applies in cases where individuals feel that the carrying out of the policy involves an interference with their individual freedom. Only if the increase in total income is sufficient to compensate for such losses, and still leaves something over to the rest of the community, can it. be said to be "justified" without resort to interpersonal comparisons').

[83] Ibid.

[84] HJ Hovenkamp, 'The First Great Law & Economics Movement' (1990) 42 *Stanford Law Review* 993, 1038.

[85] Ibid.

be mentioned that Bentham would have been in favour of equal distribution, which he argued – like the progressives after him[86] – would increase total welfare.[87]

6. CONCLUSION

This chapter provided an alternative account of the influence of Bentham on the law-and-economics movement. Although his role has more often been narrowed, to only consider him an inspiration for Becker's work, there are at least three ways in which Bentham's work can be argued to have not only preceded but heavily inspired the law-and-economists'. First, Bentham's utilitarian calculus of pleasure–pain is akin to using cost–benefit analysis (CBA) – a quintessence of the law-and-economics method. Second, given this pleasure–pain calculus, Bentham's utilitarian framework reached non-economic legal fields two centuries before the law-and-economists claimed to have pioneered such a move. And finally, Bentham's pleasure–pain calculus was developed using money as a unit of measurement – another move the law-and-economists claimed for themselves. These moves have been forgotten or deliberately ignored in mainstream law-and-economics account. In reviving them and bringing them to light, this chapter is written not only to credit Bentham with these moves, but also to imagine an alternative law-and-economics using Bentham's forgotten accounts. Whether a law-and-economics that acknowledges its genesis in Bentham's work would have been progressive is an unanswered question worth pondering further.

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[86] A Pigou, *Wealth and Welfare* (1912); B Seligman, *Main Currents in Modern Economics*, 480 ('It was Pigou's contention that a more even distribution of income would enhance welfare').

[87] J Bentham, *Traités de législation civile et pénale*, 2nd edn, t.1 (1820) 164, cited in N Sigot, '"Be Quiet", mais modérément: Le rôle de l'État dans la pensée économique de Jeremy' (1993) 44(1) *Revue économique* 23, 42.

11. Nudge and utilitarianism: a matter of preferences

Malik Bozzo-Rey[1]

1. INTRODUCTION

The question of how to know 'what will make choosers better off, as judged by themselves […] without being accused of thinking that we know what is best for everyone'[2] is an important question to address. Indeed, this reveals deep inconsistencies in the presentation and argumentation put forward by Sunstein and Thaler. So, after trying to clarify the meaning of nudge, I will explain why I believe these authors mobilise a certain type of utilitarianism – in this case, preference utilitarianism – whose main elements shall be identified and explained. It will become clear from this initial analysis that justifying nudges' libertarian paternalism on the grounds of a search for well-being as defined by the individuals involved – 'as judged by themselves' – raises a number of questions whose attempted resolution, far from clarifying Sunstein and Thaler's positions, only serves to highlight their internal contradictions.

2. NUDGES AND THE LAW

2.1 What Is a Nudge?

Contrary to what one might think, considering the success of Sunstein and Thaler's book and of the term 'nudge' itself (which in just a few years has gone from being rather academic to a word that every public decision-maker needs to know), finding a clear and precise definition of what a nudge is – or should be – within the book is not easy. Sunstein and Thaler run the gamut from very broad considerations to examples of varying degrees of detail in an attempt to help us understand the meaning of a 'nudge'.

Thus, they start by highlighting three benefits of the use of nudges: effectiveness, minimal cost and a certain degree of 'realism', or, rather, a match between the theoretical framework of the nudge and the reality of individual decisions.

Thus,

> *If private companies or public officials think that one policy produces better outcomes, they can greatly influence the outcome by choosing it as the default. As we will show, setting default options, and other similar seemingly trivial menu-changing strategies, can have huge effects on outcomes,*

1 I would like to thank Katya Long, PhD, for translating this chapter into English.

2 RH Thaler, *Misbehaving: The Making of Behavioral Economics* (Penguin Books 2016) 326.

> *from increasing savings to improving health care to providing organs for lifesaving transplant operations.*[3]

They also add: 'Incentive-based approaches are more efficient and more effective, and they also increase freedom of choice.'[4]

The associated cost must be as low as possible: 'Our goal is to allow people to go their own way at the lowest possible cost.'[5]

Lastly, with their emphasis on the theoretical sources of their work, namely the behavioural sciences, Sunstein and Thaler emphasise how nudges can consider and account for the way individuals behave in 'real life' and how they 'really' make decisions.

> our basic source of information here is the emerging science of choice, consisting of careful research by social scientists over the past four decades. That research has raised serious questions about the rationality of many judgments and decisions that people make. […] Hundreds of studies confirm that human forecasts are flawed and biased.[6] Human decision making is not so great either.[7]
>
> If you look at economics textbooks, you will learn that homo economicus can think like Albert Einstein, store as much memory as IBM's Big Blue, and exercise the willpower of Mahatma Gandhi. Really. But the folks that we know are not like that. Real people have trouble with long division if they don't have a calculator, sometimes forget their spouse's birthday, and have a hangover on New Year's Day. They are not homo economicus; they are homo sapiens. To keep our Latin usage to a minimum we will hereafter refer to these imaginary and real species as Econs and Humans.[8]

One can readily agree that although there are several elements here that make it possible to understand the framework in which nudges operate, there is no actual definition. Nevertheless, it is worth noting at this point that a nudge seeks to influence the context in which individuals make decisions, acknowledging that they are affected by a number of biases that predictably distort their reasoning. Sunstein and Thaler are somewhat reluctant to provide a proper definition, opting instead for a methodology that lies between induction and casuistry. It is only through the examples they use – notably the cafeteria – that they characterise rather than define a nudge. The cafeteria example is particularly paradigmatic of a nudge-based approach and is very instructive. It can be retold as follows. Suppose you are a primary school principal, and you are keen for your students to eat healthily but do not want to remove a food choice or change the menu. The key then is to change the context in which the children make decisions, for example by displaying the healthiest food at eye level and as their first choice. You will find that children tend to choose the healthier food and that their health then improves! A simple change in the context in which children choose their food can therefore affect their well-being. You have used a nudge.

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[3] RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008) 8.

[4] Ibid., 186.

[5] Ibid., 249.

[6] For an overall presentation, see E Cartwright, *Behavioral Economics*, 2nd edn (Routledge, 2014).

[7] RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, 7.

[8] Ibid., 6–7.

Thus, a nudge is '[a]ny aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives'.[9]

One may also add: 'To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting the fruit at eye level counts as a nudge. Banning junk food does not.'[10]

This is not a satisfactory 'definition' and a number of authors have worked to clarify it – irrespective of whether they are advocates or opponents of nudge theory.

Thus, Hausman and Welch consider that '[n]udges are ways of influencing choice without limiting the choice set or making alternatives appreciably more costly in terms of time, trouble, social sanctions, and so forth'.[11]

They add further: 'They are called for because of flaws in individual decision-making, and they work by making use of those flaws.'[12]

Hansen puts forth a detailed and precise definition:

> A nudge is a function of the choice architecture that alters people's behaviour in a predictable way that works independently of
> (1) forbidding or adding any rationally relevant choice options,
> (2) changing their incentives, whether regarded in terms of time, trouble, social sanctions, economic and so forth, or
> (3) the provision of factual information or rational argumentation.
> (4) Nudges are called for because of cognitive boundaries, biases, routines, and habits in individual and social decision-making, and (5) work by making use of those boundaries, biases, routines, and habits as integral parts of the choice architecture.[13]

The following elements can be gathered in light of these efforts to define what a nudge is: it is part of a choice architecture (a decision-making context); it leads one or more individuals to change their behaviour in such a way as to improve their situation (in terms of well-being) but without reducing their freedom of choice – which is why Sunstein and Thaler use the expression libertarian paternalism.[14]

Thus, there is a 'nudger', or choice architect, and a 'nudged'. When applied to public policies, the challenge lies in successfully influencing the behaviour of individuals by relying on their cognitive biases and using methods derived from the behavioural sciences, while not subjecting them to any obligation and with no significant penalty for failing to comply with the nudge (*reversibility* condition). All this while simultaneously aiming to increase the well-being of those individuals targeted by the nudge (*benevolence* condition).

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[9] Ibid., 6.

[10] Ibid.

[11] DM Hausman and B Welch, 'Debate: To Nudge or Not to Nudge' (2010) 18 *Journal of Political Philosophy* 123, 126.

[12] Ibid.

[13] P Guldborg Hansen, 'The Definition of Nudge and Libertarian Paternalism: Does the Hand Fit the Glove?' (2016) 7 *European Journal of Risk Regulation* 155, 20.

[14] CR Sunstein and RH Thaler, 'Libertarian Paternalism Is Not an Oxymoron' (2003) 70 *The University of Chicago Law Review* 1159.

2.2 From Soft Law to Replacing the Rule by the Norm

While Sunstein and Thaler humbly admit to having 'written *Nudge* in the faint hope that a few people with some influence might read it and get some useful policy ideas',[15] the fact is that policymakers and governments have seized upon this tool. They have done so to the point of creating 'nudge units'[16] and using behavioural science to develop public policy, even giving rise to a new name: 'behaviourally informed public policies'.[17] For example, Barack Obama appointed Cass Sunstein – his 'regulatory czar' – to head the Office of Information and Regulatory Affairs (OIRA), with the aim of developing more impactful regulations with less constraints. One of his most emblematic accomplishments, and one often cited by Sunstein, is the 'food pyramid', whose first version, drawn up in 1992, was, according to him, laudable in its approach, but unclear and therefore misunderstood. It completely missed its objective of helping people prepare a balanced meal. Therefore, Sunstein worked on another representation that was released in June 2011.[18]

According to Sunstein, this 'simplified plate' has the enormous advantage of being intuitively simple to understand with little effort, and therefore no need to mobilise significant mental resources.[19] In keeping with this trend of applying behavioural science to public policy, David Cameron decided to create a Nudge Unit in the UK in 2010, the famous 'Behavioural Insights Team'. This decision went hand in hand with a certain understanding of state action:

> There has been the assumption that central government can only change people's behaviour through rules and regulations. Our government will be a much smarter one, shunning the bureaucratic levers of the past and finding intelligent ways to encourage support and enable people to make better choices for themselves.[20]

The ball was rolling: Australia, Canada, the Netherlands and Germany set up similar teams, followed by India, Japan and France. International institutions such as the World Bank, UN agencies, the OECD and the EU also chose to integrate a behavioural approach into the design and evaluation of their action programmes.

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[15] RH Thaler, *Misbehaving: The Making of Behavioral Economics*, 333.

[16] For a paradigmatic example, see D Halpern, *Inside the Nudge Unit: How Small Changes Can Make a Big Difference* (Virgin Digital, 2015).

[17] See for example the OECD programme: www.oecd.org/gov/regulatory-policy/behavioural-insights.htm. Also, see J Sousa Lourenco et al., *Behavioural Insights Applied to Policy - European Report 2016* (Publications Office of the European Union, 2016) 12, available at http://publications.jrc.ec.europa.eu/repository/handle/111111111/40074. For an interesting overview, see A Oliver, *Behavioural Public Policy* (Cambridge University Press, 2013); A Oliver, *The Origins of Behavioural Public Policy* (Cambridge University Press, 2017).

[18] The 1992 version can be found here: www.sciencedirect.com/topics/food-science/food-guide-pyramid. For the 2005 version, see www.foodpyramid.com/. The 2011 version elaborated by Sunstein and his team is available here: /www.myplate.gov/.

[19] For a detailed history, see D Halpern, *Inside the Nudge Unit: How Small Changes Can Make a Big Difference*.

[20] Prime Minister Cameron and Deputy Prime Minister Clegg, 'The Coalition Agreement', 7, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf.

An attempt to understand the extent of this phenomenon can be made while raising a number of questions. Sunstein and Thaler present nudges as an effective and inexpensive alternative to the tools usually used in public policy, but also as a complement to them. However, they do not actually explain how these two assertions are compatible. And yet, the question arises as to how nudges relate to the tool usually favoured by governments to influence people's behaviour: the law. It is tempting to consider that states have a genuine interest in relying on the findings of the behavioural sciences to reinforce legal provisions and/or policy choices aimed at protecting individuals' own interests. One may consider for example that article 9 of the European Parliament's Directive 2014/40/EU[21] setting out the positioning of health warnings on packets of tobacco products and article 10 advocating for a combination of written and pictorial warnings[22] are in line with Sunstein's recommendation in the example mentioned above: the need to simplify and clarify the message to minimise mental effort. However, I believe that the core of the relation between the nudge and the law is found in the concept of norm.[23]

Indeed, a norm may be understood as:

> *A principle of action embodied in a variety of media (texts, notes, images, classifications, technical devices) which is presented to the observation of those to whom it is addressed, whether identified beforehand or not, and whose transgression may be discouraged by various kinds of outcomes (punishment, sanction, failure, incentive, shame, etc.). The 'rule', on the other hand, is defined as a specific variety of norm, issued by a legislative source as expressed in the national and international legal orders.*[24]

Therefore, it would be misleading to consider nudges as merely another avatar of soft law, as this would fail to consider the 'norm creep'[25] which comes with a range of devices of regulatory normalisation, to borrow from a theme favoured by Michel Foucault.[26] It would therefore be misleading to confine nudges to a paradigmatic expression of soft law, particularly since it is not certain that one of the aims of nudges is not to free oneself from the law as such, precisely by creating forms of influence over behaviour that are outside the scope of the law or do not fall directly under it. However, it should first be noted that the law as such does not necessarily exclude falling within the same mechanism as nudges, as Lord Leggatt indicated in the Fourth Jonathan Hirst QC Commercial Law Lecture. Thus,

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[21] European Parliament Directive [2014] OJ L127/1.

[22] On this point, see: A Alemanno, 'Nudging Smokers the Behavioural Turn of Tobacco Risk Regulation' (2012) 3 *European Journal of Risk Regulation* 32.

[23] On this point, see M Bozzo-Rey and A Brunon-Ernst, *Nudges et Normativités : Généalogies, Concepts et Applications* (Hermann, 2018) 12; M Bozzo-Rey, A Brunon-Ernst and A Van Waeyenberge, *Nudges: Better Choices?* (University of Toronto Press, 2016) 8–10.

[24] M Bozzo-Rey and A Brunon-Ernst, *Nudges et Normativités: Généalogies, Concepts et Applications*.

[25] MA Frison-Roche, 'Le Contrat et La Responsabilité: Consentements, Pouvoirs et Régulation Économique' (1998) 97 *Revue trimestrielle de droit civil* 43.

[26] M Foucault, *Discipline & Punish: The Birth of the Prison* (Alan Sheridan tr, Vintage Books, 1995); M Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979* (Michel Senellart ed, Graham Burchell tr, 1st edition, Picador 2010); M Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (Michel Senellart ed, Graham Burchell tr, 1st edition, Picador 2009).

> The Act[27] provides a scheme dealing with such matters. It is open to commercial parties, if they choose, to exclude or vary the default rules provided by the Act and agree something else. But the Act saves them the trouble of doing so. It also establishes a benchmark for what is widely regarded as a reasonable set of mutual rights and obligations that strikes a fair balance between buyers and sellers. In part the law operates as what behavioural economists call a 'nudge', to assist parties to achieve optimal results by providing a good default option. It serves a similar function to, for example, an arrangement where employees are automatically enrolled in a pension scheme and contributions deducted from their wages unless they positively opt out.[28]

However, one cannot deny the authority or power of nudges and, even more so, of the architects of choice who design them.[29] Favouring the use of the word 'influence' and insisting on the gentle change brought about by nudges also hints at the potential of escaping the limits and accountability that are specific to state action. This includes breaking free from some of the oppositions that have structured our societies: public/private, national/international, economics/politics. This further blurs the boundaries between various fields and removes the individual from its societal context while emphasising – as the ultimate paradox – the context in which he or she makes decisions. Rather than truly clarifying these tensions, Sunstein and Thaler insist instead on the advantages of nudges (while also not being particularly clear on the question of what they are advantageously compared to) and emphasise their purpose: to improve the well-being of individuals a*s judged by themselves.*

3. WHAT KIND OF UTILITARIANISM IS THIS?

3.1 The Implicit Utilitarianism of Nudges

Sunstein and Thaler do not explicitly lay claim to any specific utilitarianism as such. Nevertheless, there is every reason to believe that their perspective belongs to consequentialist (they consider the consequences of individuals' actions through their various decisions) and welfarist utilitarianism (nudges are designed to increase well-being). The challenge is then to understand which conception of utilitarianism they are referring to and to what extent this may prove problematic in light of their claims, particularly when these involve taking into consideration the preferences of individuals 'as judged by themselves'.

There are three conceptions of well-being within contemporary utilitarianism.[30] The first defines well-being as a mental state with a positive or negative intrinsic value or experience: *the value of my life depends on how I feel or on my experiences*. This is hedonism.[31]

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[27] Sale of Goods Act 1979, UK Public General Acts 1979 c. 54.

[28] Lord Leggat, 'What Is the Point of Commercial Law?' (The Fourth Jonathan Hirst QC Commercial Law Lecture, The Law Society in London, 2 November 2021) 21–2, available at www.supremecourt.uk/docs/what-is-the-point-of-commercial-law.pdf.

[29] These questions will be addressed again later.

[30] This is based on the work of Tim Mulgan. For a detailed account, see T Mulgan, *Understanding Utilitarianism* (Acumen, 2014) 61–92.

[31] K de Lazari-Radek and P Singer, *The Point of View of the Universe: Sidgwick and Contemporary Ethics* (Oxford University Press, 2014); J Griffin, *Well-being: Its Meaning, Measurement, And Moral Importance* (Clarendon Press, 1986).

The second holds that only that which one prefers, or desires, is of value; a life is therefore good to the extent that our preferences are satisfied. Clearly, preference utilitarianism shares some similarities with hedonism since satisfying my preferences is what gives me pleasure. But preferences allow us to account for the pleasure derived from what I do not experience myself (in the case of empathy, for example) or for the eventuality where I experience pleasure in pain (in the case of masochism).[32]

Unlike the first two approaches, both of which can be described as subjective conceptions of well-being, the last one is intended to be objective. Rather than drawing what is good for me from some fact relating to me, it proposes a list of things that are good for everyone, irrespective of what any particular individual feels or prefers.

For example, this list might include the following features:

1. Basic needs, meaning 'what we need to survive, to be healthy, to avoid harm, to function properly'.[33]
2. Success or accomplishments.
3. Understanding or knowledge.
4. Agency, autonomy, liberty.
5. 'Friendship',[34] 'deep personal relationships'[35] or 'mutual love'.[36]
6. Religion.
7. Notoriety or respect.[37]

Based on the elements mentioned so far, it appears that Sunstein and Thaler implicitly refer to preference utilitarianism. The characteristics of this utilitarianism are presented below. This will make it possible to understand how it is connected to the type of paternalism which these authors put forward.

3.2 Preference Utilitarianism

At the core of preference utilitarianism is the idea that one's preference has intrinsic value and is *in itself* that which allows individuals to increase their well-being. Therefore, one can speak of *intrinsic preferences* as being constitutive of well-being in their own right and not as a means to an end. In other words, if it is good for me to listen to music, it is because I want to listen to music. And conversely, if I do not want to listen to music then it is not good for me. The implication of this idea is that only *my* preferences can improve *my* well-being. But it also presents a theoretical difficulty for the justification of paternalism because it presupposes that someone knows best what is good for me, in this case what will satisfy my preferences.[38] This presumes that somehow individuals are not the best judges of what can satisfy them, of what can improve their well-being. And yet Sunstein and Thaler champion a certain form of

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[32] RM Hare, *Moral Thinking: Its Levels, Method, and Point* (Oxford University Press, 1981).

[33] J Griffin, *Well-being: Its Meaning, Measurement, And Moral Importance*, 42.

[34] S Kagan, *Normative Ethics* (Westview Press, 1997) 29–39.

[35] J Griffin, *Well-being: Its Meaning, Measurement, and Moral Importance*.

[36] D Parfit, *Reasons and Persons* (Oxford University Press, 1984) 493–502.

[37] T Mulgan, *Understanding Utilitarianism*, 84.

[38] G Dworkin, 'Paternalism' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2014), available at http://plato.stanford.edu/archives/sum2014/entries/paternalism/.

paternalism. Is this in contradiction with the fact that preference satisfaction is used to identify and justify nudges and that individuals are presented as being the best judges of what is good for them?

From a different perspective, choosing preference utilitarianism is particularly useful to Sunstein and Thaler since, unlike hedonism, it is (supposedly) much easier to measure preferences as they are considered to be reflected in the actions of individuals.[39] For instance, if I want to know whether you prefer to listen to music or play a video game, all I need to do is suggest both and observe which one you choose. It is easy to see the value of such a concept when it comes, for instance, to developing public policies, as is the case with nudges. After all, all that is needed is to design institutions that allow individuals to satisfy their own preferences, that allow them to freely choose how they satisfy their preferences. Their well-being would then be improved. Here one can see both the benefit and the drawback involved in Sunstein and Thaler's use of preference utilitarianism: it justifies the use of nudges in public policy, while avoiding the reproach of paternalism. But can one simultaneously argue that nudges are necessary because of the irrationality of people's decisions to improve their well-being and justify nudges on the grounds that people know what is best for them?

Furthermore, consistency would also require that Sunstein and Thaler be able to provide satisfactory answers to the various blind spots of preference utilitarianism. The first of these is the scope of what constitute a preference. The second is whether (or not) we need to know that our preferences are satisfied. The third is whether our preferences can be quantified and measured. First and foremost, the question is if satisfying a preference, including of course when it has been identified as such by the individual concerned, necessarily increases the well-being of that same individual. It is quite easy to imagine that satisfying some preferences is bad. Another version of this argument states that satisfying a preference is sometimes so divorced from the individual's life that basing a theory on it may be completely counterproductive. This is especially true when the preference in question is obviously difficult to satisfy, or when the individual would never know whether it was satisfied or not. For example, suppose I want to end poverty, or for there to be no more wars, or that we have the ability to go and live on other planets. Let us assume that all these preferences are satisfied. Then another question arises: will this improve *my* well-being?

Sunstein and Thaler also face the problem of how to determine and compare the well-being of individuals, and therefore of how to measure preference satisfaction. This is an important point, as it is this that would allow one to assess the effectiveness of a nudge. For example, should we focus on the number of preferences that have been satisfied or on their quality? Is a life preferable (that is, does it produce more well-being) if a maximum number of preferences are satisfied, regardless of their quality?[40] Is a decision justified if it generates equal amounts of satisfaction and frustration (a lack of preference satisfaction)? This raises the question of the uniformity of individual preferences: should I consider only individual satisfaction, or should I ask myself whether a nudge will increase or reduce the overall well-being of the target population? Should the satisfaction of a preference be considered as necessarily superior

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[39] This is an important point that will be addressed further.

[40] We find a similar structure of questioning here to that between Mill and Bentham on the quality of pleasures. On this point, see JS Mill, *Utilitarianism* (1861); Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. JH Burns and HLA Hart (Clarendon Press, 1996).

in terms of well-being compared to frustration in terms of ill-being? At this point, the reason why Sunstein and Thaler do not restrict the number of choices offered to individuals when they are nudged becomes clear.

Any consistent nudge theory whose aim is to promote the well-being of individuals 'as judged by themselves' must clarify a final point: namely, the difference between various types of preference satisfaction. This would involve considering that a preference that is completely satisfied does not necessarily increase the well-being of the individual concerned or, conversely, that not satisfying a preference can increase the well-being of an individual. In other words, are there desirable and undesirable preferences, preferences that should be satisfied and others that should not? Following Tim Mulgan, let us consider the following examples.[41]

Say you are strolling through the woods when I come up and threaten to torture you if you do not give me 100 euros. In this situation, you will (most likely) prefer not to be tortured rather than keep 100 euros. In other words, your preference not to suffer is stronger than your preference to keep your money. If you give me 100 euros, I will satisfy one of your preferences, in this case the strongest one, and thus increase the overall level of preference satisfaction. However, while I have satisfied your strongest preference, it would be difficult to argue that I have improved your life. What judge would agree not to convict me on the grounds that I have satisfied your preference not to be tortured, probably because I have myself brought about the actualisation and effectiveness of that preference? Your life would probably have been better if I had not threatened you with torture. Therefore, it cannot be said *that as a rule* and in all cases the satisfaction of a preference improves the life of an individual. Alternatively, it may be that not satisfying an individual's preferences improves his or her life. For instance, if a child refuses to go to school – setting aside the matter of the legal obligation to attend school – but as a parent you force them to do so, clearly, you are not satisfying the child's preference. But by refusing to accommodate this preference, you broaden their future possibilities and thus the potential satisfaction of other and new preferences. In the end, not satisfying this initial preference of not going to school results in an (ultimately) better life for the child. Therefore, not satisfying a preference can improve an individual's overall well-being.

These admittedly rather rudimentary examples raise several questions for advocates of nudges. Let's start with the most obvious one: what is the difference between these two examples? Which status should be given to a preference of which we were not aware, but which is revealed by a situation? For example, what is the status of the preference revealed by the nudge in the example of the cafeteria? When wishing to satisfy preferences, should I rely solely on 'isolated' and temporally determined preferences to assess the well-being provided by their satisfaction (concluding ultimately that a satisfied life is preferable to one in which fewer preferences are satisfied), or should I consider preferences from a global perspective and try to define which life is preferable overall? Which criteria should be used to justify choosing a short but intense life over a longer one in which only a few preferences are satisfied, but are so every time? If I prefer a shorter life, therefore one with a smaller overall number of satisfied preferences, then we may hypothesise that, in the end, preference satisfaction is neither the sole nor the most important factor in my decision making. The issue at stake here is the possible – and perhaps even inherent – tension between individual judgement used as a measure of well-being (which may exclude preference satisfaction in defining the good life) and the very

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[41] The following paragraphs are based on T Mulgan, *Understanding Utilitarianism*, 80–2.

foundation of preference utilitarianism (which relies on preference satisfaction as a measure of the good life). As far as nudges are concerned, it is therefore legitimate to ask whether Sunstein and Thaler's *as judged by themselves* contains its own contradiction.

Finally, one should also bear in mind that using preference utilitarianism in their theoretical framework serves to justify libertarian paternalism in the name of individual well-being. Sunstein and Thaler thus assert: 'Our goal […] is to draw on empirical work about preference formation and welfare to propose a distinctive form of paternalism, libertarian in spirit, one that should be acceptable to those who are firmly committed to freedom of choice on grounds of either autonomy or welfare.'[42]

Relying on individuals' views of their preferences is inherently necessary to Sunstein and Thaler's argument as it counters the criticism that it could lead to an imposition of a value system that is exterior to individuals. In other words, the 'as judged by themselves' is clearly instrumental in countering upfront the fact that the architect of choice might use nudges to influence people's behaviour not according to their values but according to his own.

The previous sections have provided a clearer overview of the questions and issues raised by the co-existence of nudges (understood as the improvement of well-being according to the individuals concerned) and utilitarianism on which nudge theory is based within the same theoretical space.

3.3 Which Preferences Are Actually at Issue?[43]

From a formal perspective, the key concept here is that of preference. From a substantive perspective, one must consider the essence of the well-being advocated by Sunstein and Thaler. In other words, what are the contents of the preferences of individuals 'as judged by themselves'? It is therefore worthwhile to examine how our authors approach the concept of preferences.[44] On the whole, and this is hardly surprising, they are unwilling to rely on the classical conception of preferences used in welfare economics.[45] There are two reasons for this. The first is that revealed preferences do not seem to be the most suitable for a fair measurement of preferences. In addition, they seem to have some doubts about the very concept of preferences, something that could affect the internal consistency of their argument.

For instance, they here question the ontological nature of preferences: 'If the arrangement of the alternatives has a significant effect on the selections the customers make, then their true "preference" does not normally exist.'[46]

Such a claim is problematic, at the very least. Indeed, if a libertarian paternalistic intervention is justified on the grounds that, due to cognitive biases, individuals may not act according to their own interests as they define them, and that this intervention will increase their well-being 'as judged by themselves', then an understanding of individual preferences is

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[42] C Sunstein, 'Preferences, Paternalism, and Liberty' (2006) 59 *Royal Institute of Philosophy Supplements* 233.

[43] For an in-depth examination of this issue, see T Grüne-Yanoff, 'Old Wine in New Casks: Libertarian Paternalism Still Violates Liberal Principles' (2012) 38 S*ocial Choice and Welfare* 635, 641–2.

[44] Ibid., 641–4.

[45] Ibid., 641.

[46] CR Sunstein and RH Thaler, 'Libertarian Paternalism Is Not an Oxymoron', 1164.

necessary to support it. 'The false assumption is that almost all people, almost all of the time, make choices that are in their best interest or at the very least are better, by their own lights, than the choices that would be made by third parties.'[47]

In this setting, it is crucial not to rely on a conception of revealed preferences since, precisely, the argument is that revealed preferences may not be in line with the preferences individuals say they hold. But then what preferences are Sunstein and Thaler referring to? 'In some cases, individuals make inferior decisions in terms of their own welfare – decisions that they would change if they had complete information, unlimited cognitive abilities, and no lack of self-control.'[48]

This should also be rounded off by: 'Across a certain domain of possibilities, consumers will often lack well-formed preferences, in the sense of preferences that are firmly held and pre-exist.'[49]

Accordingly, one would need to be able to reconstruct the preferences that individuals would hold in an ideal situation for them to be 'well-formed'. But how could they be 'well-formed'? By having 'complete information'? Very well, but then what exactly do they mean by this needs to be clarified: what does this expression involve and how can this complete information be obtained? This presupposes indeed that there could be a description of reality that is so comprehensive as to be without alternative and accepted by all. It seems difficult to uphold this idea theoretically, philosophically and practically.[50]

Moreover, there is also a risk of circular reasoning that needs to be avoided: 'Which desires enhance well-being? Answer: those that a fully informed prudent person would have. Question: what desires would a fully informed prudent person have? Answer: those that enhance well-being.'[51]

But supposing that a group validates such an understanding of reality and that this generates specific preferences for that group, the well-being of each individual would then be defined by a group preference and not by a subjective preference specific to the individual. The authors add 'unlimited cognitive abilities'. Fine, but again, what exactly do they mean by this? Are they referring to Econs, which they admit do not exist? Are they engaging us in a thought experiment and pretending that individuals can have 'unlimited cognitive abilities'? Finally, even if this were the case, it is unclear how this would necessarily guarantee 'true' and 'well-formed' preferences, unless they rely on a rationality that they otherwise deny. Finally, individuals should not 'lack self-control'. This last point raises the same question as the previous ones: what exactly is to be controlled and why add this third characteristic?

If one assumes that these three elements make it possible to reconstruct what would be – or what would have been – the preference of an individual in an ideal situation, then it is difficult to see how Sunstein and Thaler could rely on the well-being of individuals 'as judged by themselves': indeed, such a reconstruction is not in line with a subjective conception of well-being.[52]

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[47] Ibid., 1163.

[48] Ibid., 1162.

[49] Ibid., 1164.

[50] J Broome, *Weighing Goods: Equality, Uncertainty and Time* (Basil Blackwell, 1991) 107–15.

[51] T Mulgan, *Understanding Utilitarianism*, 75.

[52] CS Rosati, 'Internalism and the Good for a Person' (1996) 106 *Ethics* 297, 307–8.

For preference utilitarianism, the only way to make people better off is to satisfy their preferences, that is, to give them what they want according to them. This is the necessary condition to justify a nudge and sufficient to make it effective. This may appear to be a particularly good and satisfactory answer, at first glance. However, Sunstein and Thaler leave unresolved important questions about the very nature of preferences and how they can be constructed by individuals. At least two more questions need to be asked at this stage of the analysis: how can one ensure that a nudge satisfies a preference? If preferences are intrinsic, how could someone external to the individual – the choice architect – possibly know them?

4. THE CHALLENGES OF A COMBINED USE OF WELL-BEING AND PREFERENCES

4.1 An Ethical and Methodological Problem: Knowing Preferences

We thus return to what our two authors tell us. In the wake of *Nudge*, which stressed that their main aim was to 'make choosers better off, as judged by themselves',[53] Sunstein has repeatedly stated that 'the lodestar is people's own judgments. To be a bit more specific: The lodestar is welfare, and people's own judgments are a good (if imperfect) way to test the question whether nudges are increasing their welfare.'[54]

Clearly, focusing on people's own perceived well-being helps overcome some of the criticisms levelled against paternalism and serves to justify the use of nudges. This is quite commendable. However, one must bear in mind that this is not the entire nudging process. In fact, two (related) elements must be considered: the architecture of choice and, consequently, the person who will design it, the choice architect. Even if 'the lodestar is people's own judgments', Sunstein and Thaler themselves acknowledge immediately before that statement that 'Choice architects might as well have their own ideas about what would make choosers better off'.[55] Together, the two quotations mentioned in this paragraph offer two potentially problematic and even contradictory interpretations.[56] Two ideas seem to coexist. The first is that the choice architect should not develop the choice architecture according to his/her own judgements but only according to those of the people concerned by the nudge. The possibility that he/she might disagree with these judgements is acknowledged, possible or even probable. However, since Sunstein and Thaler's criterion seems to be the actual and current well-being of individuals, of which the latter may not be aware, it would then be provided to the choice architect by experts who can identify it. In absolute terms, there is a genuine risk that the choice architect will disregard this advice – assuming it is possible for experts to know individuals' preferences – and will ultimately seek only to impose his or her own value system. This seems inconsistent with the very idea they are trying to push back against, namely that they

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[53] RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, 5.

[54] CR Sunstein, '"Better off, as Judged by Themselves": Bounded Rationality and Nudging', *Routledge Handbook of Bounded Rationality* (Routledge, 2020) 563.

[55] Ibid.

[56] On this point, see R Sugden, '"Better off, as Judged by Themselves": A Reply to Cass Sunstein' (2018) 65 *International Review of Economics* 9, 10–11.

'know what is best for everyone'. Furthermore, the question they should address is that of the context-dependence of individual preferences. Indeed, if preferences are context-dependent that is, if a person's assessment of what is best for them is context-dependent, then it cannot be used to determine the appropriate context in which they should make their choice. In more concrete terms, the use of 'as judged by themselves' is particularly unclear in the discussion of the need for nudges to promote healthy eating:

> Consider the issue of obesity. Rates of obesity in the United States are now approaching 20 per cent, and more than 60 per cent of Americans are considered either obese or overweight. There is overwhelming evidence that obesity increases risks of heart disease and diabetes, frequently leading to premature death. It would be quite fantastic to suggest that everyone is choosing the right diet, or a diet that is preferable to what might be produced with a few nudges […] We do not claim that everyone who is overweight is necessarily failing to act rationally, but we do reject the claim that all or almost all Americans are choosing their diet optimally […] With respect to diet, smoking and drinking, people's current choices cannot reasonably be claimed to be the best means of promoting their well-being. Indeed, many smokers, drinkers and overeaters are willing to pay third parties to help them make better decisions.[57]

This is a somewhat strange line of reasoning when set against the statement that 'the lodestar is people's own judgments'.[58] Let us analyse it in detail. The first point of note is that the argument is not about whether obese people make irrational choices. Second point: obesity is undesirable because of the health risks associated with it and we can therefore agree that it is better to be healthy than obese. Third point: we must therefore infer that people who are obese and American must necessarily be reasoning incorrectly or, more accurately, that their ability to act on their preferences is somehow impeded. Fourth point: the claim that people who are obese do not make the choices that are best suited to serve their interests seems to be based on an external evaluation. Conclusion: on the one hand, the 'as judged by themselves' standard is not central to their argument, and on the other hand, when it is (weakly) used, it is done to justify the use of paternalistic intervention, which is the exact opposite of what Sunstein and Thaler want.

The combination of the choice architect and the requirement of 'as judged by themselves' actually raises the question of how to compare the well-being of irrational people or, more precisely, of individuals who, according to the behavioural sciences, make irrational decisions. In other words, in order to assess whether a nudge truly improves well-being, one must be able to compare the levels of well-being of (irrational) people before and after they have been nudged. Since well-being seemingly needs to be assessed by people themselves, this also raises the question of whether individuals' estimation of their well-being is ex ante or ex post; in other words, will they have the same appreciation of their well-being before and after being nudged? There is also the question of how their judgement should be expressed; for example, should consent be implicit or explicit? This issue was the subject of much debate – including

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[57] RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, 7.

[58] For a detailed discussion, see AC Cartwright and MA Hight, '"Better off as Judged by Themselves": A Critical Analysis of the Conceptual Foundations of Nudging' (2020) 44 *Cambridge Journal of Economics* 33; R Sugden, '"Better off, as Judged by Themselves": A Reply to Cass Sunstein'.

considerations as to the role of behavioural science in the process of drafting legal provisions – when the rules on cookies were being defined in the amendment of the 2002/58/EC Directive on Privacy and Electronic Communications by Directive 2009/136/EC. The explicit consent of users is now required for the use of cookies.[59]

Whether or not this is the case, there needs to be a way to measure and compare these two preferences or well-being assessments.[60] Indeed, there is a risk that is inherent to any approach that relies on a conception of well-being rooted in the subjective judgement of individuals: that the epistemological and the ontological question will be conflated. The former is aimed at identifying how individuals' preferences can be known at point in time t, t+1, and so on, whereas the latter is aimed at identifying the preferences to be considered when they involve individuals who change over time.[61] While Sunstein considers that 'the standard [the 'as judged by themselves' standard] will often provide sufficient guidance'[62] and 'if the choice architect is actually succeeding in making choosers better off by their own lights, there would seem to be no objection from the standpoint of welfare',[63] nevertheless, while repeating how important the *as-judged-by-themselves* criterion is, he does not provide any substantive analysis of it. The figure of the architect of choice presupposes however that this be clear in order to be able to evaluate whether the architecture is a success. Ultimately, the key question is what makes a nudge a success, what makes a nudge 'work'. This is crucial because a nudge is a particularly suitable tool for public policymaking. And it is not enough for individuals to change their behaviour as a result of a nudge for that nudge to be considered a success. Indeed, to be successful, the nudge must induce a change in behaviour and this change must improve the well-being of individuals *as judged by themselves*.

4.2 The Indeterminacy of 'As Judged by Themselves' and the Justification of Nudges

Cartwright and Hight study the meaning, content and consistency of the 'as judged by themselves' through three cases which they label 'Simple Case', 'Simple Future Self Case' and 'Objective Standard Case'.[64]

Let us examine the first case, the 'Simple Case'. It is formalized as follows:

> Person P at t_0 – the moment of a decision – makes a judgment, and being nudged is, at that moment, judged by P to be in P's own best interests.[65]

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[59] A Alemanno, 'L'Union Européenne et Le Nudging' (2016) 37 *La Revue Tocqueville* 21.

[60] The following is based on AC Cartwright and MA Hight, '"Better off as Judged by Themselves": A Critical Analysis of the Conceptual Foundations of Nudging'.

[61] Ibid., 38. This type of issue pushed Guala and Mittone to consider that the best justification of nudges must be a political and not an ethical one; see F Guala and L Mittone, 'A Political Justification of Nudging' (2015) 6 *Review of Philosophy and Psychology* 385.

[62] CR Sunstein, 'The Ethics of Nudging' (2015) 32 *Yale Journal on Regulation* 413, 429.

[63] Ibid.

[64] For the most part, we follow here the analysis proposed by AC Cartwright and MA Hight in their work '"Better off as Judged by Themselves": A Critical Analysis of the Conceptual Foundations of Nudging', 41–8.

[65] Ibid., 41.

This could for example be an employee, let us call him Pete, who considers that he should be nudged to save money though a tailored retirement plan, as in the famous example in Sunstein and Thaler's book. The reasoning is based on the idea that if Pete's preferences were not constrained by biases, he would act in this way. The argument can also be made as follows: if Pete truly took the time to analyse the situation rationally, he would reach the conclusion that it is indeed in his interest to be nudged as he may not necessarily be able to make the decision that will ensure his increased well-being. Is this truly consistent? Not really, as the alternative is as follows: either Pete truly believes that it is in his best interest to save for his retirement and in that case the nudge is unnecessary as it would only confirm a pre-existing preference; or Pete believes that it is in his best interest not to save money, and in that case the nudge is in contradiction with his own preferences. Thus, 'as judged by themselves' cannot be considered to apply to an individual at the time of decision-making. For Sunstein and Thaler's proposition to make sense there must necessarily be temporality: the Pete at the time of decision-making is not the one that should be considered, but rather a future Pete who would regard the potential nudge to have been in his best interest. In a sense, 'as judged by themselves' only works retroactively.

This could be formalized in the following terms:

> Person P, at some future time t_n, judges at t_n that she is better off *now* (i.e. at time t_n) by having been nudged at t_0, regardless of P's beliefs at time t_0.[66]

Still using Pete's example, this seems to be common-sense: at the time of retirement, he considers indeed that the best decision he could have made at age 25 was to set money aside. At 55 he is quite happy to have more money available than if he had not been nudged at 25 to take part in the retirement plan. Who could possibly disagree with this? Even more because it gives meaning to 'as judged by themselves' and justifies the use of nudges along with their particular form of paternalism, which is therefore no longer problematic. And yet, this presumes that Pete's preferences remain stable over time. Or, to be more precise, it assumes that it is possible to compare the levels of well-being between one person and another person that could have been. At t_0 can Pete know what his preferences will be at t_n?[67] More problematic still, if Pete cannot know his future preferences, how can the choice architect responsible for designing the context in which Pete is to make his decision at t_0 according to Pete's preferences at t_n do so? Comparing the well-being of Pete at t_0 and the well-being of Pete at t_n does not seem to make sense, except if one were to consider that preferences remain stable over time and that Pete's preferences at t_n will be exactly the same than at t_0. This seems difficult to imagine. If one were to consider it to be possible, this would mean that the nudge was not created according to Pete's preferences but to those of another Pete that does not yet exist and for whom we do not have the tools to evaluate what could be a decision that would improve his well-being 'as judged by himself'. Any consistent nudge theory should have not only clear criteria to define preferences and how they influence individuals' well-being at the present moment but also some elements or a methodology allowing for inter-temporal comparisons.

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[66] It is the *Simple Future Self Case*, ibid. 43.

[67] For further discussions of the difficulties raised by this case, see Parfit and the non-identity problem: D Parfit, *Reasons and Persons*; D Parfit, 'Future People, the Non-identity Problem, and Person-affecting Principles' (2017) 45 *Philosophy & Public Affairs* 118.

In that case, maybe should there be an objective list of individual preferences untethered by time or the individual in question? This would provide us with the following formalization:

> Person P, at some future time t_n, according to a value standard independent of P, would judge that she herself is better off having been nudged at t_0, regardless of P's beliefs at time t_0.[68]

This is interesting as it releases us from the need to consider Pete's capacity to evaluate whether he should be nudged at t_0 and allows us instead to postulate that if he were able to make this judgment simultaneously from an objective criteria he would accept being nudged. This brings us back to the problem inherent to any attempt at the definition of one – or several – objective criteria:[69] how and by whom should such criteria be developed? Seemingly gaining in intelligibility and consistency involves foregoing one of the essential elements of nudge theory: the choice architect does not seek to impose his/her value system, does not know what is best for others; libertarian paternalism is *truly* a different and softer form of paternalism. As a result, we lose the very point of 'as judged by themselves' since, even if Pete could assess the situation of his present self against that of his future self by using an objective criterion, it is not his own criterion and does not necessarily reflect his preferences either at t_0 or t_n.

4.3 An Ontological Problem: the 'Fragmented Self', or Doubling the Problem of Preferences by the Very Nature of Nudges

In keeping with what has just been said, the coherence of nudge theory can be examined in another way. Nudges are frequently presented as a cost-effective solution for public decision-makers seeking to change the behaviour of a significant number of individuals through public policies.[70] Another problem then seems to appear: that of the effectiveness of the influence on individual preferences. Is the aim of a nudge to change my preference momentarily or to change it in a lasting way? Once again, we can see how important temporality is, how it is impossible to avoid this question, and how it at the very least raises several paradoxes for any nudge advocate.

If the aim is to change the preference temporarily, then it is conceivable that nudges must be changed constantly, since the preference and the cognitive bias on which the nudge is based persist. In this case, one constantly seeks to change the preference while also recognising that it persists – which in turn implies that preferences are well defined. Would this mean, for example, that nudges only work in the case of undetermined preferences? And how can it be said that a nudge improves well-being according to the preferences of individuals if these are not determined and therefore not knowable?

The temporary nature of the change opens up the possibility of a return to a pre-existing state of preference. But conversely, if preferences are not stable and are temporarily changed by a nudge, then nudges would also need to be constantly changed, since there would be no guarantee of their effectiveness as the preferences in question are only momentary.

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[68] It is here the *Objective Standard Case*, AC Cartwright and MA Hight, '"Better off as Judged by Themselves": A Critical Analysis of the Conceptual Foundations of Nudging', 47.

[69] T Mulgan, *Understanding Utilitarianism*, 83–9.

[70] E Singler, *Nudge Marketing: Comment changer efficacement les comportements* (Pearson Education, 2015).

Let's take a closer look at the issue of change or influence on preferences.[71] Luc Bovens[72] offers an interesting analysis and questions the influence of nudges per se by asking to what extent they can actually influence our preferences. He even takes his reasoning a step further by considering what the consequences would be if this were truly the case – which will lead us to another interpretation of the *Save More Tomorrow* example (and possibly lead us back to Pete) used paradigmatically by nudge advocates. A nudge may lead me to do something I don't think is in my best interest, such as when a nudge prompts me to save money for retirement when I don't think it is necessary to do so.[73] While it is easy to identify the outcome of nudges (I save money), the real question is their impact on my preferences when I include temporality in my evaluation of them, that is, whether their effect on my preferences are persistent. But what does my decision to save money say about my preferences? Have my preferences changed? Bovens provides a nuanced answer. My preferences have changed because my decision is not the same. After being nudged, I do have a preference (to save money for my retirement) that I did not have before. But it could also be argued that my preferences have not actually changed: I have not become frugal. In fact, a nudge has influenced one of my decisions, the manifestation of which is an action that expresses a momentary or temporary preference that does not fit in with the general structure of my preferences.

> I am like the fox and the sour grapes. The fox loses his appetite for the grapes that he cannot reach. Even if he does not want these grapes anymore, he remains the kind of fox who likes juicy summer fruits in general. So his preference over the token action of eating these very grapes does not cohere well with his preferences over the type of actions of eating juicy summer fruits.[74]

In other words, if I start saving because of a nudge when I had not done so before, I am doing something I want to do because I prefer that action to not saving, but I do not want to do it because it conflicts with the general structure of my preferences. Or, to use the example of the cafeteria, I may eat salad because of the nudge that changes my choice architecture at that point in time, but in general I prefer to eat hamburgers. My choice is made on the basis of a 'fragmented personality'.[75] This undermines the stability of my preferences. Of course, the answer lies in an overall change in my preference structure. But how else could I achieve this than by applying multiple nudges which would then have a lasting and coherent influence on the architecture of my choices, so that I only make decisions according to a preference, even if it was not my own to begin with: being thrifty (in the example given above). So, the nudge not only influences my decision at point t but changes the general structure of my preferences so that the nudged preference fits with all my preferences at points t+1, t+2 etc. This resolves the fragmentation of my personality. But it also raises two other issues: the possibility of the

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[71] For a broad and interdisciplinary overview of the issue, T Grune-Yanoff and S Ove Hansson, *Preference Change: Approaches from Philosophy, Economics and Psychology* (Springer, 2009).

[72] L Bovens, 'The Ethics of Nudge' in Till Grüne-Yanoff and Sven Ove Hansson (eds), *Preference Change* (Springer, 2009). Bovens distinguishes six types of dispositions or tendencies that may be influenced by a nudge: ignorance, inertia, acrasia, discomfort, exception and social benefits.

[73] Ibid., 212.

[74] Ibid. He uses here the fable developed by Jon Elster in J Elster, *Explaining Technical Change: A Case Study in the Philosophy of Science* (Cambridge University Press, 1983) 123.

[75] L Bovens, 'The Ethics of Nudge', 212.

nudge being ineffective – or more precisely, useless – since I am already acting according to the purpose of the nudge, and the imposition of the choice architect's value system, which has been discussed above. The ultimate solution would be a much harsher form of paternalism that would aim to impose choices regardless of the preferences of individuals and of how they perceive them to improve their well-being. However, not only is such a solution unthinkable for Sunstein and Thaler, but it is precisely what they seek to avoid through nudges and libertarian paternalism. In other words, no matter how one approaches the question, it is essential for nudge theory to include a detailed examination of the preferences it wishes to develop, since it relies on the notion of 'as judged by themselves' as its justification. However, one must acknowledge that constructing or reconstructing a coherence such as this from the elements proposed by Sunstein and Thaler is impossible.

5. CONCLUSION

Sunstein and Thaler fail to provide any precise content to their conception of well-being, their utilitarianism or their understanding of 'as judged by themselves', even though they use it both as a standard for evaluating nudges and as a justification for the interference of paternalism, albeit a libertarian one.

Nudge theory rests on many implicit assumptions: preference utilitarianism and a vagueness around the exact meaning of 'preference' and 'well-being', and how the latter should be measured and compared. Temporality, which could potentially offer a promising way forward, is actually left out of the analysis. All this makes the case for nudges extremely fragile. Their initial appeal, particularly for public policy purposes, is undermined when one attempts to clarify the authors' assumptions and examine the consequences of these assumptions. Therefore, for a theory to be based on a subjective conception of well-being, there must at least be a clear definition of preferences and a method or standard by which well-being can be measured or, at the very least, a means by which well-being can be compared between individuals or, better still, between individuals and over time.

In closing, it appears to us that there are several avenues of research that should be pursued by philosophers, legal scholars and anyone seeking to use the findings of the behavioural sciences in public policy tools such as nudges. First, a coherent theoretical framework should be developed regarding the preferences of individuals and how they should fit into the justification of libertarian paternalism. It would also be relevant to integrate a more refined conception of the freedom at stake in nudges: can we really be satisfied with a freedom defined in terms of freedom of choice, while ignoring other understandings of freedom?[76] Furthermore, it seems particularly relevant to seize upon the several developments in utilitarian studies regarding both the nature of preferences and how they relate to well-being, but also the issues surrounding well-being measurement and comparison. For example, both the empirical approaches of well-being psychologists and the more mathematical approaches of aggregating individual well-being should be included. On the other hand, there may also be a need for a more robust conceptualization of the paternalism associated with nudges by recognising, for example, that

[76] Berlin and Pettit only mention them. I Berlin, *Four Essays on Liberty* (Oxford University Press, 1982); P Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press, 1997).

it is a paternalism of ends and not just of means. Legal scholars and legal philosophers may want to look closely at how nudges relate to the law and how they may redefine how the law is used in policymaking. Finally, much of the discussion on nudges revolves around their ethical evaluation and it turns out that, despite their best efforts, neither Thaler nor Sunstein manage to answer the different criticisms convincingly. But perhaps this is simply because the ethical approach is not the most appropriate to help them? In this regard, Guala and Mittone's idea of a political justification of nudges is a particularly fruitful avenue to pursue.

12. Bentham, Rawls and Sen on Law, Justice and Rights

Sterling Harwood and Don A Habibi

1. INTRODUCTION: EXPLORING BENTHAM'S IMPACT ON LAW, RIGHTS AND THEORIES OF JUSTICE

Jeremy Bentham (1748–1832), arguably the founder of utilitarianism, saw justice as requiring policies that maximize pleasure and minimize pain for all.[1] He famously believed that taking moral rights seriously meant first making them real by enshrining them into law. Bentham sometimes saw rights as securities against misrule.[2] Legal rights have clearly designated rights providers (for example, government), responsible to the rights holder (for example, citizens). To provide a claim right means the responsible party shall enable the rights-holders' exercise of their rights. More specifically, this means providing for 'positive rights' (for example, paying for schools to ensure the right to an education, or welfare to ensure the right to basic needs). Rights providers also ensure 'negative rights', which require noninterference (for example, tolerating freedom of speech and religion by simply 'staying out of the way'). Bentham understood that rights require, to be effective, identifying the rights provider. Otherwise, the rights

[1] Richard Brandt reports that 'Utilitarianism […] seems to have appeared first in the work of [Bishop] Richard Cumberland around 1672' (RB Brandt, *Morality, Utilitarianism, and Rights* (Cambridge, Cambridge University Press, 1992) 370). Elsewhere, citing his own survey of the relevant evidence, Brandt states: 'Pleasure is motivationally basic, in the sense that all our intrinsic desires for a state of affairs S owe their existence to an experience of S having been pleasant, or to something similar to S having been pleasant, or to the association of an experience of S with something else that was pleasant. In that sense Bentham was right that pleasure and pain are on the throne.' Ibid., 175, citing RB Brandt, *A Theory of the Good and the Right* (Oxford, Oxford University Press, 1979) Ch. 5. Consider also: 'Jeremy Bentham, jurist and political reformer, is the philosopher whose name is most closely associated with the foundational era of the modern utilitarian tradition. Earlier moralists had enunciated several of the core ideas and characteristic terminology of utilitarian philosophy, most notably John Gay, Francis Hutcheson, David Hume, Claude-Adrien Helvétius and Cesare Beccaria, but it was Bentham who rendered the theory in its recognisably secular and systematic form and made it a critical tool of moral and legal philosophy and political and social improvement.' JE Crimmins, 'Jeremy Bentham' (8 Dec. 2021) *Stanford Encyclopedia of Philosophy*, available at https://plato.stanford.edu/entries/bentham/ (accessed 7 Jan. 2022), emphasis on 'secular' added. See also, R Dworkin, *Taking Rights Seriously*, revised edition (Cambridge, MA: Harvard University Press, 1977) 260.

[2] See J Elster, *Securities against Misrule: Juries, Assemblies, Elections* (Cambridge University Press, 2013), esp. Ch. 3. Bentham highlights the phrase 'securities against misrule' in *Securities against Misrule and Other Constitutional Writings for Tripoli and Greece*, in P Schofield (ed.), *Collected Works of Jeremy Bentham* (Oxford, Clarendon Press, 1990).

claim fails as unenforceable and nonexistent.[3] Utilitarianism offers a decision theory designed to provide legislators and individuals with objective methods to arrive at rational social arrangements. Benthamite utilitarians believe legal rights to be justified to the extent that they maximize net happiness for all concerned, and extralegal rights to be imaginary, unjustified and unlikely to produce good outcomes.

This chapter explores the especially consequential aftermath of Bentham, including competing theories of justice advanced over recent decades by two highly influential moral philosophers. Both John Rawls (1921–2002) and Amartya Sen (1933–) challenge Bentham's utilitarian approach to law, rights and justice by presenting theories of their own. We examine their criticisms of Bentham's 'classical' version of utilitarianism and argue that, despite weaknesses, Bentham remains a viable force in the arena on law, rights and justice, and that Rawls and Sen have weaknesses of their own.

A lifelong bachelor, Bentham was an eccentric, disorganized and visionary polymath. Among his areas of expertise, Bentham excelled as a legal theorist, political consultant and activist.[4] He recruited an impressive group of young intellectuals known as the 'philosophic radicals'. He and his followers aimed to break the power monopoly of the ruling class and pave the way for eventual democratic governance. Their radical goals included Bentham's extensive plans for transforming the British (and other nations') legal, penal, educational, economic, electoral and governmental systems to make them fair, meritocratic and efficient. Bentham opposed the established Church, the monarchy, the nobility's legal and taxation privileges, packing juries, restrictions on usury, natural rights claims, militarism and colonialism. He supported universal suffrage, legal rights for all citizens, welfare for the poor, the secret ballot, humane prisons, public education, using corpses for medical research and training, a league of nations, international law, the ethical treatment of animals, gender equality, birth control, sexual freedom, decriminalizing homosexuality and many other enlightened aspirations. For an 18th-century man, Bentham was remarkably 'woke'.

Bentham spread his radical ideas internationally. He advised the revolutionary French Assembly, which honoured him with French citizenship. He inspired and advised both revolutionary liberators of Spanish America, Simón Bolívar and José de San Martin.[5] He offered his advice to leaders from around the world and across ideological lines, ranging from the

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[3] As Hillel Steiner puts it, 'To have a right is to be in possession of the powers to waive or demand and enforce compliance with its correlative duty'. In other words: 'rights are essentially about who is owed what by whom.' See *An Essay on Rights* (Oxford, Blackwell, 1994) 260; see also, 'Moral Rights' in T Hurka (ed.), *The Oxford Handbook of Ethical Theory* (Oxford University Press, 2007) 459.

[4] HLA Hart, 'Between Utility and Rights' (1979) 79 *Columbia Law Review*, reprinted in *Essays on Bentham: Studies in Jurisprudence and Political Theory* (1982). It is an irony of history that many of Bentham's writings on law went unpublished until generations after he died. Had he been more organized and able to finish projects, his influence would have been far greater. Hart and his successors working on the Bentham Project at the University of London have brought many of Bentham's unpublished works to the light of publication.

[5] AL Cot, 'Bentham's Spanish American Utopia' (2020) 17 *Revue d'études benthamiennes*; J Coleman, 'John Stuart Mill on the French Revolution', *History of Political Thought*, IV:1 (Spring, 1983) 95 ff. See also, P Niesen, 'Roots of Mill's Radicalism' in Miller and Macleod (eds) *Companion to Mill* (Chichester: Wiley Blackwell, 2017).

Russian Empire to the Barbary States of North Africa. He designed a more efficient prison, the Panopticon, which had an unfortunate consequence of increasing government control and making surveillance more cost-effective.[6] Ultimately, however, Bentham served as a major force designing the global liberal political tradition. His godson, John Stuart Mill, carried the ideas of the philosophic radicals and utilitarianism (with some revisions) into the next generation. This chapter analyses the consequences of Bentham's ideas concerning rights and law.

John Rawls, in his landmark *A Theory of Justice*, explicitly presented an alternative to utilitarianism. He considered utilitarianism as 'the predominant systematic theory' of moral philosophy, shaping our sense of just social arrangements to consist of maximizing happiness, satisfaction or fulfilment.[7] He attributed the success of utilitarianism to the impressive talents of its 18th and 19th-century founders.[8] Utilitarianism, at least arguably, stood for nearly two centuries as the reigning theory to dethrone. Rawls identified its vulnerability: distributive justice. 'The striking feature of the utilitarian view of justice is that it does not matter, except indirectly, how this sum of satisfactions is distributed among individuals.'[9] Rawls addressed this problem with his own theory of justice, which included contractual rights and his 'difference principle'[10] to limit inequalities. For more than half a century, Rawls has been a central topic of academic debate; however, he failed to replace utilitarianism, which still justifiably remains a strong influence over policymakers, legislators, economic planners and decision makers. Rawls will serve as a foil in our inquiry on Bentham.

Over the course of his long and stellar career, Amartya Sen had a front row seat to the reign of Rawls' theory of justice as the theory to beat. Sen serves as another foil for analysing the aftermath of Bentham's ideas. Sen and Rawls were colleagues and friends; and, as we show, rivals. In 2009 Sen published his magnum opus, *The Idea of Justice*, presenting his attempt to replace Rawls' theory with his own rights-based approach to achieving justice. Sen also goes on the attack, trying to discredit Bentham over the substance and significance of natural, that is, human rights. This chapter examines how Bentham's ideas fare against two of his most important and relatively recent rivals. We explore the historic tensions between law and rights-based alternatives to Benthamite utilitarianism for achieving more just social arrangements.

2. SEN MISTAKENLY CRITIQUES RAWLS AND BENTHAM

We critique four positions Amartya Sen takes regarding Rawls' theory of justice, Bentham's criticism of nonlegal rights and the human rights community's vanguard role facilitating Sen's theory of justice. We argue that Sen is:

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[6] Bentham first published *Panopticon; Or the Inspection House* in 1791. Michel Foucault brought Bentham's work back into prominence with his *Surveiller et punir: Naissance de la prison* (Gallimard, 1975), in English, *Discipline and Punish: The Birth of the Prison*. For a more accurate treatment of Bentham, see, A Brunon-Ernst (ed), *Beyond Foucault: New Perspectives on Bentham's Panopticon* (Surrey: Ashgate, 2012).

[7] J Rawls, *A Theory of Justice*, revised edition (Cambridge, MA: The Belknap Press, 1999) 7.

[8] Ibid. Tellingly, Rawls disregarded socialism and libertarianism as the principal ideological opponents to challenge.

[9] Ibid., 23.

[10] Ibid., section 13, 65–73.

(a) too pessimistic about the adequacy of Rawls's theory of justice for supporting real-world decision-making because Sen neglects Rawls' decision procedure known as reflective equilibrium, and especially wide reflective equilibrium;
(b) too optimistic about his own theory of justice, which over-relies on the unreliable use of public reason in the marketplace of ideas to avoid sinister interests. Sen entrusts the International Human Rights Movement (IHRM) to usher in a more just world, even though the leading organizations are politicized;
(c) surprisingly unsuccessful at dodging Bentham's attack on human rights. Sen aims at Bentham's strengths – precisely where Bentham stands the test of time. Further, Sen misses Bentham's weaknesses, which have been identified by such prominent Bentham scholars as Ross Harrison and T.M. Scanlon (and more recently, by Andrew Clapham);[11] and
(d) surprisingly sloppy in making Bentham appear prescient. We liken Sen to using loose cannons to battle for rights: he fails to limit or even discourage the creation and uncontrolled proliferation of important rights, instantiating the problems of human rights inflation and gridlock.[12] Sen's theory of strong human rights leads to conflicting claims which sink Sen's theory of justice as incoherent.[13]

This quartet of quarrels concerns the relationship between law and morality and the tensions between utilitarian and rights-based ethics. Law generally grows from roots in interests and needs, which rights can describe. In this way, rights often engender law. These relationships become explicit in legal documents. For example, consider the elegant language of the United States Constitution. The Preamble conveys moral concepts by enshrining 'Justice', 'domestic Tranquility', 'the general Welfare', and 'the Blessings of Liberty'. In the Bill of Rights, Amendment IX states: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' Also consider: 'just compensation' in the Takings Clause of Amendment V; banning 'cruel and unusual punishment' in Amendment VIII; 'due process' in Amendments V and XIV; and 'equal protection of the laws' in Amendment XIV. Bentham, as we shall see, does deny and disparage natural rights, and he specifically criticized the natural rights claims of the rebellious American Framers.[14]

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[11] For serious objections to utilitarianism in general, see S Harwood, 'Eleven Objections to Utilitarianism' in LP Pojman and P Tramel (eds), *Moral Philosophy: A Reader*, 4th ed. (Hackett Publishing Co., 2009).

[12] For an early suggestion that rights had already proliferated so far as to include 'the right to stupidity', see F Nietzsche, *Twilight of the Idols*, trans. R. J. Hollingdale (Oxford University Press, 1990, originally 1889), esp. 'Expeditions of an Untimely Man' Sec. 36, p.95.

[13] 'Strong' human rights, refers to assertions of eternal, inalienable, indefeasible, indefatigable, universal rights claims, rather than our endorsement of such claims. We specifically mean to avoid suggesting that 'strong' implies a coherent, sound position on the nature of human rights. See D Habibi, 'Amartya Sen's Strong Theory of Human Rights' (December 2012) 17 *Journal of Indian Philosophy and Religion* 107–41; and D Habibi, 'Amartya Sen's Defense of Human Rights and the Challenge of Bentham' (August 2014) 2(1) *Theoria & Praxis*, available at https://theoriandpraxis.journals.yorku.ca/index.php/theoriandpraxis/article/view/39368/35697.

[14] See Bentham's letter to John Lind (2 September 1776), in TLS Sprigge (ed.), *The Correspondence of Jeremy Bentham, Volume I: 1752–76* (London, Athlone Press, 1968) 341–4. Versions of Bentham's many criticisms appear in Lind's pamphlet, *An Answer to the Declaration*

3. SEN NEGLECTS RAWLS' 'REFLECTIVE EQUILIBRIUM'

To gain credibility for his own *Idea of Justice*, Sen seeks to discredit rival theories. Sen castigates Rawls' 'ideal theory' approach as overly abstract and impractical. Instead, Sen presents his 'nonideal theory' approach replete with real-world applicability and the benefits of 'public reason'.[15] Strangely, he omits the key, practical component of Rawls' decision theory, which calls for discussion, debate and disagreement, for working out differences. Rawls prescribes the process he called 'reflective equilibrium', described as the endpoint of a deliberative process in which we reflect on and revise our beliefs about an area of inquiry, moral or non-moral.[16] Rawls envisions voluntary groups, committed to the same values, working out the most just set of social arrangements, much like Bentham's and Mill's encouragements for 'experiments in living'. In later writings, Rawls expands this concept to include 'wide reflective equilibrium'. Instead of finding agreement with likeminded people, wide reflective equilibrium involves coexistence, consensus and compromise with differing communities. It is Rawls' version of a properly functioning marketplace of ideas. Instantiating the liberal model, Rawls' just society embraces liberty, individuality, diversity, tolerance and distributive justice, as correctives to reasonably perceived unfairness. He thus addressed utilitarianism and its goal of total net happiness without regard for its distribution.

Sen considers Rawls' ideal theory approach the core problem of Rawls' project. Sen's work in public health, economics, social choice theory and social justice correspond to 'nonideal theory'; that is, he begins with the existing world and seeks to increase global justice. We must confront the world as it is and work with it to make it better. For Sen, Rawls' world of the imagination constitutes a distraction.[17]

In his otherwise thorough and thoughtful *Idea of Justice*, Sen all but erases the essential practical components of Rawls' theory. Sen omits reflective equilibrium and the concrete role it plays in public reason. He mentions 'reflective equilibrium' only briefly in four scattered

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of the American Congress (London, T. Cadell, J. Walter, T. Sewell, 1776). See also, NL York, 'Natural Rights Dissected and Rejected' (August 2017) 35(3) *Law and History Review*; HLA Hart, 'Bentham and the United States of America' (1976) 19(3) *The Journal of Law & Economics* 556.

[15] For example, in addition to his criticism of Rawls' ideal theory, Sen criticizes Rawls on the important principle of 'impartiality'. Sen distinguishes himself from Rawls by describing Rawls' use of 'closed impartiality' and his own 'open impartiality'. Rawls imagines a closed group of likeminded people committing to a social contract which favors the Western liberal, social democratic values. Sen's model emphasizes 'global justice', which is open to a diverse array of people. See *The Idea of Justice* (2009) chapter 6, esp. 140–52; and 'Open and Closed Impartiality' (Sept. 2002) 99(9) *The Journal of Philosophy* 445–69.

[16] See J Rawls, *A Theory of Justice*, section 13, 65–73. Norman Daniels defines it as: 'The method of reflective equilibrium consists in working back and forth among our considered judgments […] about particular instances or cases, the principles or rules that we believe govern them, and the theoretical considerations that we believe bear on accepting these considered judgments, principles, or rules, revising any of these elements wherever necessary in order to achieve an acceptable coherence among them.' See https://plato.stanford.edu/entries/reflective-equilibrium/.

[17] See for example, K Meshelski, 'Amartya Sen's Nonideal Theory' (2019) 12(2) *Ethics & Global Politics*.

places: twice in the text and twice in footnotes.[18] Reflective equilibrium (a combination of *modus ponens* and *modus tollens* in critical thinking) functions as the heart of Rawls' decision procedure.[19] When our principles and considered judgements conflict, Rawls endorses internal dialogue and debate as useful exercises to weed out inconsistencies and achieve a balance. Far from abstract ideal theory, Rawls' theory of justice incorporates a concrete method to figure out what we ought to do in terms of justice and fairness. The method works on various levels of generality and for specific moral questions. Sen's main criticism falls apart. Rawls provides us with practical ways to examine principles, policies and goals.[20]

4. BENTHAM'S REJECTION OF NON-LEGAL NATURAL RIGHTS CLAIMS, SUCH AS SEN'S, FAILS AS SELF-CONTRADICTORY

To defend his human rights-based Idea of Justice, Sen must refute Bentham's denial of natural law and insistence on *legal* rights. Interestingly, he does so by promoting an orthodox conception of super-empowering rights, reminiscent of sacred natural rights claims. Sen stands apart from other analytic philosophers who defend human rights by making strategic retreats from the grandiose claims of universal human rights.[21]

Rather than back away to more defensible territory, Sen attempts to advance the claims of *universal* human rights – without borders or boundaries – transcending time, culture, and all other claims of sovereignty. In response to Jeremy Bentham's famous quip, that 'natural and imprescriptible rights' amounted to 'nonsense upon stilts',[22] Sen argues that human rights preexist law – making them extralegal and longer-lasting than law (perhaps even eternal or at least as old as the first human). Bentham insists that *only* law creates rights. Sen and T.M. Scanlon (as we see below) build on H.L.A. Hart's claim that rights often inspire or give logical reasons to create law. Bentham saw rights as a 'child of law' while Hart sees human rights as parents of law because they motivate specific legislations.[23] We agree with Hart, Sen

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[18] A Sen, *The Idea of Justice* (Cambridge, MA: Belknap/Harvard University Press, 2009) 126, 129, notes 8 and 53. Interestingly, *two* index entries for 'reflective equilibrium' (p.467) miss the mentions on pp.8 and 126, and one entry incorrectly cites the term on p.10.

[19] See S Bobzien, 'Ancient Logic' in *Stanford Encyclopedia of Philosophy*, section 3.3, available at https://plato.stanford.edu/entries/logic-ancient/.

[20] Sen suggests that Rawls and his 'transcendental institutionalist' predecessors neglected results. They focused their attention on starting out, that is, the 'point of departure'. Sen, following his realization approach, wants to focus on the 'points of eventual arrival'. A Sen, *The Idea of Justice*, 8–9.

[21] See, for example, J Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice Hall, 1973), 95.

[22] 'Anarchical Fallacies; Being An Examination of the Declarations of Rights Issued During the French Revolution', in J Bowring, ed., *The Works of Jeremy Bentham*, Part VIII (Edinburgh: William Tait, 1839), 501.

[23] A Sen, *The Idea of Justice*, 363. See also, D Habibi, 'Amartya Sen's Defense of Human Rights and the Challenge of Bentham', 12.

and Scanlon because solid documentation shows rights-talk helps create legal rights in many places worldwide.[24]

Despite Bentham's extreme stance, he did at least predict uncontrolled proliferation of natural rights against governments. People and interest groups easily create and invoke extralegal rights, without any limiting principles.[25] Obviously, rising expectations seriously risk disappointment.[26] Sen celebrates the expansion of rights against governments, confident that trustworthy do-gooders will guide us, as long as the free marketplace of ideas weeds out irresponsible rights-talk. Other philosophers dismiss Bentham without argument or ignore him altogether.[27] Bentham himself fails on grounds of proliferation, as we see at the end of this section.

To defend the universalism claim, Sen strenuously denies that human rights are a Western liberal invention or a Western conceit. He denounces self-serving authoritarian despots, who smear human rights as a tool of neocolonialism. Sen draws a straight line from the 18th century Western European Enlightenment – which includes Bentham, of course – to the contemporary International Human Rights Movement (IHRM) to reinforce his universalist claims. However, he draws an even longer line to underscore the universality of human rights. He points to similarities between enlightened proclamations of Indian rulers and Enlightenment European proponents of natural rights.[28]

Sen rejected a proposed 'Asian values' alternative to human rights critics, advanced by the first Prime Minister of Singapore, Lee Kuan Yew.[29] Lee endorsed paternalistic, state-centred control, stressing obedience and conformity, enforced by a strict, punitive legal system. Sen responded publicly, doubling down on universal, transcendent human rights. He also dis-

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[24] MA Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, Simon and Schuster, 2008).

[25] On 'basic limiting principles' (in a different context), see CD Broad, 'The Relevance of Psychical Research to Philosophy' (1949) 24(91) *Philosophy* 291–309.

[26] See GJ Postema, *Bentham and the Common Law Tradition,* second edition (New York, Oxford University Press, 2019). See also, S Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010).

[27] See R Rorty, 'Human Rights, Rationality, and Sentimentality' in S Hurley and S Shute (eds), *On Human Rights: The 1993 Oxford Amnesty Lectures* (New York, Basic Books, 1993) 127; M Walzer, 'Beyond Humanitarian Intervention' in D Miller (ed) *Thinking Politically: Essays in Political Theory* (New Haven & London, Yale University Press, 2007) 261; M Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, 1999).

[28] He explains that the ancient Emperor Ashoka and 16th-century Akbar declared basic rights for their citizens centuries before the Europeans. Similarly, he reminds readers that Maimonides fled persecution in Spain and took refuge in Arab Egypt. These examples show that religious liberties and tolerance have deep roots outside of Europe.

[29] See A Sen, 'Universal Truths: Human Rights and the Westernizing Illusion' (Summer 1998) 20(3) *Harvard International Review* 40–3; A Sen, 'Human Rights and Asian Values: What Lee Kuan Yew and Le Peng Don't Understand about Asia' (14 July 1997) 217/2–3 *The New Republic*; A Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy & Public Affairs* 351 ff. Lee Kuan Yew was an Oxford-educated, transformational politician, who helped Singapore navigate from colony to independence to economic powerhouse. What Lee advocated struck a chord with many East Asians who shared cultural beliefs in obedience to authority and conformity. Chinese leaders from Mao to Xi Jinping respected, admired, and praised Lee Kuan Yew.

missed claims that imposing human rights threatens people's religious and cultural traditions and amounts to another imperialist scheme to claim control. Secular human rights often clash with tribal mores, and Sen considers human rights advocates much more likely than religious traditionalists to promote justice in cases where they conflict, such as methods of punishing criminal behaviour or the appropriate roles for women.[30] Arguably, secular morality also has uncompromising core values.

Sen encourages expanding human rights, allowing justice-seekers to articulate their reasons. He sees the proliferation of human rights and the growing powers of the IHRM as forces for a better world. In the 18th century, Bentham warned against the irresponsible, uncontrolled proliferation of natural rights. Since the 1948 Universal Declaration of Human Rights, the dramatic expansion of human rights has led to an ever-growing list, including rights for animals, ecosystems and the planet. We lack limits to stop runaway rights inflation.[31] Over time, the cacophony of conflicting rights claims has increased, leading to unresolvable human rights gridlock.[32] For example, the right to free speech increasingly comes under fire by those asserting that freedom of religion demands protection against blasphemy, which in turn conflicts with freedom to criticize religion and freedom from religion.[33]

Bentham expresses pessimism while Sen embraces optimism. For Sen, the expansion of rights generally advances justice (for example, gay rights and women's rights). To promote justice, he wants people to recognize their duty to support human rights. Whereas Rawls prioritizes liberty, Sen emphasizes stopping hunger, providing health care and meeting other basic human needs. Sen's priorities come with a price – some unspecified combination of taxes, spending cuts, reallocating resources and selling government assets. He refers his readers to the major nongovernmental organizations (NGOs), such as Amnesty International (AI) and Human Rights Watch (HRW); governmental organizations, such as the International Committee of the Red Cross (ICRC); and intergovernmental organizations, such as the United Nations (UN) and European Union (EU).[34] He believes – but scarcely even begins to show –

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[30] For example, some religious communities still use methods of punishment (such as amputations and execution by stoning), or enforce highly restrictive roles for women, that many secular moralists regard as archaic or even barbaric. On Sen's preference for secular approaches and their greater freedom to change and improve, see A Sen, *The Idea of Justice*, 237.

[31] James Nickel defines rights inflation as 'the devaluation of human rights caused by producing too much bad human rights currency'. See J Nickel's 'Human Rights' entry in the *Stanford Encyclopedia of Philosophy* available at http://plato.stanford.edu/entries/rights-human/. See also J Griffin, *On Human Rights* (Oxford University Press, 2008) 170; C Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Boulder: Westview Press, 1999).

[32] See J Greene, *How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart* (New York, Houghton Mifflin Harcourt, 2021). See also, D Habibi, Amartya Sen's Defense of Human Rights and the Challenge of Bentham', 9–10.

[33] For example, blasphemy laws restricting religious defamation have returned with support from the United Nations and the European Union. See L Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions* (Cambridge University Press, 2014). See also J Mchangama and S McLaughlin, '30 Years After the Rushdie Fatwa Europe Is Moving Backward' (3 January 2019), *Foreign Policy,* available at https://foreignpolicy.com/2019/01/03/30-years-after-the-rushdie-fatwa-europe-is-moving-backward/.

[34] A Sen, *The Idea of Justice*, 364–5.

that they offer efficient ways of delivering the resources to repair injustices and expand human capabilities, pointing us in the moral direction of our collective future.

Sadly, Sen's faith in the major organizations that comprise the IHRM remains questionable. As Mill stresses in *On Liberty*, it is a fiction that the marketplace of ideas will usually lead to the best ideas and the truth.[35] As largely argued elsewhere, the UN, ICRC, AI, HRW and EU demonstrate a greater commitment to power politics, partisan interests and prejudices than to human rights and international humanitarian law.[36] This is evident based on how they allocate resources and where they focus their attention. Whom they choose to 'name and shame', and where they scream 'truth to power' the loudest, fails to correlate to the greatest violations of human rights and international humanitarian law.[37] Thus, they are unlikely to carry out the responsibilities Sen expects from them.

Bentham's critique of natural rights is prophetic, but his contradictions sink his critique. He fails to apply the same standards to utilitarianism that he applies to natural rights. Bentham's double standard is fatal. One may deduce anything from a contradiction. Bentham's dismissal of natural rights as nonexistent unless enshrined into law would deny imprescriptible moral rights, which Sen points out inspire and constitute the foundation of positive law. We join Sen in rejecting Bentham's blanket dismissal of natural rights (that is, in today's terminology, human rights) as imprescriptible because moral rights exist independently of positive law. They exist by virtue of human nature itself, and so are based on a metaphysical reality. Denying all human rights overlooks the metaphysics of humans, failing to appreciate the dignity of humans as rational agents with free will.[38] Bentham's failure to appreciate this leads him to contradict himself in ways first exposed by Ross Harrison.[39] Harrison says Bentham's metaphysical analysis saddles natural rights with a mere fiction.

Bentham inconsistently uses in his analysis the same terms he explicitly declares fictional when used by others. His project of classification of the law on natural principles uses such explicitly declared fictional terms as 'relation', 'condition', and 'right'. In short, Bentham is hypocritical and inconsistent.[40]

Andrew Clapham gives two clarifications which help us see the error of Bentham's ways. First, Clapham states, in the 19th century natural rights, or the 'rights of man', became at least a bit less relevant to political change, probably because Clapham sees Karl Marx – who snubs rights – as more relevant. Bentham ridiculed the idea that 'All men are born free' as 'Absurd

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[35] JS Mill, *On Liberty* (1859) ch. 2, *Collected Works*, 238–9. Mill writes: 'It is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error […] Men are not more zealous for truth than they often are for error.'

[36] See D Habibi, 'The Politicization of the International Human Rights Movement: A Utilitarian Critique' (2007) 6(1) *Journal of Human Rights* 3–35. See also, D Habibi, 'The Proportionality Problem with Human Rights NGOs' in T Cushman (ed.), *Routledge International Handbook on Human Rights* (London, Routledge, 2012) 548–59; D Habibi, 'Amartya Sen's Strong Theory of Human Rights'; D Habibi, 'Amartya Sen's Defense of Human Rights and the Challenge of Bentham'.

[37] Ibid. Habibi, 'The Politicization of the International Human Rights Movement'.

[38] On this, see LA Mulholland, *Kant's System of Rights* (New York, Columbia University Press, 1990).

[39] R Harrison, *Bentham* (London, Routledge & Kegan Paul, 1983) 32–3, 37–9.

[40] Ibid.

and miserable nonsense'. Bentham infamously derided natural and imprescriptible rights as 'nonsense upon stilts', declaring that wanting something is not the same as having it. Bentham said that 'hunger is not bread', the only real rights were legal rights, and it was the role of law makers, rather than natural rights advocates, to generate rights and set their limits. Bentham said we ask for trouble, risking anarchy, to suggest government is bound by natural rights.[41]

Second, Clapham sees that Sen responds to Bentham by claiming a 'legitimate critique' using human rights as 'pre-legal moral claims' that 'can hardly be seen as giving justiciable rights in courts and other institutions of enforcement'. Sen rejects confusing human rights with 'legislated legal rights'.

Sen also points to a further reaction to human rights discourse: some claim that human rights are alien to some cultures which may prefer to prioritize other principles, such as respect for authority. Sen calls this the 'cultural critique'. Rights are an imperialist creation, and for 'such critics, the whole idea of "universal" human rights is a gigantic fraud, where Western imperialist or ex-colonial powers try to pass off their own, very specific and localized, idea of what "rights" should be as universal, trampling roughly over everyone else's beliefs and traditions'.[42]

Sen escapes Bentham's criticism here, since we can rationally recognize rights based on things just as metaphysically real as welfare or desire, namely, interests and needs. Both sets are facts with metaphysical reality as facts. That is, interests and needs grounding Sen's rights for all are just as real as welfare and desire grounding utilitarian maximizing of happiness for all. Bentham's desires and welfare that ground utilitarianism lack any greater reality (or superior metaphysical standing) compared to Sen's needs and interests that ground extralegal rights. In short, desires, welfare, needs and interests are all equally real.

Scanlon sees this error in Bentham's analysis. Utilitarianism makes the same alleged metaphysical mistake that rights-based moralities make, postulating moral rights or values that exist independently of law. Utilitarianism grounds morality on something undoubtedly real: welfare of sentient beings. Rights and duties, however, allegedly lack any foundation in reality. Scanlon sees the fundamental matter here as reason-giving force over metaphysical reality.[43]

Are Bentham's claims to metaphysical superiority true? We doubt it, since the fundamental similarities between humans constitute the grounds of fundamental human rights, which are just as real as the fact that humans have welfare. It is real that humans generally have welfare, interests and needs. The reality of humans generally possessing reason shows itself equally clearly.

One may object that some humans suffer so much from mental disease or disability that they lack reason. Some people are permanently comatose or brain dead, with only moments or hours to live, and arguably lack any real welfare. Nonetheless, extreme examples fail to negate the principle that humans are rights-holders. If we develop a set of rights based on real interests, or real needs that apply to the vast majority of humans, that counts as a significant achievement.

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[41] A Clapham, *Human Rights: A Very Short Introduction* (Oxford University Press, 2007) 11–12.

[42] Ibid.

[43] TM Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998) 151–2.

It gets worse for Bentham, since animals mercilessly tear his position apart. We saw how he contradicts himself at first by applying a metaphysical double standard, assuming welfare and desires are real while rejecting the existence of interests, needs, duties and the causal power of natural rights to create legal rights. This second contradiction with animals fails to overlap with Bentham's first contradiction discussed above. He rejects natural and human rights because they proliferate too much; but then he insists we have extralegal moral duties to all sentient animals. Sentient animals easily swamp humans in number by multiple trillions or more. Why is Bentham saddled with this unstable, contradictory position? Because he famously insists that to discover our extralegal moral duties to animals, 'the question is not Can they *reason*? nor Can they *talk*? but Can they *suffer*?'[44] Bentham even puts this in terms of rights, saying: 'The day *may* come when the rest of the animal creation may acquire those rights which never could have been withholden [that is, withheld] from them but by the hand of tyranny'.[45] Bentham is inconsistent to emphasize this possibility for animal rights on utilitarian grounds of sentience yet insist that natural rights for humans are impossible nonsense. The maximizing principle of utilitarianism and the vast numbers of non-human, sentient animals also show that Bentham contradicts himself by rejecting natural rights on grounds of proliferation without rejecting utilitarian duties on the same grounds.

In conclusion, as far as Sen has shown, the IHRM he so heavily relies on to implement his idea of justice, is too unreliable.[46] So both Sen and Bentham fail to escape unscathed from their intense battle.

5. LOOSE CANNONS ON DECK: A BENTHAMITE ATTACK ON SEN'S IRRECONCILABLE RIGHTS CONFLICTS

Sen's idea of creating a just world relies on the use of public reason to implement an international human rights regime. He rejects Bentham's insistence on legal rights as a straitjacket, restricting governmental acts. He dismisses Rawls' reliance on public reason as too abstract to be practical, yet he believes in a marketplace of ideas where human rights advocates will take the lead on reducing injustice. Unfortunately, Sen's open-ended process for generating near absolute rights is tethered to illusion, and thus impractical. Without limiting principles or need to identify dutiful rights providers, more and more rights will lead to more intractable conflicts. In the abstract, Sen insists on 'The Importance of Processes and Responsibilities'.[47] However, he irresponsibly embraces a full spectrum of ever-expanding rights without identifying the necessary rights providers. Bentham equated 'natural rights' to 'words that speak daggers'.[48] He foresaw that passionate rights claims would lead to despotism and abuse. Easy to claim, super-empowering natural rights 'hold out a mask for every crime; – they are every

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[44] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 282–3 n b.

[45] Ibid., 283 n b.

[46] D Habibi 'The Politicization of the International Human Rights Movement: A Utilitarian Critique'.

[47] A Sen, *The Idea of Justice*, 22 ff.

[48] *Anarchical Fallacies*, 500.

villain's armoury – every spendthrift's treasury'.[49] It is too tempting to invoke rights claims or violations – especially for those lacking rational argument. Because human rights claims trump all others, invoking them stifles rational discussion.

Just as Bentham predicted, we already live in a world of human rights inflation. Sen himself lapses into deeming multiple dozens of rights important without giving any procedure for reconciling them when they conflict – which Sen recognizes as inevitable, given the variety and growing number of rights claims he encourages. For example, he regards rights to freedom most essential.

Giving a special place – a general pre-eminence – to liberty goes well beyond taking note of the importance of liberty as one of many influences on a person's overall advantage. While personal liberty is indeed useful, like income and other primary goods, that is not all that is involved in its importance. It is a central concern both in a person's freedom, touching the most private aspects of personal life, and it is also a basic necessity (for example, in the form of freedom of speech) for the practice of public reasoning, which is so crucial to social evaluation.[50]

However, sacred liberty rights clash with other essential rights: 'The total priority of liberty is too extreme. Why should we regard hunger, starvation and medical neglect to be invariably less important than the violation of any kind of personal liberty?'[51]

We have capabilities to provide freedom from want for those in need. The productivity, technology and wealth exist.

Sen also regards multiple methods of public reason essential, which he believes will help us resolve questions and details. Unhappily, Sen indulges in wishful thinking that the marketplace of ideas will work things out rationally without telling us how. To which we ask: where is reflective equilibrium when Sen needs it?

'The importance of a framework for public reasoning – much emphasized by John Rawls himself – is particularly important.'[52] Without sufficient explanation or guidance, Sen wants bureaucrats, technocrats, cosmopolitan elites, grassroots activists, local folks and other rational beings to navigate the real world and nudge the rest of humanity toward justice.

'Reasoning is central to the understanding of justice even in a world which contains much "unreason"; indeed, it may be particularly important in such a world.'[53] Making room for irrational action is indeed important, but the diagnosis of irrationality may be a far more complex exercise than it might at first appear. What is important […] is not a presumption that people invariably act in a rational way, but rather the idea that people are not altogether alienated from the demands of rationality […] What is more important for the purpose of the present exploration is the fact that people are, by and large, able to reason and scrutinize their own decisions and those of others.[54]

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[49] Ibid., 524.

[50] A Sen, *The Idea of Justice*, 63.

[51] Ibid., 65; for other instances pertaining to important aspects of freedom, see 21–2, 24, 27, 29, 30, 34, 41.

[52] Ibid., 91.

[53] Ibid., 19.

[54] Ibid., 178. For other instances of the importance of reason, see 4, 5, 10, 12, 15, 16, 19, 20, 32, 34, 35, 43, 45, 46–7, 104, 112–13, 179, 219–20, 221, 228–9 and note, 236, 247, 251, 333, 385, 394, 401, 407.

Sen is realistic in recognizing that we must deal with the 'crooked timber of humanity', and overly optimistic that reason will eventually prevail.

This small sample of examples collectively demonstrate that Sen believes in a plurality of important considerations. So, Sen owes us guidance on how to choose between inevitably conflicting values in a large, growing, interconnected and increasingly complex world of nearly 8 billion people living in vastly different circumstances. Instead, we are treated to Sen questioning utilitarianism and Rawls' theory of justice as unnuanced and too decisive – despite Sen's criticism of their theories as far too abstract![55]

Sen seems vague and even self-contradictory. He considers too many things important and fails to have a way to choose between them when they conflict. A formula for dysfunction: If everything is important, then nothing is important.

6. CONCLUSION: AT WAR WITH BENTHAM, SEN SURRENDERS TO CASUISTRY'S CACOPHONY

Sen's default to the chaos of public reasoning – in the age of celebrity worship, cable news 'dark money' secretly funding politicians, focus groups and internet algorithms creating feedback loops, information bubbles and cocoons to inhabit, and cults of science deniers, history deniers, and so on – shows in his quote below. Sen's theory of justice fails the minimal test of a good theory or good explanation: it must avoid being more mysterious than that which it seeks to demystify. It raises more questions than it answers. Here is Sen's surrender to the chaos of public reasoning:

> [I]t would be a mistake to expect that every decisional problem for which the idea of justice might conceivably be relevant would, in fact, be resolved through reasoned scrutiny. And it would also be a mistake to assume […] that since not all disputes can be resolved through critical scrutiny, we do not have secure enough grounds to use the idea of justice in those cases in which reasoned scrutiny yields a conclusive judgement. We go as far as we reasonably can.[56]

On one hand, we agree with Sen that critical scrutiny about justice will fall far short of resolving all disputes. On the other hand, if critical scrutiny routinely fails to build a lasting consensus, surely that casts considerable doubt on whether the conclusive judgements upon which Sen relies so heavily are really conclusive after all, since we arrived at them by the same flawed decision procedure that has failed so many times in so many other areas. Sen's resignation or surrender at the end of his long book smacks of the unmotivated or jaded government employee too willing to accept routine failure to resolve political issues of justice as good enough for government work. Sen fails to identify his proud conclusive judgements anyway. So, his theory ends up as abstract and rudderless as the abstract theories of justice Sen shuns. At the end of the day, we are left where we began, using Rawls' common sense reflective equilibrium: the logic of *modus ponens* and *modus tollens* to reconcile our considered (rather than conclusive) judgements with a theory of justice explaining or even justifying our considered

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[55] Ibid., 11, 7 ff.
[56] Ibid., 401.

judgements. The goal is logical consistency and reliability to resolve more and more particular cases, or particular issues, justly rather than on an ad hoc basis.

Finally, under multiple emergencies of a pandemic and costly wars without end, is it a rude question to ask: Does the best theory of justice demand that we theorize less and take more direct altruistic action? Regarding justice, should we learn by doing[57] (for example, Millian social experiments in living), rather than merely theorizing? While holed up in an ivory tower above the fray, do too many academics hasten to speak *for* the other without speaking *to* the other? Could Elvis Presley's songwriters have been right after all in calling one of his songs 'A Little Less Conversation'?[58] The four questions above form another quartet of quarrels we save for another day.

The analysis in this chapter exposes Sen's serious shortcomings, as well as Bentham's default acceptance of extralegal rights. Despite Bentham's contradictions, contemporary versions of utilitarianism remain relevant to debates on justice. Rawls and Sen both fail to deliver the 'knockout punch' against utilitarianism. As a result, obituaries for utilitarianism are premature. Further, obituaries for a realistically possible marriage of post-Benthamite utilitarianism and extralegal rights are premature. Certainly, John Stuart Mill opened this door in the last of his 1861 articles on utilitarianism, where he blesses the union of utility and justice via the duty to uphold rights and punish those who violate rights.[59] Utilitarianism and rights remain contenders – and perhaps even partners – in a viable theory of justice.

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[57] See J Dewey, *Democracy and Education* (New York, Macmillan, 1916); HW Reese, 'The Learning-by-doing Principle' (2011) 17(1) *Behavioral Development Bulletin*.

[58] See https://en.wikipedia.org/wiki/A_Little_Less_Conversation; also, www.youtube.com/watch?v=Zx1_6F-nCaw.

[59] See Mill's *Utilitarianism*, ch. 5. See also D Lyons, *Rights, Welfare, and Mill's Moral Theory* (New York, Oxford University Press); DO Brink, 'Mill's Ambivalence about Rights' (2010) 90 *Boston University Law Review*, available at www.bu.edu/law/journals-archive/bulr/documents/brink.pdf.

PART II

UNSETTLING THE LEGAL LANDSCAPE AND DEBATING LEGAL GOVERNANCE

13. Utilitarianism and LGBT rights

Benoît Basse

1. INTRODUCTION

Let us start with a striking paradox. Historically, it cannot be denied that utilitarianism played a prominent role in challenging the dominant disapproving point of view on homosexuality.[1] In 18th-century England, Jeremy Bentham, the founding father of modern utilitarianism, defended sexual liberty and argued that the law should cease to criminalize 'pederasty' between consenting adults. However, it must be noted that utilitarianism does not seem to be a major philosophical reference among theorists involved in the LGBT movement since the late 1960s. Instead, LGBT theorists and activists tend to adopt a *liberal* perspective that focuses on the fundamental rights of individuals. Moreover, utilitarianism is regularly suspected of justifying the sacrifice of the minorities' interests whenever necessary to promote the greatest happiness of the greatest number. Therefore, we would like to raise the following question: to which extent is utilitarianism able to capture LGBT people's demand for respect?

First, we would like to pay tribute to Jeremy Bentham's outstanding defence of homosexuality, by underlying his incredible audacity for the time: to our knowledge, he was the first major philosopher to consider that homophobia was the real problem, and not homosexuality. Moreover, we will claim that Bentham's case for sexual liberty constitutes the core of the utilitarian doctrine on sexual morality, with which any utilitarian philosopher would agree. However, there are reasons to think that the Benthamite approach does not totally fit the contemporary claims in terms of genuine *respect* for LGBT people's equal dignity. Indeed, it is possible to imagine a society in which LGBT persons no longer face the legal punishments criticized by Bentham, but are nevertheless not fully respected in their dignity as persons. We will argue that even though John Stuart Mill never wrote anything about homosexuality, his version of utilitarianism allows a significant step forward. In his essay *On Liberty*, he famously recognizes some positive value to diversity in society, both of opinions and of ways of life. This is a reason to think that a Millian defence of homosexuality is more likely to meet LGBT people's demand for respect, as opposed to mere tolerance.

[1] In this chapter, we will use the term 'homosexuality' to designate same-sex relations and same-sex relationships. It is well-known now that this word initially belonged to the vocabulary of psychiatry and was coined in 1892 by Charles Gilbert Chaddock. He invented a new taxonomy of sexual behaviours, based on the sexual object choice. See for instance DM Halperin, *One Hundred Years of Homosexuality and Other Essays on Greek Love* (New York, Routledge, 1990) 15–40.

2. BENTHAM'S CLASSICAL UTILITARIAN CASE FOR SEXUAL LIBERTY

2.1 Bentham's Audacity

Jeremy Bentham (1748–1832) is without doubt the first major philosopher in Western history to have written at length on homosexuality and more generally on what he called 'irregular sexualities', with the firm intention to criticize the traditional and conservative views on these matters. Bentham's general project was to contribute to a deep reform of the law, in order to promote the greatest happiness of the greatest number. We would like to argue that Bentham's theses were not only progressive and far ahead of their time, but also already contained all the key ideas of a consistent utilitarian approach of sexual morality.

As Louis Crompton observes, in 18th-century England, 'whatever their private behavior, men and women in Tudor and early Stuart Britain were not inclined to any revealing discussion of homosexuality'.[2] One could initially think that this attitude was partly shared by Bentham himself, since he did not dare to publish any of his writings on homosexuality during his lifetime. He was indeed fully aware of how dangerous it could be to do so in a time when homosexuality was considered as a vice not to be named. Furthermore, the danger of facing accusations of being 'one of them' and, as a consequence, of being sentenced to death was not to be neglected by anyone tempted to defend an unorthodox view on this subject. This is alluded to in the following passage:

> Never, surely […], never did work appear from which, in the way of personal advantage and mischief – those words being taken in their ordinary sense – never one from which, in the way of reputation – never one from which, at the hands of public opinion – a man found so much to fear, so little to hope.[3]

Thus, we cannot reasonably blame Bentham for his prudence and for not publishing his writings on sexuality, given that doing so would undoubtedly have caused him more harm than benefit. Jeremy Bentham wrote more than 500 pages on homosexuality, during three different periods, including 1774, 1785 and 1814–16. Interestingly, these writings did not appear in the 19th-century *Works of Jeremy Bentham*, published by John Bowring. It was only in 1932, and then in 1978, that some of these writings were finally transcribed and released by two researchers, namely Charles Kay Ogden[4] and Louis Crompton.[5] More recently, in 2014, a new volume was added to the *Complete Works of Jeremy Bentham*, including his latest writings on the subject.

We would like to argue that no other philosopher before Bentham had gone so far in the defence of same-sex relations and relationships based on mutual consent. Bentham's break-

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[2] L Crompton, *Homosexuality and Civilization* (Cambridge, London, The Belknap Press of Harvard University Press, 2003), Ch. 12.

[3] *The Collected Works of Jeremy Bentham: Sexual Irregularities, and Other Writings on Sexual Morality*, ed. P Schofield, C Pease-Watkin and M Quinn (Oxford, Oxford University Press, 2014) 49.

[4] Charles Kay Ogden's transcription was published in the review *Psyche*, XI, 3 (1930-1931).

[5] *Journal of Homosexuality* (1978) Vol. III, No 4 and Vol. IV, No 1. The text published by Louis Crompton is the one from 1785 called *On Pederasty*.

through on this topic cannot be overestimated, especially given the context of intolerance. In particular, he carefully and extensively argued against all kinds of prejudices that he had found to be associated with homosexuality. As was his habit, he endeavoured to replace those ill-founded ideas with rational arguments and conclusions.[6]

Bentham was 26 years old when he first wrote on homosexuality, in the context of an increasing hostility towards this sexual practice. In England, people accused of 'sodomy' would face death penalty more than ever in that period.[7] Among English writers, the general attitude was to keep silent on this subject. In his very influential *Commentaries on the Laws of England*, Bentham's former professor of law, William Blackstone, writes the following:

> I will not act so disagreeable a part, to my readers as well as myself, as to dwell any longer on a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English Law, which treats it, in its very indictments, as a crime not fit to be named.[8]

Blackstone did not hesitate to support capital punishment for those guilty of sodomy, basing his reasoning on 'the voice of nature and of reason and the express law of God'. Conversely, Bentham sets himself the task of demonstrating that none of these sources ('nature', reason or even God) may justify the criminalization of homosexuality. From Bentham's strict utilitarian perspective, human reason – and its ability to evaluate the overall consequences of a practice in terms of happiness – is the only normative legitimate source. This sharply distinguishes him from the tradition of natural law and from Kant's ethics.

According to the traditional natural law theory, we cannot call something good unless we know its proper function. This doctrine grounds morality in general and sexual morality in particular in 'human nature'. The basic idea is that what is good for a thing will be determined by the ends or purposes for the sake of which its natural faculties exist. In other words, something is good if it fulfils its function. For instance, an eye exists for the sake of allowing a living animal to see. A good knife is one that cuts well. This approach, mainly developed by Thomas Aquinas,[9] is rooted in Aristotle's teleological philosophy.[10] Now, as far as sexuality is concerned, it is justified only to the extent that it fulfils the alleged natural function of our sexual faculties, namely procreation. As a consequence, homosexuality is generally seen by these theorists as a wrong conduct, since it implies a misuse of our sexual organs. The focus

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[6] Today, 71 jurisdictions in the world still criminalize private, same-sex, consensual sexual activity. All of them criminalize men and 43 criminalize women. Besides, 11 jurisdictions can or do impose the death penalty for same-sex intimacy. A list of these countries is provided by the association *Human Dignity Trust*'s website, available at www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type_filter=crim_lgbt.

[7] England's first sodomy law was passed during the reign of Henry VIII in 1533 under the name 'Buggery Act'. Anyone convicted of sodomy could face the death penalty and the confiscation of his possessions by the government. Buggery remained a capital offence in England until the enactment of the Offences Against the Person Act in 1861, which replaced death penalty by imprisonment.

[8] W Blackstone, *Commentaries on the Laws of England* (Oxford, 1765) Book IV, Chapter XV, Section IV.

[9] T Aquinas, *Summa Theologiae* (1485) Part Ia–IIae, questions 90–97.

[10] Aristotle, *Metaphysics*, A, 3, 983a; *Physics*, II, 8, 199b; *Nicomachean Ethics*, I, 1094a.

is put on the 'purposes' of sexuality. Its main purpose is seen as the biological reproduction of the human species. It is clear that this claim disqualifies same-sex relations from the start. Moreover, some natural law theorists assert that the second purpose of human sexuality is to create a comprehensive union of two individuals. The next step then consists in arguing that homosexual persons are incapable of realizing this very special kind of union. The idea is that heterosexual sexuality unites two individuals to fulfil a common function that neither individual can fulfil on their own.[11] Of course, the following objection quickly rises: even heterosexuality far from always results in procreation. Take the case of infertile couples, for example. But the answer is constantly the same: even in a case where sexuality is not procreative in effect, it is still procreative in *type* and the sexual organs are used 'correctly', that is to say, oriented towards procreation. As a result, according to the traditional natural law theory, not only is homosexuality wrong, but also masturbation, contraception, premarital sex, pornography, prostitution and adultery.

The German philosopher Immanuel Kant considered any kind of sexual activity outside marriage as an offence against 'duties to ourselves'. On this basis, you may think that gay marriage would make same-sex relations acceptable to him, but this would most probably not be the case. Not only did he never imagine that marriage would eventually be a possibility for gay and lesbian couples, but he considered homosexuality *per se* as an obvious and extremely serious lack of respect for the 'categorical imperative', by which practical reason expresses its supreme principle of morality. In its second formulation, the moral imperative commands the following: 'So act that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.'[12] Thus, Kant sees sexual desire as an impulse to use the body of another human 'merely as a means' to get a selfish satisfaction. In other words, sexual relations imply treating others as mere objects, instead of treating them as whole persons. For him the only condition in which sexuality escapes this pessimistic view is marriage, which he defines as 'a contract between two persons, in which they mutually accord equal rights to one another, and submit to the condition that each transfers his whole person entirely to the other, so that each has a complete right to the other's whole person'.[13] In brief, Kant thinks that only marriage establishes a full reciprocity between two persons, that is not present in non-marital sexual relations. As to same-sex relations, they are definitely considered as an abominable way to treat oneself and another person merely as a means. In short, it is seen as a degrading and dehumanizing activity.

The classical natural law theory and the Kantian sexual ethics seem to imply what Alan Soble calls a 'pessimistic' view on sexuality. Indeed, they both 'perceive the sexual impulse and acting on it to be things that are nearly always, if not necessarily, unbefitting the dignity of the human person. They see the essence and the result of the sexual drive to be incompatible with more significant and lofty goals and aspirations of human existence.'[14] In this respect,

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[11] See J Finnis, 'Law, Morality, and "Sexual Orientation"' (1993–4) 69 *Notre Dame Law Review*, 1049–76.

[12] I Kant, *Groundwork of the Metaphysics of Morals*, edited by M Gregor and J Timmerman, Introduction by CM Korsgaard (Cambridge, Cambridge University Press, 2012) 41.

[13] I Kant, *Lectures on Ethics*, edited by P Heath and J Schneewind (Cambridge, Cambridge University Press, 1997) 158.

[14] A Soble, R Halwani, S Hoffman and JM Held (eds), *The Philosophy of Sex. Contemporary Readings*, 7th edition (New York, Rowman & Littlefield, 2017).

utilitarianism implies, on the contrary, a much more 'optimistic' view on sexuality in general, since sexual pleasure is simply one of the many kinds of satisfactions that contribute to a human being's happiness. As to homosexuality in particular, we cannot think of any other philosophy that so radically challenged the traditional negative view of it.

2.2 Bentham's Hedonistic Utilitarian Case for Sexual Liberty

According to the principle of utility, an action is right if it tends to promote the greatest happiness of the greatest number. This fundamental normative principle is to be applied to any moral or political issue, and sexual morality makes no exception. 'Under the principle of utility, Bentham writes, there can be but one such [ethical] source, viz. the effect of the operation on the sum of happiness – the operation is preponderantly noxious or it is *not.*'[15] The only question that matters from a utilitarian point of view is therefore: does a certain sexual practice contribute to increase the amount of general happiness (defined as a certain quantity of pleasure in society)? Bentham's general thesis on homosexuality is the following: since same-sex relations give pleasure to those who engage in them and cause no harm to others, they should be permitted. As long as sexual gratification is obtained consensually, it is a way to promote the greatest happiness of the community. He goes even further and claims that the real mischief for society is produced not by homosexuality, but by its criminalization and punishment. Hence, Bentham clearly supports the removal of sanctions from harmless sexual activity. This hedonistic case for sexual liberty is at the core of any utilitarian argument on sexuality and we cannot help but think that Bentham expressed more than 200 years ago the key ideas defended by any utilitarian philosopher today.[16]

In his effort to demonstrate that homosexuality represents no threat to social and political order, Bentham is led to carefully examine all 'alleged mischiefs' linked to same-sex relations and he patiently refutes all of them. In fact, his main task as a moral philosopher was to criticize ill-founded arguments based on mere prejudices, mostly by appealing to experience, history and consistent reasonings. Here is a rapid overview of his major critics from the conservative standpoint.

To start with, what about the claim that such a non-procreative practice, if tolerated, would put the very existence of humanity in danger? This was, for instance, Voltaire's constant objection to what he called 'l'amour nommé socratique'.[17] In order to rebuke this alleged consequence of homosexuality, Bentham refers to Ancient Greece where same-sex relations

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[15] *The Collected Works of Jeremy Bentham: Sexual Irregularities, and Other Writings on Sexual Morality*, 58.

[16] See, for instance, how the Australian utilitarian philosopher Peter Singer argues that homosexuality is not immoral, simply on the basis of the principle of utility: 'If a form of sexual activity brings satisfaction to those who take part in it, and harms no one, what can be immoral about it?' (P Singer, 'Homosexuality is not immoral', *Ethics in the Real World. 82 Brief Essays on Things That Matter* (Princeton and Oxford, Princeton University Press, 2016) 141). In fact, it seems like Peter Singer does not claim to add anything decisive to Bentham's point of view. However, he goes further than Bentham when raising the following taboo issues: 'should adult sibling incest be a crime?' (ibid., pp.135–8) and should it be always prohibited to have sexual relations with animals?

[17] Voltaire, 'Socratical Love', *Philosophical Dictionary* (1764).

between males, though very common and socially accepted, never threatened the existence of the population. Bentham writes: 'I can find nothing in history to countenance the notion I am examining. On the contrary the country in which the prevalence of this practice is most conspicuous happens to have been remarkable for its populousness.'[18] In what may be a provocative statement, Bentham goes even further and claims that 'if [by] the irregularity in question population were capable of being affected in any way, the way in which it would be affected would rather be favorable than unfavorable'.[19] Influenced by the recent works of Thomas Malthus,[20] Bentham somewhat playfully points to a possible social advantage of homosexuality, since it could help to limit dangerous growth of the population, in a time when overpopulation was considered by him as a cause of unhappiness in the British empire. In truth, he held the view that there is no causal relation whatsoever between the toleration of same-sex relations on the one hand, and the growth or the decline of a population on the other hand. He thus states: '[pederasty] is incapable of having any effect on population'.[21]

Another French philosopher, Montesquieu,[22] suggested that relations and relationships between males tended to make men abnormally 'weak', so that they finally resemble women. Again, Bentham's reply consists in analysing what history says about it. Facts obviously contradict this objection: 'Of all associations of men of whom any memorial has been handed down to us by history, the one most celebrated for personal courage is the Theban band. This preeminence is stated as being the known result of a particular bond of union: and this bond is mutual love – love operating in this irregular shape.'[23] In other words, being attracted to persons of the same sex has never prevented anyone from being courageous and possessing all the military virtues. In brief, all attempts to show that people engaged in same-sex relations are dangerous for society or even for themselves finally fail. But is it all Bentham had to say in his defence of 'pederasty'? Isn't it too short a view to stress the absence of danger of such a practice? If this were the case, then Bentham would have gone no further than a plead for 'tolerating' homosexual behaviours. This would certainly have been great progress in his day, but it would not be enough to understand the contemporary demand of *respect* for homosexual persons.

At least two remarks should be added at this stage. The contemporary reader may have the impression that Bentham's case is quite disappointing in the end, since he often describes homosexuality using very pejorative terms, such as 'miserable taste', 'vicious propensity', 'preposterous propensity', 'eccentric and unnatural propensity' and even 'abomination of pederasty'. Should we draw the conclusion that Bentham is only defending the decriminalization of homosexuality for pragmatic reasons, while continuing to condemn such a practice and wishing that it did not exist? There seems to exist good reasons to think that these expressions

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[18] *The Collected Works of Jeremy Bentham: Sexual Irregularities, and Other Writings on Sexual Morality*, 25.

[19] Ibid.

[20] T Malthus, *An Essay on the Principle of Population and Other Writings* (London, Penguin Classics, 2015).

[21] *The Collected Works of Jeremy Bentham: Sexual Irregularities, and Other Writings on Sexual Morality*, 25.

[22] Montesquieu, *The Spirit of the Laws* (1748), Book XII, Ch. 6.

[23] *The Collected Works of Jeremy Bentham: Sexual Irregularities, and Other Writings on Sexual Morality*, 33.

do not reflect Bentham's own thought, but represent mere rhetorical and strategic concessions to his opponents' vocabulary. Bentham was most probably fully aware that no one would have taken seriously any writing too openly in favour of people practising sodomy. Besides, it should be noted that these negative expressions totally disappeared in his latest drafts, written between 1814 and 1818. In those drafts, Bentham even invented neutral expressions such as 'the improlific appetite' and 'the Attic mode', in order to avoid any negative characterization of homosexuality itself. More generally, he thought that ordinary language was a vehicle of numerous fictitious entities and prejudices that infected all fields of science, and law in particular.

The second thing to insist upon is that, contrary to appearances, Bentham did not limit himself to asserting that homosexual practices were not dangerous and should be tolerated by law, just as we might tolerate certain kinds of bad behaviours whose punishment would cost more to society than the mischief itself. The fact that Bentham dedicated so many pages to refuting the so-called dangerousness of pederasty should not lead us to miss the positive point of his argument, namely that same-sex relations between consenting adults are *good*, insofar as the persons involved experience *pleasure*. It should also be reminded that Bentham's refusal to distinguish between 'higher' and 'lower' pleasures in terms of intrinsic quality, logically prevents him from despising certain kinds of sexual pleasures, as long, once again, as they imply every partner's consent. Bentham's statement is unequivocal: 'if pleasure be not a good, neither is anything a good.'[24] As a consequence, Bentham's utilitarian and hedonistic approach implies a more positive side, highlighting the beneficial effects of homosexuality, starting with the 'addition to the mass of pleasure'.[25] On the contrary, Bentham insists, 'punishment […] will be not only evil, but so much pure evil'.[26] Indeed, punishment is always a mischief in itself – since it implies a certain amount of pain – and the only rational justification for it, from a utilitarian point of view, lies in its beneficial consequences for the community. There is no doubt that the legal persecution of pederasty belongs to the first category of cases when punishment is illegitimate, namely 'where it is *groundless*: where there is no mischief for [punishment] to prevent; the act not being mischievous upon the whole'.[27] Thus, the real mischief consists in the criminalization of homosexuality, for at least two reasons. First, the fear of being sentenced to a very severe punishment (imprisonment or even death) leads many people to sacrifice a huge quantity of possible pleasures, which implies a diminution of the overall happiness. Second, Bentham stresses a disastrous negative consequence of the existence of penal laws against pederasty, namely the danger of false accusations, which is greater in this case than in any other. As Beccaria[28] had noticed before him, Bentham writes:

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[24] *The Collected Works of Jeremy Bentham: Sexual Irregularities, and Other Writings on Sexual Morality*, 43.

[25] Ibid.

[26] Ibid., 92.

[27] *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation*, edited by JH Burns and HLA Hart (Oxford, Oxford University Press, 1996) ch. XIII, 159.

[28] Beccaria writes: 'Yet adultery and sodomy which are hard crimes to prove, are precisely those in which, according to the received views, the tyrannical presumptions of the *nearly proofs* and *half-proofs* are admitted (as if a man could be *half-innocent* or *half-guilty*, that is, *half-punishable* or

> [H]ow easy it is to fabricate out of the dread of an accusation of this nature an instrument of extortion is but too obvious and too notorious. Give me so much money, or I will say to such or such a person in conversation, or to such or such a person in writing, or in a word to every one in print, or even in the way of accusation to the Judge – that at such or such a place and time, you said so and so to me, or you comported yourself so or so – relative to me.[29]

In other words, anyone is potentially at risk of being accused of this alleged crime and sentenced to very severe punishments, after having been blackmailed. In line with Bentham, the contemporary utilitarian philosopher Peter Singer also underlines this terrible threat that is likely to affect anyone in society, before drawing further bad consequences: 'the prohibition of sodomy […] provides a basis for blackmail and harassment of homosexuals and has made it more difficult for groups that educate people about HIV and AIDS to carry out their work.'[30]

Finally, it should be noted that utilitarianism implies a criticism of paternalism, since everyone should be the sole judge of what is agreeable or disagreeable to himself. And the amount of pleasure and pain are the only criteria to be considered, as long as the activity that produces them bears no evil consequences for other people. As a result, Bentham is led to attach equal value to homosexuality and heterosexuality, although the former happens to be 'irregular' in a purely statistical sense.

2.3 Bentham's Critique of Homophobia

The most striking feature of Bentham's writings on homosexuality is probably his deep and illuminating analysis of what is designated nowadays by the word *homophobia*. Once again, the groundbreaking and innovative character of his insights can hardly be overemphasized. Bentham totally changed the traditional perspective on homosexuality, by simply reversing the usual judgement on its value. He was the first philosopher, as far as we know, to consider the widespread 'antipathy' towards homosexual people as the real problem. Two hundred years before the Gay Liberation Movement actually started in the 1970s, Bentham had already tried to convince his potential readers that pederasty was only an imaginary mischief, whereas homophobia was the corresponding *real* mischief.

Bentham suggests different origins of this irrational and dangerous antipathy towards homosexuals. Indeed, we may legitimately say that homophobia is irrational, in the sense that it leads to certain actions and policies in contradiction with the utilitarian principle. But this does not mean, of course, that this kind of hatred emerges without any causes. According to Bentham, one major cause of this overall 'horror' and rejection of irregular sexualities is the disastrous influence of *asceticism*, defined by him as a 'principle, which, like the principle of utility, approves or disapproves of any action, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: but in an inverse manner'.[31] He argues that asceticism has its roots in religion and essentially consists

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half-acquittable)' (*On Crimes and Punishments*, edited by Richard Davies (Cambridge, Cambridge University Press, 1995) 79–80).

[29] *The Collected Works of Jeremy Bentham: Sexual Irregularities, and Other Writings on Sexual Morality*, p.95.

[30] P Singer, 'Homosexuality is not immoral', 139–40.

[31] *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation*, 17.

in sacrifice. Indeed, asceticism implies the idea that the more frustrating an action is, the more virtuous it is, since it is supposed to show the agent's capacity to control oneself. This doctrine is directly opposed to the principle of utility which requires the maximization of pleasure for the greatest number of sensitive beings. Bentham regards asceticism as an irrational doctrine because it fails to value pleasure as such. According to those moralists and religionists,

> pleasures that are allowed of, are never allowed of for their own sake but for the sake of something else which though termed an advantage or a good present not to any one so obviously and to them perhaps not at all, the idea of pleasure. When the advantage ceases, the pleasure is condemned.[32]

But how is such an attitude even possible from a utilitarian perspective? What are the springs of action that lead certain people to embrace it, at least in words? There must be a hidden interest that explains why they seem to consent to an immediate decrease of their personal amount of pleasure. The first reason is the 'love of reputation', that is to say, the desire to be admired and praised by other people for being a person motivated by virtue, defined as the ability to control one's propensity to pleasure. However, Bentham suspects cruelty behind this appearance of virtue. He writes:

> Nothing can be more false and groundless – nothing more hypocritical, than the pretense of a love of virtue. In the suffering of no man, not even the most wicked and mischievous of mankind – in no such suffering, in no suffering in any shape considered by itself, considered in any other light than that of a necessary means of producing a more than equivalent good […] does a virtuous man, in so far as that appellation justly belongs to him, derive pleasure.[33]

Bentham goes further and suggests sarcastically that this verbal indignation is often a mask of hypocrisy. Indeed, experience shows that quite many despisers of homosexuals are secretly driven by envy or even act in contradiction with their so-called moral values.

The other reason that supports asceticism is the desire to please God and the belief that all the efforts and sacrifices made in this world will be rewarded by the Almighty in the hereafter. However, Bentham did not consider asceticism to be so central to Christianity. Indeed, he accused Saint Paul of having perverted Jesus' teaching. Bentham sees Paul as an impostor who, after having persecuted the followers of Jesus, changed his mind for suspicious reasons, pretended to be the 13th apostle and finally incorporated asceticism and homophobia into the Christian religion. Bentham stresses that there are no traces at all of any antipathy towards homosexual people in the Gospels.[34]

Bentham also points out a common *horror for singularity*: 'In persons of weak minds, anything which is unusual and at the same time physically disgustful is apt to excite the passion of hate. Hatred when once excited naturally seeks its gratification in the tormenting or destruction of the object that excited it.'[35] Thus, homophobia is to be understood as one of the many examples of this natural tendency to make suffer or even destroy any sensitive object which

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[32] *The Collected Works of Jeremy Bentham: Sexual Irregularities, and Other Writings on Sexual Morality*, 4.

[33] Ibid., 93.

[34] Ibid., 15. See also *The Collected Works of Jeremy Bentham: Not Paul; but Jesus. Vol. III. Doctrine*, published by The Bentham Project (UCL, London, 2013).

[35] Ibid., 72.

produces a painful feeling in us. This logic is at work when people get a certain pleasure from – or at least avoid a certain pain by – killing any animal that appears dangerous or disgusting to them. Bentham mentions toads and spiders. And he suggests that homosexuals are victims of the same propensity.

Now, what are the forms of expression of this antipathy? The most obvious ones are physical violence, passionate hate speech and legal persecution. But we should credit Bentham for having captured some more sophisticated and intellectual forms of homophobia as well, such as the previously mentioned theory of natural law. Even though he himself used the adjective 'unnatural' several times in his earliest drafts, as a concession to the ordinary language of his time, Bentham cannot seriously have meant that same-sex relations were actually 'against nature'. This would contradict his constant claim that human *reason* is the sole and only normative source. Nature is deprived of any normative power. Bentham even suggests that homosexual desires are no less 'natural' than heterosexual ones. More generally, the truth is that human beings simply differ in their tastes and inclinations, and this variety has nothing to do with certain tastes being more or less 'natural' than others. He remarks that most people who apply this term to certain sexual practices actually point out their non-procreative aspect, yet this is nothing but an arbitrary use of the word. The truth is that this epithet tells us nothing meaningful about the practice in question, and much more about the feelings of the *persons* who use it. Its main function is to express their disapproval, in order to bring other people to share their hostility towards the same object of disgust. In short, revulsion and hate come first and then are disguised by pompous words such as 'unnatural' or extremely confused distinctions when applied to sexuality, such as the one between 'pure' and 'impure'.

Bentham's conclusion is unequivocal: homophobia is the real mischief, whereas homosexuality is an imaginary mischief and causes no harm at all. Homophobia is just a passionate negative reaction to a feeling of disgust that was inherited from and transmitted by tradition. Bentham thinks that it only blinds people's reason and that the legislator should make the principle of utility prevail over a hidden principle of sympathy and antipathy, so that law actually promotes the greatest happiness of the greatest number, instead of serving the 'sinister interests' of a minority.

So far, we have argued that Bentham's defence of homosexuality was way ahead of its time and already presented the key ideas with which any coherent utilitarian philosopher today would agree. But in spite of his role as a pioneer, we may have the feeling that Bentham missed something important that prevents his thought being a complete fit with the Gay Liberation Movement that started in the late 1960s. The LGBT Movements, more generally, have broadly adopted the language of fundamental human *rights*, conceived as prior to and independent from positive law. Yet this liberal perspective, expressed in terms of basic rights, was severely attacked by Bentham himself.[36] Moreover, it may appear entirely insufficient nowadays to underline that LGBT persons' sexual activities imply no harm to others and should be tolerated for this reason. What LGBT persons demand is not only toleration of their sexual activities, but *equal respect* of their *dignity*.[37] This is what the word 'Pride' is supposed to mean, in

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[36] See *The Collected Works of Jeremy 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 (Oxford, Oxford University Press, 2002).

[37] See for example RD Mohr, *The Long Arc of Justice. Lesbian and Gay Marriage, Equality, and Rights* (New York, Columbia University Press, 2005), Ch. 4.

opposition to shame. Can utilitarianism account for these demands? It is tempting to explore what John Stuart Mill's version of utilitarianism has to offer as a defence of homosexuality.

3. JOHN STUART MILL'S UTILITARIANISM AND LGBT PEOPLE'S RIGHTS

3.1 How Should We Apply the *Harm Principle* to Homosexuality?

Contrarily to Bentham, John Stuart Mill (1806–73) did not write anything explicit about same-sex relations and relationships. We thus have no idea about his personal views on these matters. However, this is no reason for banning any speculation about what kind of conclusions his version of utilitarianism would lead to in this area. In particular, to which extent can Mill's philosophy account for LGBT persons' demand for respect of their equal dignity?

First of all, John Stuart Mill is well known for having staunchly defended what is often called the *harm principle*, which obviously supports the claim that consenting adults should be free to engage in any kind of sexual activities, unless they cause harm to somebody else. In his essay *On Liberty* (1859) he famously wrote: 'The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.'[38] Of course, one might argue that Mill's *harm principle* needs some explanation, since most actions affect others. But Mill was fully aware that many of our actions 'may seriously affect, both through their sympathies and their interests, those nearly connected' to us, and even 'society at large'.[39] Indeed, many people claim that homosexual activities cannot be considered as self-regarding conducts, since they bear consequences for other people as well. What if some people (or a majority of homophobic people) claim that they feel horrified by the very idea of homosexual relations? Mill however made it very clear that being affected by an action is not enough to take it out of the self-regarding sphere. He specified that it is only when 'by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class and becomes amenable to moral disapprobation in the proper sense of the term.'[40] So the state and society are not justified in prohibiting certain conducts merely because they think they are 'perverse, foolish, or wrong'.[41] The *harm principle* should not be interpreted as an intellectual weapon for those 'who consider as an injury to themselves any conduct which they have a distaste for'.[42] We can certainly rest on an analogy here between sexual morality and what Mill says about the religious bigots who pretend that other people 'disregard [their] feelings by persisting in their abominable worship or creed'.[43] Being hurt in one's feelings is definitely not the same as being harmed as Mill understood it. Moreover, according to Mill, only those actions which violate a legal right of others should be

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38 JS Mill, *On Liberty*, in *The Collected Works of John Stuart Mill,* ed. JM Robson (Toronto, University of Toronto Press, 1963–91) [hereafter CW], Vol. XVIII, 224.

39 Ibid., 281.

40 Ibid.

41 Ibid., 226.

42 Ibid., 283.

43 Ibid.

subject to legal sanction. This is a first reason to think that Mill would have strongly disagreed with jurists such as Lord Devlin, who conceive of the law as a means to enforce 'some shared morality' and 'to guard existing moral beliefs'.[44]

Lord Devlin thought that Mill's harm principle was not sufficient to decide whether a certain conduct should be tolerated or prohibited. More precisely, he asserted that some of the so-called harmless self-regarding actions do have a real destructive effect on our common beliefs and values, so that 'the public interest in the moral order can be balanced against the claims of privacy'.[45] In other words, what Devlin objects to in Mill's harm principle is that there exist apparent self-regarding actions that constitute a serious threat to a community's shared morality and, therefore, that society should defend its very existence by prohibiting such behaviours. Devlin thought this was precisely the case for homosexuality, which is the reason why he strongly disapproved of the 1957 Wolfenden Report, which recommended not punishing homosexual behaviours.[46] Indeed, the members of the Wolfenden Committee had obviously adopted a Millian perspective when stating that 'there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'. Now, it should be noted that in his reply to Devlin's critical considerations on homosexuality, the English legal philosopher H.L.A. Hart mainly adopted a utilitarian line of argument, in particular when underlying that, in reality, the decriminalization of homosexual conduct would not lead to the ruin of society, as Lord Devlin proclaimed it. Hart states:

> no evidence is produced to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society. No reputable historian has maintained this thesis, and there is indeed much evidence against it. As a proposition of fact it is entitled to no more respect than the Emperor Justinian's statement that homosexuality was the cause of earthquakes.[47]

On this point, Hart clearly embraced a utilitarian perspective, arguing that, in reality, the laws against homosexual conduct caused a lot of unnecessary misery to men who are incapable of changing their sexual orientation.[48] Whereas Lord Devlin considered Mill's harm principle as inappropriate, for the reason that it prevented the lawgiver from enforcing any community's shared morality, Hart only conceded that this harm principle needed to be *revised*, in order to include some cases of legitimate paternalism. Hart defended a kind of *physical paternalism* that prevents people from harming themselves very severely. He thought that drug legislation and seatbelt laws, for instance, may be justified on this ground. Nonetheless, he insisted that this minimal paternalism could sharply be distinguished from moral paternalism and from Devlin's legal moralism. What is crucial here is that even according to the harm principle thus revised, it remains illegitimate to criminalize a practice simply because a majority of citizens

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[44] P Devlin, *The Enforcement of Morals* (Oxford and New York, Oxford University Press, 1965) 114.

[45] Ibid., 19.

[46] In England, homosexuality was decriminalized in 1967. Until then, the Criminal Law Amendment Act 1885 was still in force. Section 11 of this legislation was used to sentence both Oscar Wilde and Alan Turing to jail.

[47] HLA Hart, *Law, Liberty, and Morals* (London, Oxford University Press, 1953) 50.

[48] See also N Lacey, *A Life of H.L.A. Hart. The Nightmare and the Noble Dream* (Oxford, Oxford University Press, 2004) 220–1, 256–61.

are 'disgusted' by it. As Nicola Lacey puts it, Hart 'denounced the legal enforcement of morality as a form of cruelty',[49] since it involves a very hypothetical enforcement of morality at the cost of huge suffering. Besides, he contested the existence of a single morality.

But it may be said that the harm principle alone remains insufficient, since it only gives a reason not to punish homosexual conduct; deprecation of such conduct and hate aimed at LGBT persons is nevertheless able to continue. In truth, one can imagine a society in which same-sex relations would not be subject to penal sanction but in which LGBT persons would still be considered of lesser value. The harm principle's function is to answer the question of when coercion from the state is justified, and not to determine the moral worth of our actions. At best, the Millian harm principle alone does not seem to provide any reason to go beyond some kind of constitutional *toleration* of homosexual behaviour. This is why it has been suggested that something more is needed in order to grant the same positive value to same-sex relations and to meet the contemporary requirements of justice for LGBT people. A fitting example is the historical US Supreme Court's decision in *Lawrence v Texas* in 2003.[50] In a 6–3 opinion delivered by Justice Anthony M. Kennedy, the Court held that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause of the Fourteenth Amendment, which prohibits arbitrary deprivation of 'life, liberty, or property' by the government, except as authorized by law. At first sight, one could think that the Court's position simply incorporates Mill's harm principle from *On Liberty*. And there are indeed passages in Justice Kennedy's opinion that surely echo Mill's way of defining a private sphere that should remain free from any governmental interaction. But as Mark Strasser rightfully noticed, *Lawrence v Texas* goes far beyond this and 'cannot plausibly be explained as simply incorporating Mill's harm principle'.[51] In brief, the US Supreme Court refused to take for granted that same-sex relations and relationships were of less value than different-sex relations and relationships. To be more precise, it fully admitted that for lesbians and gay people too, the sexual conduct could be 'but one element in a personal bond that is more enduring'[52] and that for them too, 'the right to make certain decisions regarding sexual conduct extends beyond the marital relationship'. More generally, the fight against all discriminations based on sexual orientation obviously seems to require more than the Millian harm principle. Having said that, we should keep on exploring Mill's philosophy and seek other elements that would not only condemn repression, but also favour a policy of genuine respect towards LGBT persons, excluding all kinds of discriminations. As Richard Mohr rightly points out, such respect is due to lesbians, gay men, bisexuals and transgender people in virtue of what they *are*, namely *persons* whose dignity is way too often insulted.[53] Is utilitarianism capable of going further than mere toleration towards what LGBT people *do*, and supporting their demand of full respect for their equal dignity as persons? In

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[49] Ibid., 259.

[50] *Lawrence v Texas* (539 U.S. 558).

[51] M Strasser, '*Lawrence*, Mill, and Same-Sex Relationships: On Values, Valuing, and the Constitution' (2006) 15 *Southern California Interdisciplinary Law Journal*, 285.

[52] *Lawrence*, 539 U.S. at 567.

[53] Richard Mohr convincingly writes: 'Equality in a moral sense is at heart a principle that asserts individuals as having equal dignity or personhood. Rising to the level of a right, equality is the authoritative claim that a person will not be held in lesser regard – as having less worth – unless that lesser regard is warranted by something the person has (or has not) done.' (R Mohr, *The Long*

this regard, we would like to argue that John Stuart Mill's thought represents a significant step in that direction.

First of all, commentators generally agree that John Stuart Mill took much more seriously than Bentham the very idea of *moral rights*, especially in the last chapter of his book *Utilitarianism* (1861), where he endeavours to convince his readers that the so-called contradiction between utility and justice is an illusion. The idea that individuals have rights that impose constraints on the pursuit of collective goals is usually not associated with utilitarianism, but rather with the liberal political thought and the deontological approach of morals. So the question whether Mill's 'liberalism', exposed in *On Liberty*, and his explicit allegiance to utilitarianism are compatible has given rise to an almost endless debate among commentators.[54] But it can convincingly be argued that Mill himself thought that the recognition of moral rights (or fundamental rights) was ultimately grounded on the principle of utility itself. In other words, even though at first sight it may seem that utility often requires a breach of these moral rights, Mill seems to have been confident that a systematic respect of each individual's moral rights would benefit the whole society *in the long run*.[55] Of course, we may still suspect that this way of reconciling utility and justice is too optimistic, but we cannot deny that Mill has a theory of rights. He defined moral rights as follows:

> It seems to me that this feature in the case – a right in some person, correlative to the moral obligation – constitutes the specific difference between justice, and generosity or beneficence. Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right.[56]

It seems clear that, contrarily to Bentham, Mill surely admitted the legitimacy of moral claims and the existence of 'moral rights', even though they would not be currently backed up by any system of legal rules, nor by any conventional morality. He took this step by admitting that 'we do not call anything wrong, unless we mean to imply that a person *ought* to be punished in some way or other for doing it'.[57] Mill did not provide an extensive list of those rights which he regarded as justifiable on grounds of utility. It is nonetheless tempting to suggest here that there is no reason not to enlarge the realm of these Millian moral rights to LGBT persons' fundamental interests, so as to include not only a right to their own security and a right not to be punished for having same-sex relations, but also a fundamental right not to be discriminated against, when looking for housing, applying for a job, and so on. Mill tells us that justice is a name for 'certain classes of moral rules, which concern *the essentials of human well-being* more nearly, and are therefore of more absolute obligation, than any other rules for the guid-

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Arc of Justice. Lesbian and Gay Marriage, Equality, and Rights (New York, Columbia University Press, 2005) 74).

[54] See JC Rees, 'A Re-reading of Mill on Liberty' (1960) 8(2) *Political Studies*; CL Ten, 'Mill and Liberty' (1969) *Journal of the History of Ideas*, 47–68; D Lyon, 'Mill's Theory of Morality' (1976) 10(2) *Nous*; 'Human Rights and the General Welfare' (1977) 6(2) *Philosophy & Affairs*, 113–29; J Gray, 'John Stuart Mill on Liberty, Utility, and Rights' (1981) 23 *Nomos*, 80–116.

[55] See LW Sumner, 'Mill's Theory of Rights', in *The Blackwell Guide to Mill's Utilitarianism*, edited by HR West (Oxford, Blackwell Publishing, 2006), Ch. 8.

[56] JS Mill, *Utilitarianism*, CW, Vol. X, 247, emphasis added.

[57] Ibid., 246.

ance of life'.[58] In this respect, it is sufficiently clear that to be treated as a person of lesser value and to endure all kinds of insults and discrimination obviously conflicts with 'the essentials of human well-being'.

3.2 A Millian Defence of Queerness?

Moreover, John Stuart Mill famously defended the idea that people should be free to adopt different ways of life. In fact, it is difficult to think of another classical philosopher who went so far in the defence of originality, both concerning our thinking and our way of living. It should be remembered that after having defended our liberty of thought and discussion in the second chapter of *On Liberty*, Mill also applied the harm principle to our actions in the following chapter:

> The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgement in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost.[59]

First, Mill simply denied the existence of a single and unique way to live a flourishing life. Instead, he wisely admitted that what is good for some people may be bad for others. Because human beings are different, they find their pleasure in different things. 'There is no reason, Mill writes, that all human existence should be constructed on some one or some small number of patterns. […] Human beings are not like sheep; and even sheep are not undistinguishably alike.'[60] Mill is absolutely convinced that a great variety of lifestyles contributes to the greatest happiness of the greatest number. First, people are happier when they are free to frame the plan of their life that suits them best and to thrive their own way, instead of sacrificing their individuality to comply to certain rigid social standards. Being spontaneous – or as we would say today, being oneself – is one important element of well-being. Mill goes even further by defending *eccentricity* as a source of benefits for society, instead of seeing it merely as a cause of social disorder:

> Eccentricity has always abounded when and where strength of character has abounded; and the amount of eccentricity in a society has generally been proportional to the amount of genius, mental vigour, and mental courage which it contained. That so few now dare to be eccentric, marks the chief danger of the time.[61]

The real mischief for society and human advancement is the despotism of custom and the lack of originality in our ideas and behaviours. Secondly, Mill believed that liberty to *choose* our own way of life was a major ingredient of our well-being. He claimed that everyone's happiness does not only depend on adopting a certain kind of existence, but also on being conscious that he or she freely chose this kind of life more suitable to him or her. This implies

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58 Ibid., 255, emphasis added.
59 JS Mill, *On Liberty*, CW, Vol. XVIII, 260.
60 Ibid., 270.
61 Ibid., 269.

that individuals should be free to break through customs and old habits, in order to experience different ways of living, more appropriate to who they truly are.

Although Mill never wrote explicitly about same-sex relations and relationships, it is not difficult to see how these considerations can resonate with LGBT people's aspiration to get away from all kinds of norms that do not respect their specific identities and ways of life. The word 'queerness' is now used, in its broadest sense, to designate all non-conventional ways to define one's sexual and gender identity. Nowadays, there is little doubt that Mill's apology of originality should include the respect of all 'queer' identities claimed by lesbians, gay men, bisexuals, transgender persons, non-binary and gender-fluid people.

However, one may wonder if Mill's utilitarian way of defending everyone's freedom is fully appropriate. Mill presents the greatest variety of lifestyles as a necessity for humanity to reach the highest level of *perfection*. The effective development of all human skills – which is what he understands by 'perfection' – requires that people should be free to express new ideas and experience original ways of life. He claims that the more people are allowed to be themselves and to explore their own ways of life – instead of obeying a single pattern – the more humanity will be able to develop its specific abilities. This is why he famously distinguished between *higher* and *lower* pleasures, considering that the former involve the use of more specific human skills and a more flourishing human life. However, there is absolutely no reason to think that Mill's distinction between *higher* and *lower* pleasures reflects the one between heterosexual and homosexual pleasures. The reason why Mill thinks it is 'better to be a human being unsatisfied than a pig satisfied'[62] has nothing to do with one's sexual orientation. Mill's general idea rather seems to be that the satisfaction of our 'low' pleasures should remain within limits, so that we do not neglect the 'higher' satisfactions that are possible for us as human beings. In the long run, Mill is confident that a higher degree of perfection means a greater happiness for all. As a result, the ultimate reason why the law should protect a certain number of moral rights is the promotion of the greatest happiness. We should always keep in mind that for Mill, the harm principle and the existence of moral rights are grounded on the principle of utility. He made it clear in this often cited passage of *On Liberty*: 'To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him *no other reason than utility*.'[63]

So in the end, Mill's perfectionism and his recognition of rights are to be understood as *means* to increase the general welfare. Nonetheless, some critics may consider that this approach does not adequately grasp what is fundamentally at stake here. They may insist on the importance of valuing freedom and individual rights *for their own sake*, instead of doing so in virtue of their expected good consequences in terms of happiness.

4. CONCLUSION

We have endeavoured to show that utilitarianism definitely supports the decriminalization of same-sex relations and relationships, as Bentham himself cogently argued. Some may say that a utilitarian line of argument can lead to nothing more than mere tolerance of homosexual

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62 JS Mill, *Utilitarianism*, CW, Vol. X, 212.

63 Ibid., 250, emphasis added.

behaviours and that what is needed now is an authentic respect of LGBT people's dignity and rights. This requires not only decriminalization of what they *do*, but also equal respect for who they *are*, and, therefore, the end of all the discriminations they endure. The question remains whether utilitarianism alone is sufficient to account for this demand of respect or if we should prefer a more liberal approach. If what is needed is a set of fundamental rights attributed equally to every one of us, the debate is about whether they can be grounded on utility. In any case, we hope to have put forward, both in Bentham's and Mill's versions of utilitarianism, some important elements that point out to a genuine respect for LGBT persons.

14. Social order, cooperation and the way out: a feminist reading of Jeremy Bentham, William Thompson and Anna Wheeler

Paola Rudan

1. A FEMINISM WITHOUT FATHERS

In 1975, Miriam Williford published an essay entitled *Bentham on the Rights of Women.* The year of publication marks the impact of women's social movements and political discourses over historiography. Standing on this epistemic threshold,[1] Williford provided the first systematic consideration of the way in which the father of utilitarianism discussed, justified, and supported women's civil and political rights. In her reading, Bentham was a forerunner: the critique of women's subordination developed in *An Introduction to the Principles of Morals and Legislation* anticipated Mary Wollstonecraft's *Vindication of the Rights of Woman* and was written before the collective claim for women's enfranchisement became an issue of the day. Juxtaposed with this capacity of anticipation, Bentham's later hesitations concerning women's political rights were nothing but prudential: men and the "public mind" were not mature enough to accept the proposed changes. All in all, Bentham paved the way for the next generation of supporters of the rights of women.[2] Five years later, similar conclusions led Lea Campos Boralevi to define Bentham as the "father of feminism." Terence Ball was not of the same opinion and argued that Bentham's hesitations were not simply prudential but instead rooted in his biological determinism: the best that women could hope for was a virtually universal representation. In short, "Bentham's reputation as feminist was almost entirely without foundation."[3] Beyond their back and forth,[4] Ball and Campos Boralevi insisted on their respective arguments in later works: Ball continued to question even Bentham's influence over the following supporters of women's rights, particularly John Stuart Mill and William Thompson.[5] On the opposite front, Campos Boralevi used unpublished manuscripts to show Bentham's consistency: the principle of utility was the standard of his understanding

[1] JW Scott, 'Gender: A Useful Category of Historical Analysis' (1986) 5 *The American Historical Review* 1053–75; W Brown, 'Where is the Sex in Political Theory' (1987) 1 *Women & Politics* 3–23; P Rudan, *Woman, History and Critique of Polemical Concept* (Brill, 2023).

[2] M Williford, 'Bentham on the Rights of Women' (1975) 1 *Journal of the History of Ideas* 167–76.

[3] L Campos Boralevi, 'Bentham: father of feminism', paper delivered to the European Consortium for Political Research, Annual Joint Seminar (Grenoble, April 1978) quoted in T Ball, 'Was Bentham a Feminist?' (1980) 4 *The Bentham Newsletter* 25–33.

[4] L Campos Boralevi, 'In Defence of a Myth' (1980) 4 *The Bentham Newsletter* 33–46; T Ball, 'Bentham No Feminist: A Reply to Boralevi' (1980) 4 *The Bentham Newsletter* 47–9.

[5] T Ball, 'Utilitarianism, Feminism, and the Franchise: James Mill and His Critics' (1980) 1 *History of Political Thought* 91–115.

and justification of women's rights, leading to a "substantial" rather than "formal" conception of equality through "compensatory discriminations." While it cannot be proved that he had a direct influence over Mary Wollstonecraft, Bentham undoubtedly affected both William Thompson and John Stuart Mill with his feminist stance.[6]

This debate was enlivened in 1998 by Nicola Lacey. Rather than reading Bentham in search of his authentic position on women's rights, she regarded his discourses as critical tools for contemporary feminist legal theory. Lacey observed a surprising coincidence between Bentham's and feminist critiques of natural rights, stressing his capacity of accounting for the "socially situated nature of human identity and personhood" and "the power of social institutions to shape the formation of human dispositions." The question is not so much that of ascertaining whether Bentham can be defined as a "feminist" but rather how far he can be regarded as an "interesting interlocutor for feminism."[7] More recently, Emmanuelle De Champs has clearly seized on Lacey's suggestions in her extensive overview of Bentham's late constitutional thought. De Champs defends Bentham against Ball's charge of "biological determinism," since the differences he designates by the term "woman" are not essential but socially and legally constructed and have to do with the "power of naming" through which the legislator classifies individuals and thus defines their rights and duties. Thus, we do not find in Bentham an abstract universalism, but a project of deconstruction of existing moral and legal categories that relies on the universalism established by the principle of utility. As a "unifying principle which operates in the private and in the public spheres," utility acts "as a genuine alternative to right-based theories of gender equality," by establishing an anthropological equality from which flows the equal relevance of all interests. According to De Champs, this explains the role assigned by Bentham to consent as the criterion for the legality of any act—including sexual acts—that affects another individual, his consequent condemnation of rape as "the sort of war waged against one half of the species,"[8] his favor for divorce, as well as his support for women's political rights, albeit limited by precautionary and contingent considerations. Placed at the heart of Bentham's argument, the notion of consent constitutes both what led him to rigorously examine "the interests of women in the civil relations that united them to men" and a methodological limit, since his fundamental individualism did not allow him to question the political and social conditions under which consent is expressed.[9]

Both Lacey and De Champs allow some limits of the 1975–80 debate to be overcome—specifically, they moves beyond a conception of feminism as a political discourse which is abstract and independent from women's social movements and their singular or collective

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[6] L Campos Boralevi, *Bentham and the Oppressed* (Walter de Gruyter, 1984) ch. 2. For a more recent interpretation that parallels Campos Boralevi's one, see also AL Cot, 'Let There Be No Distinction Between the Sexes: Jeremy Bentham on the Status of Women', in R Dimand and C Nyland (eds), *The Status of Women in Classical Economic Thought* (Edward Elgar Publishing, 2003) 165–93.

[7] N Lacey, 'Bentham as Proto-Feminist? Or an Ahistorical Fantasy on "Anarchical Fallacies"' (1998) 1 *Current Legal Problems* 441–66.

[8] J Bentham, 'Sextus', in P Schofield, C Pease-Watkin and M Quinn (eds), *Of Sexual Irregularities and Other Writings on Sexual Morality* (Oxford University Press, 2014) 3.

[9] E De Champs, 'The Interests of Women in Bentham's Late Constitutional Thought', in P Schofield and X Zhai (eds), *Bentham on Democracy, Courts, and Codification* (Cambridge University Press, 2022) 68–87.

contestation of the social relations of power based on sex. Bentham has to be read in his proper terms, which means first of all to understand the place of women in his overall theory of society, government, and the law. From here, it is then possible to follow his legacy and ascertain his influence over the following criticism of women's subjection and claims for emancipation. With these aims in view, this chapter reconsiders the main *loci* of Bentham's discourse on women, arguing that it can be fully grasped under the light of his conception of society as an order arising from exchange, where equality is conceivable only in terms of equivalence and rights are thought as a form of compensation of existing hierarchies of power. In the second section of the chapter, the position of William Thompson is discussed. His criticism of women's subjection and support for emancipation are analyzed in consideration of his different conception of society, where social cooperation takes the place of exchange as a dynamic source of order. In the final part of the chapter, the political difference of Anna Wheeler's contribution is then emphasized, due to her shift from a discourse whose subject is the order of society to a perspective whose feminism relies on a conception of women as the antagonistic, collective subject of social change.

2. BENTHAM'S SOCIAL ORDER

In *A Fragment on Government*, Bentham criticized William Blackstone's definition of democracy as the "government of *all*." When one considers the experience of the "Athenian Commonwealth," neither women, nor children, nor slaves ever "partook of the supreme power." Bentham's aim was to ascertain the true foundations of political obligation and how to secure obedience in the future. Since the very existence of government is based upon the calculation of the utility of obedience as made by the majority of the subjects, "the condition of a state is the condition of all the individuals, without distinction, that compose it." The side-effect of such a concrete conception of "the greatest happiness for the greatest number" is a demystification of legal fictions: it is meaningless to object that, for civil lawyers, "a slave is *nobody*," or that, for common lawyers, "a bastard is the *son* of *nobody*." When the principle of government is concerned, what matters is the effectiveness of obedience on the side of the subjects, regardless any distinctions produced by the law.[10]

The first appearance of women in Bentham's work is integrated in his theory of political obligation, which operates in the background of the *Introduction to the Principles of Morals and Legislation*. Here he distinguishes between the interest of the "particular individual" and "the community in general," that is, "a fictitious *body*, composed of […] individual persons."[11] All individuals, without distinction, should be considered in the calculation of the greatest happiness for the greatest number, but there are differences among them that ought to be understood according to their causes, in order to pursue the general interest of the community through the operations of the law. The importance of "measuring" differences according to what might be called their "effects of utility" brings to the fore what Bentham called the

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[10] J Bentham, 'A Fragment on Government' (1776), in JH Burns and HLA Hart (eds), *A Comment on the Commentaries and A Fragment on Government* (Athlone Press, 1977) 391–551, 459–60.

[11] J Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), ed. JH Burns and HLA Hart (Clarendon Press, 1996), 11–12 [hereafter cited as *IPML*, followed by page number].

"circumstances influencing sensibility," which pave the way for understanding his conception of equality. According to Bentham, even if *all* individuals are driven by utilitarian motives, the pain and pleasure produced in their minds differ according to the quantity of force exerted by certain causes, and to the quality of their sensibility, which is always affected by other circumstances that he carefully listed and classified. Bentham did not deny that the individual's "natural constitution" determines his or her physical and mental sensibility and dispositions.[12] However, he focused most of all on the way in which society affects the individual sensibility. Sex—that is, "the primitive modifications of the corporeal frame"—is listed among secondary circumstances, which are those that determine the quantity and quality of the primary ones:

> In point of quantity, the sensibility of the female sex appears in general to be greater than that of the male. The health of the female is more delicate than that of male; in point of strength and hardiness of body, in point of quantity and quality of knowledge, in point of strength of intellectual powers and firmness, she is commonly inferior.[13]

Here Bentham seems to assume "biological determinism" as an explanation of women's subordination. However, he also adds that, as to moral biases, "chastity, modesty, and delicacy […] are prized more than courage in a woman."[14] The term "prized" highlights the operation of a process of social appreciation according to which certain qualities are regarded as more appropriate than others given the specific situation in which an individual is placed by sex. The "moral sanction"—whose source is public opinion—"dictates" to everybody a specific "performance" that he or she ought to perform to meet public approval.[15] Even woman's sensibility and "sympathetic biases" are affected by her social position: as a mother and a wife, she is more inclined to derive pleasure from the happiness of her relatives. Therefore, her biases "are apt to be less conformable to the principle of utility than those of the male; owing chiefly to some deficiency in point of knowledge, discernment and comprehension."[16] This deficiency, however, is not intrinsic to the female sex, but rather derived from a woman's social situation, including her education and wealth. The legislator ought to know all these circumstances to realize "equability": this is a property of the law aimed at pursuing equivalent effects of utility starting from the different, that is, unequal, conditions of the individuals. Both the classification of offences and the corresponding punishments should be measured according to these circumstances.[17] "A certain action, for example, would be a serious insult to a woman, whilst it is indifferent to a man," just like imprisonment could disrupt a woman's reputation and be

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[12] *IPML* 61–2. For a discussion of the 'concreteness' of Bentham's individualism, see M Quinn, 'A Failure to Reconcile the Irreconciliable? Security, Subsistence and Equality in Bentham's Writings on the Civil Code and on the Poor Laws' (2008) 2 *History of Political Thoughts* 321–42. On the 'circumstances influencing sensibility' in relation to the controversial *felicific calculus* see G Tusseau, *Jeremy Bentham et le droit constitutionnel. Une approche de l'utilitarism juridique* (L'Harmattan, 2001) 34 ff.

[13] J Bentham, *IPML* 64.

[14] Ibid.

[15] Ibid., 35, 37.

[16] Ibid., 65.

[17] Ibid., 175–6.

"next to nothing to persons placed in other circumstances."[18] Equability is necessary both "to prevent the laws being tyrannical," and "to conciliate to the legislator the suffrages of public opinion."[19] Equality as equability is not the starting point, but rather the effect of the operation of the law. This does not mean that the law is intended as a form of "compensatory" or "positive discrimination"[20] in favor of women, but rather that the reproduction of obedience—the continuity of political obligation—requires the capacity to balance the effects of the law according to the social conditions upon which it operates. Bentham's legal positivism is based on a specific conception of society as an order made of distinctions that affect individuals and determine their disposition to obedience.[21] The position of women in Bentham's theory of law cannot be analyzed only in terms of civil and political rights but should be understood in this field of tension between society and the law.

Since society is the concrete reality operating behind Bentham's science of legislation, women are implicitly conceived of as mothers and wives, mirroring their "ordinary" social position. This position, however, is not simply described as a social fact, but also justified according to general utility. Bentham provides a view of marriage as the institutionalization of a relationship of domination based on the superiority of physical power. Before the establishment of law, force was the only way of deciding among competing options. In a family as in a state, the existence of an exclusive source of sovereignty is a way of putting an end to conflicts, even those of the most ordinary species. However, even if this "affords a reason for giving a power to one or other of the parties," it does not explain why the power should be given to the one rather than the other. The explanation rests on "the order of things which the legislator finds established by nature," an order which derives from the observation that "everywhere the male is the stronger of the two."[22] The coincidence of legal and physical power in the same hands grants the effectiveness of obedience and limits the possibilities of transgression. Male domination is justified in utilitarian terms for the sake of order. This is also true for political order to such an extent that, as Bentham observed, "legislators seem all to have been of the male sex, down to the days of Catherine."[23] Marriage, however, is not simply a legalization of brute force: it is "the bond of society and the foundation of civilization." Marriage has the function of socializing human disposition, training citizens, and legitimating political authority, since the family is the place where "the relations among those who ought to command, and those who ought to obey" are preserved. Bentham's approach, therefore, is not only descriptive but prescriptive. Marriage is a social institution that must be secured by

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[18] J Bentham, *Principles of Penal Law* in J Bowring (ed), *The Works of Jeremy Bentham*, vol I (Russel & Russel, 1962) 367–580, 401.

[19] This paragraph is not included in the authorial edition of the *Introduction* but has been taken from Dumont's *Treatise* and included in Bowring's edition of Bentham's work: J Bentham, *IPML*, vol I, 33 ff.

[20] L Campos Boralevi, 'In Defence of a Myth', 44. AL Cot, 'Let There Be No Distinction Between the Sexes', 172.

[21] P Rudan, 'Society as a Code: Bentham and the Fabric of Order' (2016) 42 *History of European Ideas* 39–54; M Ricciardi, *La società come ordine. Storia e teoria politica dei concetti sociali* (EUM, 2010).

[22] J Bentham, *IPML* 121.

[23] Ibid.

the law. That is why it should not be analyzed as it is, that is, in consideration of the customs of each nation, but as it ought to be, namely as a contract and "under the auspices of liberty."[24]

As a free institution, marriage is described as an exchange of "services," classified by Bentham as a specific "kind of property."[25] A service is every performance useful to man, whose exchange supposes an asymmetric relation between the contracting parties. While man's object is to satisfy "a transient passion," "the union […] is for the woman the commencement of a long circle of pains," the trouble of pregnancy, childbirth, and maternity, "whose inevitable termination would be death, if she were not beforehand assured of the cares and protection of a husband."[26] The content of the marriage contract is nothing but an exchange of immediate satisfaction for a durable security. Thus, beneath marriage lies the same ordering logic that operates in the exchange of money described in *Defence of Usury*: the borrower obliges himself to return the loan with interest in future times so to satisfy a present need; the creditor renounces the possibility of enjoying his wealth in present times in order to obtain a future profit. Both calculate their utility, but their utility depends on their different conditions in terms of wealth. This original asymmetry is overcome insofar as both parties find an equivalent satisfaction, though in displaced times.[27] The ordering power described by Bentham in his understanding of monetary and commercial exchange operates within all social relationships, establishing an ordered "social intercourse."[28] The logic of equability also applies to the conjugal relation insofar as, though the starting positions are unequal, the effects in point of utility are equivalent, that is, both parties take advantage of the exchange. Political economy provides the pattern for the science of legislation.

Starting from these assumptions, divorce is justifiable in utilitarian terms in the same way as usury. Any legal prohibition would make the transition riskier and less convenient for the party whose future is more exposed to the possibility of loss. The prohibition of divorce, then, is "absurd and cruel" for women, who are forced to live forever in "a species of slavery" and "under the constant authority of a man" that they detest. The social effects of such a condition would be negative, since it "introduces negligence and disorder" that weakens "the moral tie of their children" and leads to the dissolution of fortunes.[29] In Bentham's view, divorce is a way of protecting marriage as a social institution and of ensuring women's free acceptance of their socially necessary subordination. Divorce is the exception that confirms the rule according to which "the wife should submit to the laws of the husband, saving recourse to justice." The husband, in fact, remains the sovereign authority over the family and the administrator of wealth, since "it is commonly by his labor that the property is acquired."[30] This does not make the husband a tyrant, nor the wife a "passive slave," since "the right of enjoyment should be in common." Equality as equability ensures "to both parties the same degree of interest in the

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[24] J Bentham, *Principles of the Civil Code* (written from 1780), in *The Works of Jeremy Bentham*, vol I, 297–364, 351, 353 [hereafter cited as *PCC*, followed by page number]. For an exhaustive analysis of Bentham's views on marriage, prostitution and sex, see M Sokol, *Bentham, Love and Marriage*: *A Utilitarian Code of Law in Historical Contexts* (Continuum, 2011).

[25] J Bentham, *PCC* 338.

[26] Ibid., 352.

[27] Bentham, *Defence of Usury* (Payne, 1787) 8.

[28] J Bentham, *PCC* 338.

[29] Ibid., 352–4.

[30] Ibid., 356.

domestic prosperity."[31] As a free and revokable exchange of services, marriage transmogrifies: from the very institution of male domination, it changes into a way out of "the hardest and most humiliating servitude" of women.[32] This same necessity of securing marriage explains Bentham's defense of "short marriage contracts" and his support for the decriminalization and public management of prostitution, as suggested by Restif de la Bretonne in *Le pornographe*.[33] Temporary sexual exchanges and legal prostitution are means for satisfying sexual desire, avoiding both "illicit connections" and the birth of children deprived of paternal cares, as well as the legal sanction that would affect women who are already penalized by the moral one. Further, "where prostitution has been extirpated," like in Hungary, "the conjugal bed was violated", and adultery spread.[34] When it is codified as a legal exchange of services, even prostitution becomes a function of order.

Bentham's conception of society as an order based on the capacity of exchange to produce equivalent effects of utility without questioning social hierarchies drives his proposals for reformation, both civil and political. From the French Revolution onwards,[35] he argued in favor of women's suffrage for two main reasons. First, it would be simply impossible to exclude them from all political influence, since they already exercise one by virtue of the social appreciation of their beauty. The point is whether they exercise this seductive influence according to the law, or against it.[36] Second, women's franchise is a "security against misrule": not so much against the abuses of the governors, but rather of the husband and his monopoly of physical force in domestic concerns. "To constitute equality in [women's] favour, for every necessary inferiority they should have a compensation."[37] In short, the logic of equability also operates in Bentham's conception of political rights: "compensation" is not a way out of subordination, but rather an enforcement of it, since subordination is necessary for the very existence and reproduction of the social order, to which the law ought to be subservient for being effective and securing political obligation. This also explains his prudence in fostering women's political emancipation. The relation between men and women depends on many circumstances, such as religion and the form of government. Whenever the legislator wants to introduce any change, he ought to be aware "that established opinions"—upon which the political and social order is based—"may not be violently shocked." That is why in the end Bentham believes that

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31 Ibid.

32 Ibid., 359.

33 N-E Retif De La Bretonne, *Le Pornographe, Projet de Reglement Pour Les Prostituees* (Hachette Livre, 2012).

34 J Bentham, *Principles of Penal Law*, 455, 554–6.

35 J Bentham, *Considérations d'un Anglois sur la composition des États-Généraux* (written in 1788), in P Schofield, C Pease-Watkin and C Blamires (ed), *Rights*, *Representation and Reform*: *Nonsense upon Stilts and Other Writings on the French Revolution* (Clarendon Press, 2002) 63–146, 68–9.

36 J Bentham, Project *of a Constitutional Code for France*, in *Rights*, *Representation and Reform*, 227-61, 248; on Bentham's conception of influence see P Rudan, 'Influence as a Constitutional Factor: Bentham's Public Ethics', in G Tusseau (ed), *La déontologie publique: trajectoire et présence d'une notion ambiguë* (Institut Francophone pour la Justice et la Démocratie, 2019) 65–77.

37 J Bentham, *First Principles Preparatory to Constitutional Code* (Clarendon Press, 1989) 98–9, n. 7.

the times are not mature enough for the establishment of women's suffrage,[38] and that women should not even attend parliamentary meetings, where their presence in the public would affect men's rational capacity and corrupt their deliberations.[39] This does not make him an enemy of women, just as his support for women's civil and political rights does not make him a feminist. He is a brilliant supporter of order, whose point of view he embraces through all his life. Nonetheless, perhaps beyond his intentions, he contributed to nurturing successive claims for women's emancipation.

3. THOMPSON'S COOPERATION

William Thompson started writing his *Inquiry into the Principles of the Distribution of Wealth Most Conducive to Human Happiness* at Ford Abbey, in Bentham's holiday house.[40] At Bentham's house, he also met Anna Wheeler for the first time.[41] Thus, Bentham inspired, both directly and indirectly, one of the first manifestations of British Socialism, and one of the most influential advocates for women's rights before the publication of J.S. Mill's *The Subjection of Women*. Thompson explicitly admitted his debt in the opening pages of *Appeal of One Half of the Human Race, Women, against the Pretensions of the Other Half, Men, to Retain Them in Political and Thence in Civil and Domestic Slavery*, a reply to James Mill's "Article on Government" and his justification of women's exclusion from the franchise.[42] Thompson labelled Bentham "the great master of legislation" and acknowledged his authority against James Mill's, right before discarding all authorities in the name of the "principle of Utility," the only appropriate "test of political as well as private morals."[43] Consistent with Bentham, Thompson considered the condition of women as deeply imbricated in his overall conception of society. This also meant, however, that the *Appeal* moved beyond commercial society, which remained Bentham's normative horizon. More specifically, Bentham's conception of exchange as the ordering dynamic of society was replaced by Thompson's ideal of mutual cooperation as the true and proper foundation of women's emancipation.

Like his master, Thompson assumed a concrete view of utility: "there is no such thing as a general, abstract happiness," since the happiness of the individuals also depends on "dissim-

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[38] J Bentham, *Essay on the Influence of Time and Place in Matters of Legislation*, in *Works* I, 169–94, 177 and *First Principles*, 100.

[39] J Bentham, *Political Tactics,* ed. by M James, C Blamires and C Pease-Watkin (Clarendon Press, 1999) 64.

[40] J Bentham, letter to William Plumer Jnr (17 October 1819) in *The Correspondence of Jeremy Bentham*, vol 9, 1817–1820, ed. S Conway (Clarendon Press, 1989) 360. On Thompson and Bentham see also P Lynch, 'William Thompson and the Socialist Tradition' (1962) 13 *University Review* 3–10. For a complete reconstruction of Thompson's biography and work, see R Pankhurst, *William Thompson (1755–1833). Britain's Pioneer Socialist, Feminist and Cooperator* (Pluto Press, 1991).

[41] AL Cory, 'Wheeler and Thompson's "Appeal": The Rhetorical Re-Visioning of Gender' (2004) 2 *New Hibernia Review/Iris Éireannach Nua* 106–20, 109.

[42] W Thompson [and A Wheeler], *Appeal of One Half of the Human Race, Women, against the Pretensions of the Other Half, Men, to Retain Them in Political and Thence in Civil and Domestic Slavery* (Thoemmes Press, 1994) [hereafter cited as *Appeal of One Half*, followed by page number].

[43] Ibid., 9–10.

ilarity of constitution, from moral and physical causes, more particularly where the organization in some respect differs."[44] These premises make sex a determinant cause of individual happiness. The sexual constitution of the body is, for Thompson, a natural fact whose effects depend on the social state. Man's superior physical strength is an undeniable fact. However, its consequences can be understood only within the social conditions in which the body operates. Thus, for instance, in the early stages of society force was more useful than knowledge for the well-being of the species. This made women's physical weakness the cause of their subordination.[45] This original mark of force also persists within "the present arrangement of society," where the "system of individual competition for wealth" penalizes women, whose capacity for competing continues to be affected by the "permanent inferiority of strength and occasional loss of time in gestation and rearing infants," which reduce them to a state of economic dependency.[46] In a system of competition, unequal powers produce unequal effects. Thus, while Bentham emphasized the capacity of exchange to realize equivalent effects of utility, saving the social and sexed hierarchies that trigger the dynamics of exchange, Thompson put the accent on competition and conceived equality in terms of the available "means of happiness" that all individuals had in their power.[47] Consistently, he also claimed an epistemic shift from political economy—or "the mere science of producing wealth by individual competition" – to a "new science, the *social science* or the science of promoting human happiness."[48] While Bentham moved from an expository understanding of the ordinary social dynamics, and hence prescribed their optimization through the reformation of the existing laws, Thompson conceived of social science as a critical tool driven by the vision of "a state of society very different from that which now exists."[49]

In this critical perspective, the analysis of "the system of marriage" unveils a conception of the law as a social fact shaped by the existing relations of domination. Through marriage, "the law has erected the physical organization [of women] into a crime," institutionalizing relations based on force and the consequent sexed social hierarchies.[50] In marriage, a compensatory logic like the one described by Bentham operates. However, far from realizing equivalent effects of utility, the exchange results in women's oppression: in exchange for mere subsistence, a wife is reduced to a state of "domestic slavery," deprived of her will and even the "power of locomotion" which is not permitted by the husband.[51] In Thompson's view, slavery is not only a metaphor, but describes the legal condition of being "a *chattel personal*" so much so that marriage is defined as a "white slave code" comparable with the black one. Insofar as it is part of the "male-created laws," marriage cannot be regarded as a contract, which should be "equal and just."[52] Moreover, the sexed social asymmetries that marriage institutionalizes are

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[44] Ibid., 47.

[45] Ibid., 155–6.

[46] Ibid., x–xi.

[47] Ibid., 74.

[48] Ibid., xvi; for a comparison between Bentham and Thompson concerning their conceptions of utility, see T Eagleton, 'The Radicalism of William Thompson' (2000) 26 *The Irish Review* 80–8.

[49] W Thompson*, Appeol of One Half*, ix.

[50] Ibid., 170-131.

[51] Ibid., xi.

[52] Ibid., 57, 66, 55. According to Carole Pateman, Thompson 'laid the foundation for subsequent feminist criticism of marriage as a contractual relation'. C Pateman, *The Sexual Contract* (Stanford University Press, 1988) 156.

enforced by the "public opinion of the oppressors," whose sanction operates against women by depriving them of all capacities of enjoyment.[53] Even sexual pleasure is affected by this process of social sanctioning, which establishes a double standard that leaves the husband free to satisfy his desires while condemning the wife for doing the same. Disposing of wealth and other means of influence, the husband monopolizes "the legal, the moral and the physical power of compelling obedience."[54] Bentham's classification of sanctions[55] is recalled by Thompson with the aim of defining a "petty domestic despotism" that does not simply oppress women, but also and above all continually produces them as subordinate beings. Women are "systematically, if not perfidiously trained" for "intellectual imbecility." In this frame, the pleasures permitted by the husband are also slave-pleasures, since "no mechanical or commanded mode of action can be moral. […] Voluntariness is the prerequisite of morality."[56]

Although Thompson considered "Mary Wolstonecroft's" [*sic*] views as narrow, her arguments resonate with his. Women's condition is doubly social: on the one hand, it is a social product, which derives from the position of subordination to which a competitive acquisitive system condemns the weaker; on the other hand, it has social effects, insofar as it reduces the possibilities of improvement based on cooperation. These effects do not simply decrease women's happiness, by virtue of depriving them of all the means of enjoyment, but also men's happiness.[57] Competition and the animal appetites nourished by the exercise of power impede all possibilities of sharing pleasure, and of being more interested in the happiness of others than oneself. Thus, like "the institutions […] supporting slavery", man's domination over women is "the most effectual engine for the ultimate annihilation of knowledge, production and happiness."[58] Where a relation of domination exists, the "intellectual energy" of the master is directed to retain "the slaves in slavery." Keeping the slave ignorant is a means towards this end. The mutual feelings resulting from this kind of relationship are only alienation and hate: sympathy and benevolence cannot operate, since there is no necessity of exercising them. In the end, "the general intellect of the whole community, male and female, is stunted or perverted in infancy […] by keeping from women the knowledge possessed by men."[59] Thompson did not regard knowledge as individual, but rather as a social wealth based on mutual interest, reciprocity, and cooperation. Once intellect is regarded as a predicate of "general society," and "mutual co-operation" as the foundation of all its useful improvement,[60] women's subordination can no longer be conceived as a separate issue involving a distinguished class of persons, since it is rather a general problem that must be solved for the interest of all.

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[53] W Thompson, *Appeal of One Half*, 68–76.

[54] Ibid., 61.

[55] J Bentham, *IPML* 35.

[56] W Thompson, *Appeal of One Half*, 85, 81, 89.

[57] Ibid., 80.

[58] W Thompson, *Inquiry into the Principles of the Distribution of Wealth Most Conducive to Human Happiness* (London, 1824) 297–9.

[59] Ibid., 251–2.

[60] Ibid., 439. On the 'general intellect' see: M Pasquinelli, 'The Origins of Marx's General Intellect' (2019) 2 *Radical Philosophy* 43–56.

Thus, Thompson's social science becomes the starting point for his criticism of Mill's "Article on Government." In contrast with Mill,[61] he believes that there cannot exist any identity of interest where a relation of domination subsists. Like a political community, a family may be regarded as a unity of interest[62] only "as separated from another family by its individual stock of wealth," that is, through competition. However, this unity based on enmity does not solve the internal conflicts of interests concerning the distribution of wealth, that is, the means of happiness.[63] Hostility of interests will cease when men understand "the identity of their real and comprehensive interest with that of their fellow creatures," and the dispositions and "habits of sympathy" that cooperation requires. At that point, no restriction to the use of power would be necessary, because cooperation replaces competition as a principle of social organization.[64] Until that point, however, a sort of "compensation" of women's inferiority is necessary to grant them the possibility of improving their own condition. Though political economy is the science of a competitive society, the *laissez-faire* it prescribes is still better than a "mercantile" system, where monopoles exclude all freedom of choosing a commercial partner, as happens to women who are "free" to get married just because they have no choice.

By reason of the sexual social asymmetries of power existing in a competitive society, women are "*more in need* of political right than any other portion of human beings, to gain some chance of emerging from this state."[65] Political rights were for Thompson—as for Bentham—"securities against misrule." The "system of representation" was regarded as a "discovery"—a kind of political technology—which counterbalances "the physical inconveniences of [women's] structure."[66] Representation would also pull women out of the limited relations that domesticity imposes on them. They would broaden their views and improve their "intellectual aptitude" through exercise. While applying Bentham's constitutional jargon, Thompson also emphasized women's paradoxical advantage due to their historical exclusion from politics: being "the universal slave of the oppressed as well as of the oppressor amongst men," women are indifferent to competition for power.[67] Being weaker, they would always meet men's "physical power of resistance" where they do not dispense equal justice.[68] All in all, women are more fit for government than men, simply because they have been oppressed. The acquisition of political rights would be an advantage not only for women, but for all. In Thompson's view of society, however, this would only be a temporary solution, an accommodation to circumstances that ought to be entirely transformed. Under the system of voluntary

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61 J Mill, *Government. Reprinted from the Supplement to the Encyclopedia Britannica* (J. Innes, 1825) 27.

62 W Thompson, *Appeal of One Half*, 57.

63 Ibid., 46–50.

64 Ibid., 46–50.

65 Ibid., 107.

66 Ibid., 178.

67 Ibid., 120–2. On the 'official aptitude' as an 'antidote to sinister interest' in Bentham's constitutional thought, see P Schofield, *Utility and Democracy. The Political Thought of Jeremy Bentham* (Oxford University Press, 2006) ch. 11.

68 W Thompson*, Appeal of One Half*, 132. Dolores Dooley argued that both Thompson and Wheeler had read and discussed with Bentham during the early stages of composition of his *Constitutional Code*. See D Dooley, *Equality in Community. Sexual Equality in the Writings of William Thompson and Anna Doyle Wheeler* (Cork University Press, 1996) 181.

association, "a real rather than fictitious identity of interests would produce a practical resignation of power."[69] No more "securities against misrule" will be necessary.

What remains unclear is how such a radical social transformation would be attained. The conditions for its realization already exist, since "three fourths of the operations, professions, arts, [and] trades now carried on by men" require more intellect than force. When production is increasingly based on knowledge and competences applied to machines, women's weakness would no longer produce subjection.[70] The general intellect should be free to evolve at its utmost capacity. However, as Thompson declared, "civil and criminal laws are formed by the state of public opinion, at least amongst the law-makers, whatever that may be, depending on the quantum of knowledge possessed."[71] This is the reason why the *Appeal* is addressed to men—to persuade them of the advantage of surrendering their domination over women. The enlightened part of male public opinion should then "withdraw their cooperation" and act as if the laws did not penalize women because of their sex. However, this would neither affect the ill-disposed among men, nor change the laws that actually allow them to exercise a despotic power. Thompson's vision of society ends in a kind of utopian blind-spot: the cause of the pursued social change—an enlightened public opinion, a knowledge eventually free from selfish interests and animal appetites—can be attained only when that social change has been accomplished. It is an effect of that social change. Even if he aspired to a social organization radically different from the commercial society praised by Bentham, Thompson also develops his discourse from the general point of view of society. It is Anna Wheeler who, by addressing women as subjects of the struggle for emancipation, finally points to their possibility of exercising a social power against male domination, and of attaining general effects of emancipation starting from a perspective which is irreducibly partial.

4. WHEELER'S WAY OUT

Appeal of One Half of the Human Race, Women, against the Pretensions of the Other Half, Men is commonly considered to be Thompson and Wheeler's intellectual and political joint venture. In the introduction, in fact, Thompson declares himself "the interpreter and the scribe" of Wheeler's sentiments, explaining however that Wheeler directly wrote only a few pages, commonly acknowledged to be the last ones.[72] When one turns to these pages, the title of the work appears as doubly mistaken. In the first part the addressees are men, but the addresser is a man too. However, when in the end the addresser becomes a woman, the addressees also change. "Women of England […] awake"! This is the beginning and the core of the appeal. The perspective is subverted, and the possibility of transforming the existing, unjust society

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[69] W Thompson, *Appeal of One Half*, 95. C Nyland and T Heenan, 'William Thompson and Anna Doyle Wheeler: A Marriage of Mind on Jeremy Bentham's Doorstep', in R Dimand and C Nyland (eds), *The Status of Women in Classical Economic Thought* (Edward Elgar Publishing, 2003) 241–60.

[70] W Thompson*, Appeal of One Half*, 183–4.

[71] Ibid., 160.

[72] Ibid., v–vii; AL Cory, 'Wheeler and Thompson's "Appeal"', 107. The most complete overview of this partnership and how far it was affected by Bentham's utilitarianism is provided by Dolores Dooley in *Equality in Community*.

is entrusted to those who, being oppressed, can still aspire to "the greatest sum of happiness" both for themselves, and consequently "for the whole race."[73]

Bentham's utilitarian lexicon, his social understanding of the distinction between the sexes and "the glorious principle of Utility itself"[74] are still operative in Wheeler's discourse. However, she did not put the principle of utility at the foundation of a systematic theory of women's emancipation, which she never provided, since she was first of all engaged in political activism. Rather, utilitarianism—not only Bentham's "original," but also its Thompsonian and Owenite articulations—was the first environment where that political activism took place and her political discourse took shape, nourishing the expectation that women would also eventually enjoy happiness.[75] Such an expectation is precisely the mark of Wheeler's different perspective: women, rather than social order, are the subject of her discourse. This difference emerged from the very beginning, when she refused to assume women's physical weakness as a given, unchangeable natural fact turned into a social relation of domination. Women are not naturally weak. Rather, their physical weakness is entirely social, insofar as the exercise required to acquire force is repressed. Force is considered as "*unfeminine*" and the quality of "delicacy"—which materially draws near to illness—is regarded as woman's perfection, rather than a defect to improve her dependency on man. "His two ruling animal propensities, sexual desire and love of domination," are the social measure to which her body should subdue itself, because delicacy excites the former, while weakness gratifies the latter. "The cursed system of sexual morality"[76] shaped according to that male's social measure turns women's force—both physical and intellectual—into a vice. Even the right to speech is regarded as immoral, unless it is exercised for flattery.[77] By breaking this order of things and speaking as a woman to women, Wheeler was thus able to unveil the limits operating not only in Bentham's but even in Thompson's view, when they both insisted on women's weakness as the natural presupposition of their social subjection. As she further clarified in *The Rights of Women*, a lecture delivered in front of the Cooperative movement at Finsbury Square in 1829, there is not any "essential difference between the sexes." On the contrary, "man's own tyranny has created the distinction which he ungenerously sets up as a just cause for its exercise."[78]

The act of representing the effects as the cause may be regarded as the patriarchal discursive strategy that should be unveiled in order to condemn the existing state of affairs while at the same time pointing to the possibility of overcoming it. With a surprising reference to the conservative Christian writer Chateaubriand and his work *The Martyrs*, Wheeler insisted that "deficiency of strength in Woman is nothing but a *civilized disease*": civilization is their martyrdom, since the heroism of pagan women was tamed by Christianity and their natural faculties were fettered "to shorten the duration of life, and to provide men with a rapid succes-

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73 W Thompson*, Appeal of One Half*, 187–8.

74 Ibid., 195.

75 See B Taylor, *Eve and the New Jerusalem. Socialism and Feminism in the Nineteenth Century* (Pantheon, 1983) ch. I; O Siméon, '"Goddess of Reason": Anna Doyle Wheeler, Owenism and the Rights of Women' (2020) 2 *History of European Ideas* 285–98.

76 W Thompson*, Appeal of One Half*, 191.

77 Ibid., 191.

78 A Wheeler, 'Rights of Women' in MS Pierse (ed), *Irish Feminism 1810–1830*, vol I (Routledge, 2010) 2–8, 4.

sion of youthful slaves."[79] This conclusion is supported by natural scientists such as M. Bory de Saint-Vincent, and above all by the role women played in history, considering for instance the "heroic courage, ability and perseverance displayed by women, in the days of terror, which marked the progress of the French revolution." In short, "this supposed organic weakness, which condemns women to be slaves, is by no means borne out by fact,"[80] while women's intellectual inferiority is the product of men's understanding that "*knowledge is power*" and ignorance is necessary to keep women enslaved.[81] This view sharpened Wheeler's judgment on the existing social order. While Bentham regarded commercial society as the peak of progress and Thompson considered it an immature but still evolved stage along a path leading to voluntary cooperation and association, Wheeler believed that "the state of society called civilized, […] in fact is nothing more than barbarism masked."[82]

Displaying the evils "inherent in the very system of labor by individual competition, even in its most free and perfect form"[83] is therefore necessary for finding a way out, which cannot be reduced to a reformation of the law, since women's subjection to man's domination is not merely a legal, but first and most of all a social fact: under that system, "the loss of time, pain, and expense incurred by women in bearing and rearing" children[84] is simply unable to be compensated. Subsistence—the only miserable good that women have in exchange for their subjection to man's despotism "in what he calls his marriage contract"—cannot either realize equivalent effects of utility or provide equal possibilities of happiness. Far from being an unchangeable fact imposed by social necessity or simply a mark of women's natural weakness, the toil of maternity points to the inescapable limits of the social logic of compensation: it highlights the workings of male domination behind the dynamics of exchange and of equability. This domination is deeply imbricated into the proprietary order of society. Being "the active producer of the family"[85] and taking advantage of the sexual division of labor, the man also has the power of dispensing or denying women's means of subsistence and satisfaction, while wealth provides him with a general legitimation of his domination, "whispering into [his] ear preposterous notions of his relative importance over woman."[86] In short, private property structures a sexed social order that can be changed only when the former is abolished. Thus, inspired not only by Thompson, but also by French Utopian Socialists, Owenism, and the utopian experiments of Frances Wright in the United States,[87] Wheeler imagined a society where free cooperation and the common share of the fruits of labor would finally free women from any sort of dependency. In this new society, pregnancy is no longer an individual disadvantage, since the community takes care of each mother as well as childcare and education. Prostitution will simply end, insofar as neither want nor vanity force women to sell themselves. Force and weakness are irrelevant, because everyone will contribute to

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79 Ibid., 5.
80 Ibid.
81 Ibid., 7.
82 Ibid., 2.
83 W Thompson*, Appeal of One Half*, 198.
84 Ibid.
85 Ibid.
86 Ibid.
87 On Wheeler's political experience in France, see M McFadden, 'Anna Doyle Wheeler (1785–1848): Philosopher, Socialist, Feminist' (1989) 1 *Hypatia* 91–101.

social production according to his or her capacities. This social change will also affect men's and women's psychology: "all motives are here taken away from men to practice injustice; all motives are taken away from women to submit to injustice."[88]

In the end, however, we are again in front of a utopian blind-spot: what it is that should cause the aspired social change is in fact caused by that change. Wheeler was well aware of this problem, stating:

> men are caught in their own snares; and the ignorance, that they would exclusively confine to women, soon becomes general, and works itself into a very solid chain of fallacies and errors, which ultimately leads opinion; and opinion, whatever be the direction given to it, is always sure to be triumphant.[89]

Here the perspective of society re-emerges and allows the general effects of male domination to be highlighted. Opinion becomes a dominant force, since it is the source of what Wheeler called the "man's cruel social code," resulting from a "distorted image of a godly nature, […] who condemns him to be his own tormentor, in being the enemy and oppressor of WOMAN!"[90] The chosen words are striking, since they recall the terms used by Bentham in *Principles of the Civil Code*, where he spoke of a kind of "supplemental law […] which is not written—which consists altogether in opinion, in manners, customs—and which begins where the legislative code ends."[91] The "moral or social code" is for Bentham the expression of a normativity emerging from society and the manifestation of its specific relationship with positive laws. For him, the aim of his science of legislation is precisely that of understanding this normativity, which should drive the legislator's activity. Wheeler's use of Bentham's phrase is therefore revealing: though apparently impersonal, the general order of society is in fact marked by sexed relations of domination that are the expression of a fundamental partiality. This explains why, in Wheeler's view, woman emerged as the antagonistic part that could lead the change: "O woman, from your auspicious hands may the new destiny of your species proceed! The collective voices of your sex raised against oppression will ultimately make men themselves your advocates and debtors."[92]

The way out of the existing order of things cannot be entrusted to men, the proclaimed addresses of the *Appeal*, since they all are educated "in the brutal ignorance of the art of social happiness."[93] Rather, women should drive the change. This conclusion can appear paradoxical, considering Wheeler's awareness that women can also be hostile to the advocate of their rights, and her awareness of the "enmity [they] entertain towards each other" as a result of the combined action of oppression and competition.[94] The paradox vanishes, however, when we consider Wheeler's understanding of the "complexity of social movement." If, as she believed, the impediments "to all progressive improvement in woman" are "the most effectual means of perpetuating the ignorance, and consequent slavery of men themselves," then it becomes

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88 W Thompson, *Appeal of One Half*, 201–3.
89 A Wheeler, 'Rights of Women', 3.
90 Ibid., 2–3.
91 J Bentham, *PCC* 352–4.
92 W Thompson, *Appeal of One Half*, 211.
93 A Wheeler, 'Rights of Women', 2.
94 Ibid., 7.

possible to conceive "how beings apparently deprived of *all power*, can possess *so much*."[95] Women play an active role in social reproduction, that is, in granting the continuation of an order which is not simply institutional but is primarily and above all based on the acceptance and legitimation of sexed social hierarchies both by the oppressors and by the oppressed. It is this specific understanding of society as a movement and a dynamic deployed over time that brings Wheeler to politicize maternity as a specific social position whence the reproduction of the social order can be interrupted:

> It is not in the nature of Woman (when she has strength of character sufficient to preserve original feelings, and reject those which are forced upon her adoption) to wish to mete out undue proportions of good, for one sex above the other—her destiny is to be the *mother* of both, and nature, whose laws are general and not partial, makes no distinction in a mother's love![96]

Wheeler's appeal to the nature of woman could end up as contradictory, since nature is used by the patriarchal discourse as a way of justifying women's inferiority and subordination.[97] However—in a way which recalls Bentham's conception of "the epithet *unnatural*" as a "weapon" that allows justifying a sentiment of disapprobation in front of acts defined as "sexual irregularities"[98]—nature here has a specific critical and polemical meaning and becomes part of a rhetorical act of politicization. Nature is the opposite of a society based upon the male usurpation, which as such denied women the possibility of developing their faculties. Through this appeal to nature, Wheeler turns women's sexual difference—epitomized by her capacity of being a mother—into a support for equality between the sexes, since a mother's love is regarded as the paradigm of impartiality. In the end, the most important among the rights advocated for women is the "humanizing right of education" that will nurture the germ of freedom which male domination was not able to stifle. This is why, in the end, Wheeler directly spoke to those women who "feel their degraded social condition" and invited them to "continue not to leave the bitter inheritance of ignorance and slavery" to their daughters.[99] The fight for rights, "and that most precious of all, a sound and liberal education," is the beginning of a change that, once realized, will "secure the liberties of mankind."[100] The utopian blind-spot is eventually overcome when the understanding "of the complexity of social movement"—that is, social science or "the art of social happiness"[101]—is driven by a partial rather than a general perspective. A cooperation free from domination requires the end of oppression and can be realized only by the oppressed. It is not the work of a legislator/reformer, or of the evolutionary movement of general society, but rather of women who can exercise their social

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[95] Ibid., 4.

[96] Ibid., 3. Reading the papers published under the pseudonym of Vlasta in the journal *The Crisis*, Dooley observed that this same women's power of education would also 'effect changes in men by renegotiating expectations for the female-male relationship' (D Dooley, *Equality in Community*, 195).

[97] B Taylor, *Eve and the New Jerusalem*, 30.

[98] J Bentham, 'Sexual Irregularities – or Irregularities of Sexual Appetites', in P Schofield, C Pease-Watkin and M Quinn (eds), *Of Sexual Irregularities and Other Writings on Sexual Morality* (Clarendon Press, 2014), 6–8.

[99] A Wheeler, 'Rights of Women', 8.

[100] Ibid.

[101] Ibid.

power to transform the present state of things by freeing minds from the fetters of oppression, thus triggering the indefinite expansion of the general intellect of society and eventually conquering a universal freedom. If feminism appears anywhere in these utilitarian claims for women's emancipation, that place is where women are regarded as the active, collective subject of a transformative social movement.

15. Utilitarianism and reproductive rights

Sarah Conly

Utilitarians believe that we should maximize utility. There are, of course, many versions of utilitarianism, some more radical and some which adhere more closely to commonly accepted morality. In order to explore the utilitarian perspective at its most distinctive, I will look at what policy would derive from the more radical form of utilitarianism, hedonistic act utilitarianism. Here the idea is that for an act to be morally right it must maximize pleasure and minimize pain, producing the highest net pleasure possible for the greatest number. If an act does not do this, it is wrong.

What happens when we apply this criterion to reproductive rights? While not all utilitarians are ready to say with Bentham that rights are "nonsense … nonsense on stilts," they will assume that there are no such things as moral rights that have value independent of utility.[1] Act utilitarians are willing to accept the existence of what might be called moral rights, as long as these "rights" are taken to be merely rules of thumb for maximizing utility. Rules of thumb, though, have no prescriptive power: they simply tell us what strategy usually works. Thus, when it comes to reproduction, an act utilitarian can accept that there are certain rights, but takes this simply to mean that in a certain set of circumstances it typically behooves us to adopt a certain course of action so that we may maximize utility. If we say someone has a right to free speech, for example, it means that we think as a society we should adopt a course of action protecting speech on the grounds that that course of action on the whole maximizes utility. If those circumstances change, then a different action may be called for. If those changed circumstances are not brief in duration but appear to be stable for a sufficient length of time, we may need to develop a new rule of thumb. For example, we might have said in 18th-century Europe or the Americas that everyone had a right to take as much water as he chose from a river, because at that time there were usually no shortages of water. Now, however, circumstances are different and shortages are common, so we have established a very different system of riparian rights to allocate who gets water and how much. This rule, too, might need exceptions in particular locations and circumstances. We have established these rights through law because practically that is the best way to gain adherence to such rules, but that is a reflection of the fact that morally we seek a good way to divide up a limited resource. What we consider to be a moral right will, for the utilitarian, reflect the typical needs of a particular place and time.

When it comes to reproduction, what, if anything, would be the rules that a utilitarian would adopt under our current circumstances?

In this chapter I will consider a number of reproductive areas: 1) whether the state should restrict the number of children a person has; 2) whether the state should allow abortion; and 3) whether the state should, first, allow the use of assisted reproductive technology and,

[1] J Bentham, "Anarchical Fallacies" (1843) in John Bowring, ed., *The Works of Jeremy Bentham*, vol. 2, 501.

second, supply that technology to all those who want to reproduce and cannot do that without assistance.

1. THE RIGHT TO PROCREATE

Given the current danger of climate change and other environmental disasters, I will address the utilitarian response to the threat of overpopulation. How much danger we are in from overpopulation is a subject of some controversy, but all sources agree that even if the fertility rate continues to drop in the way it has in recent years, we face an unprecedented number of people on the planet[2] (if this should prove to be false, then naturally the utilitarian recommendation would be different). Utilitarianism is often said to have difficulty in responding to environmental problems because the actions of any single individual do not make a difference to those disasters. Thus, an individual utilitarian may well say that there is no point to his having fewer children, because his actions will not determine whether or not overpopulation occurs. If he would gain happiness from having many children, and that would make no significant difference to environmental harm, he will think correctly that it maximizes utility for him to suit his own personal preferences. However, if each individual thinks that way, we may have an environmental disaster. This is the problem of increments: often what maximizes utility in an individual case will, if widely replicated, result in extreme disutility, otherwise known as disaster.

To avoid this, utilitarians would argue that reproductive choices should not be left up to the individual, since individual choices, even made on a utilitarian basis, will result in a bad collective outcome. What is called for is legislation that will restrict almost all people in how many children they have. There may be exceptions made, as we will see below, but the decision should not be left up to the individual, precisely because of this problem of increments, where what one person does has little effect on the outcome, but in concert with many identical actions produces devastating harm. What form this legislation will take will depend on circumstances: in common with non-utilitarians, we want methods that will produce the desired results but that will have no more costs than necessary.

The most famous case of population control was China's one-child policy. The one-child policy started in 1979, and ended for everyone in 2015 when it was believed that there was an economic burden caused by there being too many old people in proportion to young people.[3] It is less widely known that prior to instituting the one-child policy, Mao in 1949 had actually encouraged population growth, decrying the use of birth control and touting the ability of increased production to handle any growth of population.[4] It was only later that the government decided that the growing population was an impediment, rather than a spur, to economic growth. There were increasingly too many people and not enough jobs for them, and they were, in particular, worried about the prospect of increased malnutrition and even famine.[5]

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[2] The United Nations and the Pew Research Center both predict global population of around 11 billion by 2100.

[3] 'Five things to know about China's one child policy' (Oct. 29, 2015) CBC News, available at www.cbc.ca/news/world/5-things-to-know-about-china-s-1-child-policy-1.3294335.

[4] T Scharping, *Birth Control in China, 1949–2000* (Routledge, 2002) 29.

[5] Ibid., 35.

While the government of China does not and did not adopt explicitly utilitarian thinking, their response to the issue of population was clearly consistent with utilitarian policy: whether an activity is right or wrong changes with the particular circumstances, as these will determine whether that activity does or does not maximize utility. Thus, as it came to be seen that the increase in population that China experienced between 1949 and 1970 was detrimental to quality of life, it revised its policy. After a great deal of discussion of various approaches to lessening population growth, in 1980 the so-called one-child policy was adopted as an enforceable state policy rather than being put forward simply as a desirable but voluntary goal. While the policy had many exceptions from the beginning (for minority groups, for people whose first child was disabled, and for various other situations), there is no doubt it was sometimes enforced through harsh measures. These measures varied from province to province, and most involved the parent losing wages or paying a fine. The harshest of these measures, forced abortion, was not widespread, but it certainly did occur, and not surprisingly has been the subject of great resentment.

However, despite its flaws of implementation, the policy does appear to have been successful. That is, there is no doubt that China's rate of population growth dropped radically, and that its fertility rate dropped even more radically. It is difficult, of course, to perceive what exactly the causal mechanisms of such a change are. Fertility rates in most of the world have dropped over time, without any one-child policy. On the other hand, in the US the fertility rate actually went up since 1979, and has only just (in 2020) returned to that lower level.[6] The general opinion is that the Chinese policy did indeed have a great impact on the drop in the fertility rate, even if it was not the unique cause.

This does not necessarily show that any kind of formal policy to reduce population numbers is needed in order to reduce the fertility rate. It has been demonstrated that over time, the fertility rate drops as women gain education and political and economic power.[7] For women to gain education and political and economic power is clearly a good thing. On the other hand, this may not in itself be sufficient to prevent the overpopulation that is predicted. For one thing, these improvements in women's lot tend to be correlated to general economic development, and people in developed countries have a much larger carbon footprint per person than those in undeveloped countries.[8] So, while there are fewer children, those children will use more resources and do more harm to the environment than would more children in an undeveloped economy. Second, these changes may be too slow to turn the tide of rising population. Given demographic momentum, even if young people have fewer children than their mothers the population can increase: 29 percent of the world's population is under 18, whereas less than 10 percent of the world's population is over 65.[9] Thus, if young people produce only two people

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[6] BE Hamilton, J Martin, and MJK Osterman, *Births: Provisional Data for 2020. Vital Statistics Rapid Release* (National Center for Health Statistics, 2021).

[7] A Sen, "Fertility and Coercion" (1996) 63(3) *The University of Chicago Law Review* 1035–106; J Drèze and M Murthi, "Fertility, Education, and Development: Evidence from India" (2001) 27(1) *Population and Development Review* 33–63.

[8] For example, the US emits 15.52 tons of CO_2 per person and Nigeria only .50 ("Emissions Database for Global Atmospheric Research" (2021) European Commission, available at https://edgar.jrc.ec.europa.eu/report_2020#emissions_table (accessed Aug. 2, 2021)).

[9] "People and Society" (2021) CIA World Fact Book, available at www.cia.gov/the-world-factbook/countries/world/#people-and-society (accessed Aug. 2, 2021).

per couple, numbers will go up, since relatively fewer older people will die than new people will be born.

What would a utilitarian recommend? As always, what a utilitarian would recommend depends on the circumstances, as these determine what will maximize utility. On the one hand, it is true that many people really value having children. Some people want the lifelong relationship that having a child will typically provide. Some people want to see their own genes, and the genes of their parents and grandparents, replicated in a new generation—they want to continue the family line. The reasons are various, but they can motivate people to the expenditure of lots of money and lots of time and lots of emotional investment just so they may have a child. Some of these needs might be met through adoption, but some who want to be parents feel that adoption will not fulfill their desires even when adoption is available, and often adoption is not available. While it is true that many people live happy and fulfilled lives without having children, including some of those who would have liked children, it can be a source of pain to fail to have children and a unique source of joy to have them.

However, a utilitarian would oppose overpopulation, as that promises lives that will contain more suffering than pleasure: lack of food, lack of fresh water, lack of shelter, and wars over insufficient resources, be these food, water, arable land, precious minerals, or oil, will cause great disutility. And this suffering will continue longer than just one generation—it promises many generations of misery until such shortages cause population numbers to fall to sustainable limits, possibly only after doing irreparable damage to the environment in which those people will live. All things considered, the joy of having a large family is outweighed by the pain caused by unrestricted population growth, once the numbers are high enough. And many of the joys of childbearing and childrearing can be achieved by having just one child. Those who have only one child typically experience the lifelong bond and the continuation of family lines that parents seek, and having only one child per man and woman should avoid the catastrophe that is otherwise promised.[10] Thus, in our current circumstances a hedonistic act utilitarian would argue there is no right to more than one child.

It is possible that formal policy aimed at reducing the birth rate will not need to be instantiated. We know that at present fertility rates are dropping without any regulations, and if we achieve the goal without government intervention that probably would maximize utility. However, it is quite possible that such a policy will be needed to prevent catastrophic population growth, because while the fertility rate is dropping, it isn't falling fast enough. As said above, even with our relatively low fertility rate, the expected population by 2100 is 11.2 billion. If a utilitarian policy for appropriate governmental steps were formulated, what would it recommend?

A utilitarian policy in such a case would do largely what any humane legislator would do. The goal is to bring about a necessary change in behavior with the least pain possible, including pain for the actor, others in society who would be affected by that person's act, and those who would pay for implementation and enforcement of whatever policy is introduced. The difference between the utilitarian and the human legislator who is not a utilitarian would be, as noted above, a different view on rights: the act utilitarian would consider as a right only those rules of behavior which maximize utility both in themselves and considering the costs

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[10] S Conly, *One Child: Do We Have a Right to More?* (Oxford University Press, 2016).

of enforcement, whereas many others think there are rights that must be respected no matter what the costs to society.

Given this, a utilitarian would introduce the least costly and least painful policy that would be sufficiently effective. I have discussed these measures elsewhere[11] but in short they could include, in increasing degrees of severity:

1. *Education*. People need to know both about the dangers of overpopulation, including current predictions of population numbers, and about themselves, how pregnancy occurs and how to avoid it.
2. *Make contraception free and readily available*. "Readily available" would mean no prescriptions required and local access so people don't need difficult travel to get the desired resource. Many pregnancies are both unplanned and undesired. Areas with the highest fertility rates are typically places with little opportunities for medical care. This first step should please every reasonable person: people would voluntarily reduce the number of children they have while suiting their own desires as to how many children they want.
3. *Incentivize fewer children through rewards*. The most obvious kind of reward is financial: a tax break, for example. But other sorts of rewards might be effective. This would depend on the particular circumstances and particular culture of those involved in a policy.
4. *Disincentivize*. A disincentive is not in itself very different from an incentive in its material impact, but psychologically the two may produce a different affect in the individual as well as a different reaction from society. An incentive is felt often to be a reward for good behavior, whereas a disincentive may be taken to bespeak disapproval of the action which is disincentivized, and these two may motivate us differently. Furthermore, given that we are more averse to losses than we are attracted to potential gains, a disincentive may have a stronger effect just in itself. Given this, instead of a special tax break—a desirable change from the default—a disincentive could be a tax penalty—an undesirable change from the default.
5. Implement fines. Again, a fine may be no different in the material harm it does than a tax penalty, but it sends a different message. A fine speaks more strongly of social disapproval that does a tax penalty, and since we are, by and large, sensitive to social disapproval, this in itself will provide extra motivation. To be fair, and thus less resented, such a fine should be similar to a tax penalty in being geared to income: well-off people would pay a bigger fine than would less well-off people.

Would these be sufficiently effective? We know that people's decisions as to how many children they have is largely influenced both by culture and by consideration of costs.[12] These are presumably two causes for the general decline in fertility rates in those places that have easy access to contraception and no religious scruples about using it. Even without a recession, as more women work and households come to depend on two incomes, a child that would cause one parent to remain at home, or that would cause a family to pay for daycare, would count as a financial cost. We know that people's views about how many children they want change, because the fertility rate has already dropped. A regulation that expresses social disapproval of

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[11] Ibid.

[12] The birth rate fell sharply during the Depression of the 1930s and the Great Recession of 2008.

a practice and a fee for engaging in that practice are likely to produce an even greater drop in the birth rate. This sort of system would simply accelerate the change we are already seeing. This, then, is likely the utilitarian recommendation.

What about abortion, as was sometimes imposed in China? While abortion might (aside from murder of the pregnant woman) be the only way to literally prevent someone from having a child that she is determined to have, it is not a desirable policy from a utilitarian perspective. We should remember that making an action literally impossible is almost never the goal of even harsh criminal sentences. The idea behind a sanction is to disincentivize a type of action enough so that most people won't do it, and to do that with as little disutility as possible. We don't expect our present measures for the prevention of murder to prevent all murders. We don't take measures that would greatly reduce the number of murders because they would be too costly. If we could keep people under armed guards 24 hours a day, or have them surveilled by drones so that they can't approach another person without being seen, would we do that? No. We don't even take all the measures we now could (cameras in every room of every building, for example) because it would be too costly, including too costly to those who might be murdered—we don't want to sacrifice all our privacy. Similarly, imposing abortion as a prevention of pregnancy is too costly. Most people would be dissuaded by far softer measures, and the few who would not are not likely to have an appreciable effect on population. When we say that a policy works we really mean that it works most of the time, or that it works enough to bring about a desired state of affairs, or at least gets us closer to a desired state of affairs. The goal of a population control policy is to prevent overpopulation, not to prevent every pregnancy that we might think excessive.

Would a utilitarian policy allow exceptions to a one-child policy? Presumably, because that would presumably maximize utility in some situations. These special circumstances might be individual—someone's child has died, or perhaps someone's child needs a sibling for a bone marrow transplant—or they might be social—a minority group is at risk of disappearing, for example. But nationwide exceptions, say, to help the economy are unlikely. After all, in the long run the economy will be devastated if we deplete our planet of natural resources. The key is not to run an economy like a Ponzi scheme that depends constantly on the next generation to provide revenue, but to re-orient the economy to a system that doesn't depend on infinite growth of the population on a planet whose resources are very demonstrably finite.

2. THE RIGHT TO ABORTION

If we conclude that the state may control population, what follows from this? Clearly the utilitarian should hold that there is no absolute right to control the body. That is, in some circumstances the individual should not be allowed to make choices about what to do with his or her body, including its reproductive function, so reproductive choices are not the exclusive domain of the person whose body it is. This follows from the policy I have outlined for population control, but it is at odds with the beliefs many of us hold about abortion. Most argue that a woman has a right to decide to have an abortion because she has the right to control her own body, or at least has the right to choose not to have a child. Since utilitarians base rights on the policy that will best promote utility, the idea that there should be absolute control over the body no matter what is unlikely to be one that a utilitarian would endorse. However, it is likely that utilitarians would, as the world is now, endorse a liberal abortion policy.

First, of course, rights to abortion generally reflect women's status, since having such a right means women are free to choose in areas of great personal importance. And being forced to have a child whether or not they want one has the likelihood of making women dependent on men for support in a way that undercuts their social and economic status. Insofar as it has any causal significance for women's equal status, the availability abortion is a good thing. However, aside from this role in political realities of the day, does the phenomenon have significant utility costs or benefits?

In most contexts, the issue of abortion has not been one that has been taken to concern population-wide effects: anti-abortion activists have simply insisted on the supposed right of the fetus to be brought to term, and those who favor its permissibility have insisted on the woman's right to control her body. However, since utilitarians are particularly focused on broad consequences, population-wide effects are relevant, should they occur. There are two population-wide issues that utilitarians need to be concerned about. First, it is sometimes thought that if we accept utilitarianism we must accept an obligation to produce as many people as possible as long as that will increase net happiness. If we accepted this thinking, it would imply that utilitarians could very seldom endorse abortion, as long as the person to be born would be sufficiently happy to outweigh his parents' unhappiness. Second, a population-wide issue concerning abortion that is important in the current age in particular is the phenomenon of gender imbalance. The concern is that abortion makes possible the existing gender imbalance in some populations—sometimes referred to as the problem of missing women.[13] The advent of medical technology that allows parents to determine the sex of their child, and the existence of abortion technology, have combined to allow parents to abort a child if it is of a dispreferred sex. And while parents may choose to abort a fetus because it is male, that is rare enough that it has not had an impact on national gender numbers. Since boys are seen as more valuable than girls, and in some cases girls are seen as absolute liabilities, some parents choose not to have them.

I first discuss the general question as to whether utilitarians should believe there is an obligation to produce as many people as possible as long as those people will increase the net happiness in the world.

First, it is significant that a fetus is not commonly considered to be a person. As was noted in the US Constitutional case *Roe v Wade*,[14] fetuses are not counted in censuses and do not have legal rights that persons do. This was the tradition at least in the west—the Romans did not consider the fetus a legal person.[15] Typically even those who currently oppose abortion and who think it should not be legal have not suggested that women who get an abortion should be treated as murderers. There are exceptions to this, but the common opinion is that killing a child and aborting a fetus are very different things. It seems plausible, thus, that a utilitarian would consider the happiness of an actual person, the mother, over the potential happiness of a non-person. However, even when we accept that the fetus is not a person, the utilitarian might still consider its potential happiness in the utilitarian calculus. The puzzle of merely potential beings is this: if we consider that we need to give no consideration at all to those who do not yet exist, it seems that we could maximize the happiness of those now living and

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[13] A Sen, "More than 100 Million Women are Missing" (1990) 37 *New York Review of Books.*

[14] United States Supreme Court, *Roe v Wade*, 410 US 113 (1973).

[15] JR Schroedel, *Is the Fetus a Person?* (Cornell University Press, 2000) 31.

leave a wasteland for those who will be born only later without having done anything wrong. This seems counter-intuitive—most of us believe that devastating the environment for those who will come after us just so we can wring a little more happiness out of luxuries would be wrong. On the other hand, if we do include the happiness of those who now don't exist when we consider what will maximize utility, it might seem that we have an obligation to produce as many people as possible, as long as that would increase future happiness. In that case, we would (most of us) have an obligation to produce as many people as possible, however we personally feel about having children, up to that point where overpopulation would result in net unhappiness rather than happiness. This also is unappealing.

I think, though, that the utilitarian is stuck on neither horn of this dilemma.[16] We may instead conclude that there is a middle course. Some number of people will very probably be born, as far as we know—their existence is extremely likely, unless the world is subject to some apocalyptic event. Since there will very probably be some people, we should consider the happiness of those people who will in fact exist. This does not mean we have to bring people into existence so that they may be happy. It just means that, given that there are probably going to be people who will be actual no matter what we as individuals do, their happiness should be considered in the utilitarian calculus. We should consider the happiness of those people who will exist, without feeling that we should produce people in order that they may be bearers of happiness. People may best be viewed as entities who, if alive, we want to be as happy as possible, rather than as merely potential vessels for happiness. Given this, we have no obligation to bring people into existence so that they may be happy. Abortion thus does not infringe upon the rule that when we consider happiness we should count every person as one and no more than one and do what we can to maximize such people's happiness. We should consider the happiness of those who will come after us, but we have no obligation to bring anyone into being.

However, this leaves the second problem. Among those people whose existence we foresee as likely, some will be male and some female. Will allowing abortion have a significantly negative effect on women, resulting in overall net disutility? The issue is that the permissibility of abortion may lead to gender imbalance—specifically, an unnaturally greater number of men than of women—and that this in turn might create significant disutility. Abortion allows parents who know the gender of the embryo or fetus to get an abortion to avoid having a girl, and across a population the result can be significant. Gender imbalance is actual—there are a number of countries where men and boys outnumber women and girls in a way that does not reflect the general equality one would expect to have.[17] Should abortion be controlled to prevent this?

Gender imbalance is particularly acute in China and India, since they are countries with large populations whose imbalance thus affects large numbers of potential women. As of 2020, China had 105 men to 100 women, rather than the 1:1 ratio one would expect to find

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[16] S Conly, "How to Deal with the Happiness of Future People" (2021) unpublished manuscript.

[17] At birth more boys are born than girls, but over time the numbers normally even out; G Livingston, "The Odds that You will Give Birth to a Girl or a Boy Depend on Where in the World You Live" (2013) Pew Research Center, available at www.pewresearch.org/fact-tank/2013/09/24/the-odds-that-you-will-give-birth-to-a-boy-or-girl-depend-on-where-in-the-world-you-live/.

among adults.[18] China outlawed sex-selective abortions in 2005, but many believe that the practice still continues.[19] While this was probably exacerbated by China's one-child policy, similar disproportions are found in countries that had no such policy, among them India, Azerbaijan, and South Korea.[20] The underlying cause is a general cultural preference for boys over girls, which in turn results in girls and women earning less and having less social and political power.

While the fact that girls are valued less is, in the long run, a function of sexism, and sexism does not maximize utility, what are the specific disadvantages of there being a significant gender imbalance? Several dangers are foreseen by those who worry about the effects of the imbalance. One is that more men will remain unmarried, and that this may possibly result in more violent crime.[21] Another is that more unmarried men will result in more sex trafficking: even more women than is the case at present will be transported, traded, and used for sex against their will. However, the connections here are speculative. When it comes to sex trafficking, at present there seems to be more in countries that do not have a gender imbalance than in those that do. When it comes to violent crime, there is as yet no evidence of there being more of this in countries with unnatural sex ratios.[22]

Furthermore, even should it be true that sex trafficking is increased when there are fewer women compared to men, the emphasis here seems to be mistaken, to say the least. The problem is that there is sex trafficking. This happens in the absence of a gender imbalance, because it is a function not of gender imbalance but of the powerlessness of women. While it is true that we do not want to make sex trafficking worse, the idea that we should focus on lessening the amount of sex trafficking somewhat by making sex-selective abortion illegal seems to miss the actual goal, which is to eliminate the relative powerlessness of women. The real problem is the underlying sexism and resulting powerlessness of women, not the sex-selective abortions that are a not entirely irrational response to that powerlessness. To say that we should respond to the victimization of women by taking away a woman's right to have an abortion for whatever reason she chooses is clearly to perpetuate the harm. We would thus add to the victimization of women and increase their powerlessness. Rather than policing abortion, we should police sex traffickers.

At the same time, there may be advantages to women when there is an imbalance in the sex ratio. This is, at present, speculative, but it is possible that as women are more rare they may be held to be more valuable, and that this in turn will make them more powerful.

Generally, a utilitarian should focus on improving the status of women, since women can thus be made happier without diminishing the happiness of men. While cultures can be slow

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[18] C Textor, "Sex Ratio in China 1953–2020" (2021) *Statista*, available at www.statista.com/statistics/251102/sex-ratio-in-china/ (accessed Aug. 3, 2021).

[19] "Five things to know about China's one child policy" (Oct. 29, 2015) CBC News, available at www.cbc.ca/news/world/5-things-to-know-about-china-s-1-child-policy-1.3294335.

[20] G Livingston, "The Odds that You will Give Birth to a Girl or a Boy Depend on Where in the World You Live."

[21] Violent crimes are more commonly committed by unmarried men, although obviously this does not imply that being unmarried causes criminal behavior.

[22] T Hesketh and J Min Min, "The Effects of Artificial Gender Imbalance" (2012) 13(6) *Science & Society Series on Sex and Science,* 487–92, available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3367246/.

to change, laws can be helpful, especially laws that improve the social and economic status of women. These would include laws that mandate equal pay for equal work, laws that give equal inheritance rights, and the provision of free basic health care so that daughters' health care is not a burden.[23]

There is, then, no reason to limit abortion because of its effect on gender imbalance.

Would there be exceptions, where abortion would be impermissible? We can certainly imagine hypothetical situations in which this would be true: for example, a woman is pregnant with a very special child who would somehow alleviate suffering in all the world, a baby perhaps with magical powers. In such a case, the utilitarian would have to hold that abortion is not a right. This potential mother could reasonably expect compensation for having to carry her pregnancy to term, and others could step in to care for the baby and child once it is born so that it may eventually begin its mission of vastly increasing the world's welfare. However, this Savior Baby scenario is not one that is likely to occur in the world as we know it. On the contrary, given the population pressure discussed above, abortion is to be encouraged rather than denied. And, of course, we know that abortion rights correlate with women's status in society and we want that status to be equal, since that certainly maximizes utility.

3. ASSISTED REPRODUCTIVE TECHNOLOGY

Some people are not able to reproduce without assistance. Same-sex couples will need at least a sperm or egg donor, and male couples will also need a surrogate mother, and many different-sex couples need medical help to conceive. Individuals who have no partner but who want children to whom they are biologically related also need these technologies. Not surprisingly, the use of assisted reproductive technology is increasing, and it is expensive. In cases where the persons themselves cannot pay the bill, should it be covered by health insurance or state health care? Should we, as taxpayers or policy holders, pay to help people to have children?

The utilitarian answer always rests on a cost–benefit analysis. On the one hand, I have argued above that the state may limit reproduction in the interests of the greater happiness. It might come to be that our situation is so dire that we should limit that in many ways, including denying people the use of assisted reproductive technology, since denying this would be less costly than interfering in existing pregnancies.

However, even if we limit procreation, we might say that it would be beneficial for everyone to have the same opportunity to have a child. Limiting ourselves to one child may be the only way to reproduce that is compatible with living sustainably on the planet, but we might say that all people should have an equal chance to have that one child, whether or not they need medical assistance. The issue is whether the cost of assistance to would-be parents is greater than the utility of their being able to have a child. Of course, having children always entails some costs to others, since society as a whole typically maintain schools and other institutions necessary for raising children. In the case of reproductive technology, however, some particular people require a great deal more help than is typical, and some may resent being called upon to cater to the special needs of others.

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[23] Ibid.

This is a difficult topic. For some people, having a child is very, very important, and many of these want a child with whom at least one of the parents has a biological connection. It most cases it is a pure matter of luck that a couple or individual are not able to reproduce without ART. Some people can reproduce very easily due to their physical and/or social circumstances, and others, without the use of ART, are debarred from what to some is one of the most meaningful experiences in life. Should luck debar some from achieving such an important goal, given that we have the medical means to help them? On the one hand, this sounds unfair in some cosmic sense—cosmic, in that it is not clearly the result of any unfair act. On the other hand, we do often let people suffer the consequences of bad luck. Utilitarians are not luck egalitarians. Whether we should aid the unfortunate generally depends on the costs and benefits of intervention.

Generally, utilitarians make no distinction in principle between acting in a way that brings about a certain result and failing to act in a way that brings about that same result. That is, they do not think that what is commonly known as the act/omission distinction has any relevance to assessing the rightness or wrongness of an act. Pushing someone off a bridge and failing to rescue someone in the water are equally morally right or wrong, if the costs and benefits are otherwise the same. Thus, if we fail to help someone to have a child when we could we are morally responsible for the result of that inaction. However, the fact that we are morally responsible for the results of our failing to help does not mean that that failure is as wrong as actively preventing someone from having a child—say, by a forced abortion—typically would be. The costs in the two circumstances are different, and that means that the overall utilitarian calculus will be different.

The costs of assisted reproductive technologies vary, but it is expensive. In the US, the cost for one cycle of in vitro fertilization is about $25,000. Most women need more than one cycle of IVF to achieve a successful pregnancy. Since in the US most health care coverage comes from private insurance, how much individuals pay out of pocket depends on their particular insurance policy. In some cases they will have to pay the entire amount themselves.[24] This is especially true since insurance may pay only for infertility treatments, and same-sex couples and individuals wanting to have a child without a partner are not necessarily infertile. The costs of surrogacy in the US are even greater—$100,000 to $150,000—and are not covered by private insurance.[25] Thus, such services tend to be impossible for those who are not financially well-off, since many people have no insurance or have insurance that will still leave a significant burden for the persons seeking help. On the other hand, in France ART typically costs nothing for the individual. France recently passed a bill that extends assisted reproductive technology to same-sex couples and single women, with the costs covered by their national public health care.[26] Their policy would cover up to four rounds of IVF.[27] However, while this costs the individual nothing, it obviously costs the French taxpayers who supply these health

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[24] A Klein, "IVF is Expensive. Here's How to Bring Down the Costs" (Apr. 18, 2020) *New York Times*, available at www.nytimes.com/article/ivf-treatment-costs-guide.html.

[25] S Snider, "The Costs of Using a Surrogate—And How to Pay for It" (2020) *US News and World Report*, available at https://money.usnews.com/money/personal-finance/family-finance/articles/how-much-surrogacy-costs-and-how-to-pay-for-it.

[26] Loi no 2021-1017 of 2 August 2021 relative à la bioéthique.

[27] "France Legalizes IVF for Lesbians and Single Women" (2021) *Associated Press*, PBS, available at www.pbs.org/newshour/world/france-legalizes-ivf-for-lesbians-and-single-women.

funds. Furthermore, it may take money from the national health care that could otherwise be spent on the treatment of injury and disease. Surrogacy, meanwhile, is illegal in France, on the grounds of a 1991 Court of Cassation decision which ruled that only merchandise can be made the subject of legal contracts.[28]

It is precisely these cost variables that so far make policy on funding assisted reproductive technologies difficult to assess. On a utilitarian basis, surrogacy should be legal—such contracts do not generally result in harm, since the babies which result do not seem to be treated any more like property than do other babies, and both the surrogate mother and the adoptive parents benefit. However, how ART or surrogacy should be paid for is a much more complicated question. Having a child is extremely important to some people, so important that those who cannot receive public assistance and who can afford it spend a great deal of money, and of course a great deal of time and emotional wear and tear, to be able to procreate. On the other hand, even people who really want children can generally live satisfactory lives if they do not bear children. Someone who will die of disease, injury, or organ failure cannot live a satisfactory life. So, if the costs of providing reproductive assistance diminish the money available for fighting worse conditions, we should not spend that money. Those who are unlucky enough to be unable to procreate without assistance will not be able to procreate, since helping them will create worse harm for others. It is true that these people will then suffer from bad luck: through no fault of their own, they will not receive the help that others don't need or can buy because they are affluent. Those who would die of disease, injury, or organ failure are similarly unlucky, however, and their need is greater.

Of course, it might be argued that we could pay for all sorts of medical assistance if we spent less on other things that are less useful—unnecessary military spending, for example. However, it appears in at least some places that spending for health care will not be increased to the point where everyone is given all that they need, even if that is what a utilitarian would suggest. Thus, in cases where health care spending is limited and spending on reproduction will make it more difficult to spend on serious disease and injury, a utilitarian calculus would recommend that we not spend on assisted reproductive technology, surrogacy, or related issues. In places where there is enough health care funding to take care of all needs, then there is no reason not to supply assisted reproductive technologies, fees for surrogacy, and other aid in having children.

4. CONCLUSION

Utilitarian policy always depends on the circumstances. In some cases, these are relatively clear. The right to reproduce is not absolute. If we need to institute policies to regulate how many children people may have, that is permissible. When it comes to abortion, there is no evidence that abortion should be prevented. As concerns assisted reproduction, the decision needs to be made on a more local basis, because health care funding is done locally. If a country can afford to provide assisted reproductive technology and surrogacy costs without underfunding worse conditions, it should. If funding reproduction takes away funding for the cure of more

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[28] Ass. plén. 31 May 1991 (no 90-20.105); J Courduries, "At the Nation's Doorstep: the Fate of Children Born in France due to Surrogacy" (2018) *Science Direct*, available at www.sciencedirect.com/science/article/pii/S2405661818300443.

serious diseases and injuries, it should not. The utilitarian policy is, as always, to do the most good.

16. Utilitarianism and killing

Tatjana Višak

1. INTRODUCTION

Consider the following case.

> *Inheritance*. I am so poor that I am made miserable by my inability to pursue various projects that mean a great deal to me. I know that when my uncle Jack dies I shall inherit from him a large amount of money. I happen to know that Jack is in the habit of taking a late-evening walk by some deserted cliffs and that it would be quite easy for me to kill him by pushing him off at a certain point where the path is particularly narrow.[1]

In my time and place, and I suppose in yours as well, killing Jack would count as an offence against both positive law and positive morality. This means that there are laws in place that forbid and punish such cases of homicide. It also means that most people would judge such an act of killing immoral. They would desire not to kill Jack if they were in the situation of the narrator, let's call her Sue, and they would feel guilty if they killed Jack. They would respond with blame to Sue upon hearing that she killed Jack.

Roger Crisp[2] mentions three analogies between positive morality and positive law. First, they aim at guiding human conduct towards similar kinds of goals. In the case at hand, they aim at restricting harm to others in the pursuit of self-interest. Second, positive morality and positive law both mark out certain actions as forbidden and place sanctions upon them. Sanctions may include punishment, social exclusion and blame. Third, both positive morality and positive law might have evolved in the course of human history as a method of social control.[3] They tell us what ought and what ought not to be done in our social interactions. Thus, positive law and positive morality have functional and structural similarities as well as an overlapping scope.

The main ethical question about the inheritance case is whether it would be right for Sue to kill her uncle or whether Sue has, all things considered, normative reason to kill her uncle. When we ask about reasons for action, we may be interested in some explanation of the action. For example, we may want to know what motivates an agent to act in a certain way. If this is what we want to know, we ask about *explanatory reasons*. *Motivating reasons* are a kind of explanatory reason. For example, the prospect of getting the inheritance may motivate the narrator to kill Jack, while the fear of sanctions may motivate her not to kill him. But when we ask about reasons for action in ethics, we are generally interested in *justificatory reasons*.

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1 R Crisp, *Reasons and the Good* (New York, Oxford University Press, 2006) 13.

2 Ibid., 10–12.

3 C Boehm, *Hierarchy in the Forest* (Cambridge, Cambridge University Press, 1999); C Boehm, 'Conflict and the Evolution of Social Control', in LD Katz (ed.) *Evolutionary Origins of Morality: Cross-Disciplinary Perspectives* (Imprint Academic, 2000) 79–101.

For example, we may want to know what, if anything, *justifies* some action. When I ask in this chapter whether Sue has all-things-considered reason to kill Jack, I am interested in justificatory reasons, which are also called *normative reasons*.

In order to find out whether Sue has a normative reason to kill Jack, we need to know what, if anything, *grounds* normative reasons for action. Some facts count in favour of killing Jack and some count against doing so. For example, the fact that it might benefit Sue may count in favour of killing Jack. The fact that Jack would be deprived of future wellbeing and that his relatives would suffer may count against killing him. While these may thus be *prima facie* normative reasons for or against killing Jack, we need to know whether killing Jack is justified *overall*. Thus, we are interested in *all-things-considered* normative reasons for action.

According to Crisp, neither positive morality nor positive law provide *ultimate* normative reasons for action. This means, for example, that Sue's normative reason not to kill Jack is not ultimately grounded in the fact that doing so would be against the law or against the moral feelings and judgements of most people at her time and place. The law and the moral feelings may themselves be based on some relevant normative fact, such as the fact that killing Jack would seriously harm Jack. If laws and moral feelings are based on such a relevant normative fact, then it is this normative fact that ultimately grounds Sue's reason not to kill Jack. If the laws and feelings are not based on some relevant normative fact, then they are just arbitrary and they do not provide ultimate normative reasons not to kill Jack.

If neither positive morality nor positive law provide ultimate normative reasons, then what are these reasons based on? According to utilitarianism it is welfare and only welfare that provides these reasons. Thus, utilitarians are welfarists about normative reasons for action. In this chapter I conceive of utilitarianism as a theory about normative reasons for action. I call an action 'right' if it is the one that the agent has overall reason to perform; otherwise I call it 'wrong'. According to utilitarianism, only the action that maximizes welfare is right, all other actions are wrong. This suggests that killing Jack is the right thing for Sue to do just in case it maximizes welfare. Utilitarianism thus understood can serve as a standard for evaluating both positive law and positive morality.

In what follows I will first say a bit more about the seemingly simple and straightforward utilitarian stance on killing (section 2). Then I will discuss several considerations that complicate the utilitarian stance on killing, such as different theories about the harm of death (section 3), disagreement about whether to promote wellbeing as an impersonal or a personal value (section 4) and acceptance of different evaluative focal points (section 5). In my discussion of these ways in which utilitarians can disagree with each other, I will get back to the inheritance case from time to time. But I will also mention other examples of killings, such as killing in war, killing of non-human animals, killing in cases of euthanasia and killing by inflicting a death penalty. I will also contrast utilitarianism to non-utilitarian views on these issues, where this is appropriate. All this will show that there isn't such a thing as *the* utilitarian stance on killing. How utilitarians view instances of killing depends on the exact version of utilitarianism that they accept.

2. THE SIMPLE VIEW

Whether an act of killing (or any other act) is what we have overall normative reason to do according to utilitarianism depends on its consequences and on nothing else. The conse-

quences in turn are assessed in terms of wellbeing. Thus a utilitarian stance on killing seems straightforward: killing, just like any other act, is what we have most reason to do if and only if and because it is the act among our options that has the best consequences in terms of wellbeing. If several acts have the best consequences, then we have most reason to perform one of them, no matter which one. So, on the face of it, whether and when killing is justified on a utilitarian basis is merely an empirical question, at least once we know what wellbeing consists in. In order to determine the right answer, one needs to assess the consequences in terms of wellbeing, impartially conceived. With regard to the inheritance case, whether Sue has normative reason to kill Jack depends on how the killing would affect the history of the world in terms of wellbeing.

Wellbeing refers to whatever makes an individual's life good for him or her. There are different theories of what exactly wellbeing consists in. According to *hedonists* about wellbeing, pleasant experiences make an individual's life good for her and unpleasant experiences make it bad for her. According to *preferentialism* about wellbeing, getting what one wants (perhaps under some idealized conditions, such as full information and rationality) makes one's life good for one and not getting what one wants makes it bad for one. The question of what the correct theory of wellbeing might be is controversial. Classical utilitarians, such as Mill, Bentham and Sidgwick, were hedonists. Contemporary utilitarians are also hedonists, or preferentialists, or else proponents of other accounts of wellbeing. All plausible theories of welfare yield the same verdicts about many cases, but disagree about some details. For example, most theories of welfare would agree that being killed would be bad for Jack in the case at hand and that Sue would probably profit from more money, but not from being arrested. I will not further discuss different theories of wellbeing here.[4]

Of course, we usually do not know how things will turn out and what exactly an act's various consequences will be. For example, Sue doesn't know whether she will be arrested for murder upon killing Jack. And she doesn't know when Jack would otherwise have died and how well off he would have been until then. Our general lack of knowledge about the future does not disqualify utilitarianism as a normative theory. It shows, however, that utilitarianism may be a poor action guide. If this is so, and if utilitarianism is nevertheless the correct theory about normative reasons for action, we may need to think about action guides (such as certain rules or principles) that help us take decisions in line with utilitarianism. This is a significant practical challenge when it comes to using utilitarianism for action guidance. I will ignore this challenge here, since it is a general challenge for utilitarianism (as well as for rival normative theories) that is not specifically related to the issue of killing.

The so-called trolley cases can illustrate the simple utilitarian stance on killing. Trolley cases are widely discussed thought experiments in ethics. Thought experiments serve to show implications of various normative theories. They also help us test a theory's implications against our intuitions. In thought experiments, we can simply stipulate what exactly our various options are and what the consequences of each option would be. We can then check what different theories would tell us to do in the given situation and consider how plausible this would be. The standard trolley case features a runaway trolley that heads towards five people on the track. The trolley will kill these five people, as we know for sure, unless we switch a lever that

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[4] See G Fletcher, *The Routledge Handbook of Philosophy of Wellbeing* (New York, Routledge, 2015).

diverts the trolley onto a side track, where it will kill one person. We do not have any further information about the persons on the tracks and have to assume that they are relevantly similar. The question is whether we have overall normative reason to switch the lever. Most people say that it would be right to divert the trolley in this case, even though it is a separate question whether they could psychologically bring themselves to do it. This common verdict is in line with simple utilitarianism, which asks us to kill just in case it maximizes wellbeing.

In another version of the trolley case, the runaway trolley heads towards five people on a track, as before. But now the only way in which I can prevent the trolley from killing the five is by pushing a heavy person off a bridge. I know for sure that doing so would kill this person. The body of the heavy person would stop the trolley and thus save the lives of the five people further down the track. Should I push the person off the bridge? Here, most people feel that it would be wrong to lay hands on the person in front of me. Yet, according to simple utilitarianism, the relevant facts are the same as before. We are in a position to reduce harm by preventing the deaths of four people and this is what we have overall reason to do, or so it seems. Non-utilitarians have tried to capture the intuition that there is a morally relevant difference between both trolley cases. Utilitarians, in contrast, denied that there is such a difference. Francis Kamm, for example, wrote *Intricate Ethics*,[5] a thick book featuring a large number of trolley cases, in order to point out the alleged morally relevant differences between them. The utilitarian Alastair Norcross makes fun of Kamm's efforts.[6] If he had to write a book about trolley cases, it would be very brief indeed: always do whatever it takes to promote wellbeing.

Another illustration of the simple utilitarian stance on killing is William Shaw's book *Utilitarianism and the Ethics of War*.[7] There are a lot of complicated non-utilitarian theories about what kinds of actions are or are not justified in the special contexts of war or self-defense.[8] For example, is it justified to kill an attacker or even innocent bystanders in self-defense? Is it okay to use others as so-called innocent shields in an attempt to prevent an attacker from killing oneself? Is it ever justified to begin a war or to attack civilians? Shaw discusses a lot of such questions and his utilitarian stance is always clear and straightforward: Do whatever it takes to maximize wellbeing or – and this is just another way of saying the same thing – to minimize harm. This is the only consideration that counts.

Utilitarianism as a theory about what we have normative reason to do is not backward looking, as the utilitarian stance on the death penalty illustrates. Punishment as such is a backward-looking notion. People have done something wrong in the past and this is taken to provide reasons for action, according to theories of retaliation. Not so, according to utilitarianism. Rather, what we have reason to do only depends on the future: it depends on which of our options will bring about the best course of the universe in terms of wellbeing. So, we need *not* look backwards in order to determine what to do, but only forward. How to bring about the best future? So, the utilitarian evaluation of the death penalty only depends on its consequences. Most importantly, utilitarians ask whether the death penalty reduces the number of crimes and thereby ultimately the amount of harm. Empirical facts suggest that this is not

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5 F Kamm, *Intricate Ethics* (New York, Oxford University Press, 2007).

6 A Norcross, 'Off Her Trolley? Frances Kamm and the Metaphysics of Morality' (2008) 20/1 *Utilitas* 65–80.

7 WH Shaw, *Utilitarianism and the Ethics of War* (New York, Routledge, 2016).

8 J McMahan, 'The Ethics of Killing in War' (2004) 114 *Ethics* 693–733.

the case. Hence, utilitarians, following Jeremy Bentham's work on this topic, oppose the death penalty.[9]

The controversy about the German air safety law provides an example of a clash between utilitarian and non-utilitarian stances on killing in ethics and the law. On 15 February 2006 the German constitutional court ruled that the air safety law was unconstitutional. It allowed, as a last resort, the shooting down of airplanes that were used against the lives of people, as, for example, in the 9/11 terrorist attack. The court ruled that killing innocent people, such as passengers on board a hijacked plane, was against the constitution, since it violated their right to life and human dignity. According to the German Constitutional Court, killing innocent people as a means to save others turns them into mere things and fails to recognize their inherent value. It does not matter from this perspective that the innocent victims on board of the plane would have died somewhat later anyway, along with many others. This is because their rights and dignity are considered to be independent of their remaining life expectancy. From a utilitarian perspective, shooting down the plane in such a case would be the right thing to do, since it reduces harm for all concerned individuals.

These examples provide a first sketch of a utilitarian stance on killing. In what follows, I will introduce some more complexities and ways in which utilitarians can disagree with each other.

3. THE HARM OF DEATH

Utilitarians take the welfare of all individuals equally into account when considering which of the options that they can perform have the best consequences. The principle of equal consideration of interests is compatible with different treatment of different individuals. Imagine, for example, a woman who has a child and a cat. Taking their welfare equally into account means to provide them both with the food and shelter that they need. Equal consideration of their welfare is compatible with sending the child to school, but not the cat. This is because the cat would not benefit from being sent to school. So, different interests can justify different treatment.

If death were a lesser harm for some individuals than for others, this could justify killing some of them for purposes that would not justify killing the others. For example, if death were a lesser harm for some non-human animals, this might justify killing them for our gustatory pleasure, while it is not justified to kill humans for this purpose. Differences with regard to the harm of death would also justify killing some rather than others in cases in which someone had to be killed in order to prevent greater harm. For example, if we had to throw one individual out of an overcrowded lifeboat that would otherwise sink, we could base our choice on differences regarding the harm of death. If death was a lesser harm for a dog than it is for a human, we could sacrifice a dog instead of a human, for example. It is therefore important to consider what determines how harmful death is for an individual.

When we talk about the harm of death for an individual, we do not consider effects on others. Of course, effects on others are also relevant in the overall utilitarian assessment of

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[9] HA Bedau, 'Bentham's Utilitarian Critique of the Death Penalty' (1983) 74/3 *Journal of Criminal Law and Criminology* 1033–65.

an act of killing. Yet, they do not belong to the harm of death for the individual, which is our focus here. Furthermore, in discussions about the harm of death, we talk about cases in which a life ends sooner rather than later. We contemplate a life that ends at a particular time, say t_1, rather than at some later time, say t_2. Thus, we do not compare mortality to immortality. We also do not talk about the process of dying, but simply about the fact that a life ends at some point in time rather than at a later point in time. The suffering that may be involved in the process of dying does not belong to the harm of death, thus understood. Lastly, we assume that the state of being dead is not as such good or bad or neutral for an individual. Rather, the welfare subject has ceased to exist, so there is nobody for whom it can be good, bad or neutral to be dead. That said, let us turn to the two major theories about the harm of death.

3.1 Frustration of Wants

One influential position, which we can call the 'frustration view' on the harm of death, holds that death harms a being to the extent that it frustrates the fulfilment of her desires. Imagine that I have the desire to go to Paris tomorrow and I die tonight. In that case, the harm of death consists in preventing me from fulfilling my desire to go to Paris and in preventing me from fulfilling all other desires that I had before I died. Dying later rather than earlier is not *necessarily* less harmful for an individual on that view. But it typically is less harmful, since people tend to have fewer and weaker desires for the future towards the end of their natural lifespans. Peter Singer accepted this *frustration view* on the harm of death throughout much of his career.[10] 'Frustration' here is just a technical term for an unfulfilled desire. What matters is that a desire remains unfulfilled. It does not matter whether an individual actually *feels* frustrated in the sense of being sad and angry about it. In fact, having died precludes the possibility of being sad or angry about anything. Yet, their death typically leaves individuals with unsatisfied (and in that sense frustrated) desires.

Some people find the frustration view about the harm of death attractive, because they do not believe that anything is objectively valuable. Instead, they believe that only valuing something confers value on the thing that is valued. So, for example, going to Paris is not good or bad for me, unless I desire it or detest it. Even wellbeing, according to this view, is good for an individual only if it is desired. Therefore, harm cannot ultimately consist in loss of wellbeing, as the alternative view on the harm of death has it. Instead, it can only consist in frustration of desires. Thus, what makes death harmful, according to this view, is that it leaves unfulfilled the future-directed desires that one had before one died.

Beings that have a conception of their own existence across time usually have plans and projects for the nearer and further away future, along with the general desire to go on living. In contrast, beings that lack a conception of their own existence across time lack a desire for continued life. They only have immediate and short-term desires, such as the desire to escape frightening or painful situations, the desire to eat and the desire to rest. Thus, according to this view, death is typically a great harm for normal adult humans, since they strongly wish to continue living and have all kinds of plans for the future. Most non-human animals, however, do not have a conception of their own existence across time, but live in the moment. So, death counts as a significantly lesser harm for them. Unborn and newly born babies, as well as some

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[10] P Singer, *Practical Ethics*, 3rd edition (New York, Cambridge University Press, 2011).

mentally severely impaired humans, are comparable to non-human animals in this regard. Singer used to argue that death is, for this reason, not particularly harmful for these individuals.[11] In this view, death at some particular point in time is good for an individual just in case continued life would frustrate more of her current desires than death. (Again, most proponents of this view would hold that the desires in question are idealized desires rather than actual desires; for example, they must be informed and rational.)

On the basis of this account of the harm of death, Singer argued that death is not a great harm for most non-human animals. He also argued that abortion and infanticide do not harm the baby in question, since it has no future-directed desires that death frustrates. What desires particular individuals actually have is, of course, an empirical question. It is very relevant when it comes to the practical implications of the frustration view on the harm of death. It does seem true, though, that most sentient non-humans, as well as human babies and some severely mentally impaired humans, live in the present. Non-sentient beings do not have any preferences in the relevant sense at all.

3.2 Deprivation of Value/Life-comparative View

An alternative account of the harm of death does not focus on the frustration of what the individual wants. Instead, it focuses on the loss of what would have been valuable for the individual in question. It conceives of the harm of death as the deprivation of the wellbeing that the individual would otherwise have experienced in the future. This so-called *deprivation view* on the harm of death does not consider how much a being *wants* his future, but rather how much *value* the future would have had for the individual in question.[12] So, for example, if a zebra dies, the animal is thereby deprived of the good and bad experiences that it would otherwise have had, had it lived longer. Depending on whether its future would have been good or bad or neutral for the zebra, dying at a particular time rather than at a particular later time is harmful, beneficial or neutral for it. Of course, we often do not know when an individual would otherwise have died and what would have happened up to then. The deprivation view only tells us that depending on the counterfactual scenario, death at a particular time harms or benefits the individual to some degree. In practice we may only be able to make informed guesses about what would have been the case. In this view, death is harmful for all and only individuals who would otherwise have had a future life with a positive welfare level. This includes individuals that do not have future-directed desires, such as young babies and certain non-human animals. Death is good in this view for individuals who would otherwise have had a bad future. Killing such an individual would be beneficial for it and would thus be a case of euthanasia. Since this view compares the actual life of an individual to the life that it would otherwise have had (in the counterfactual situation in which it died at another time), it is also called the *life-comparative view*.

In Germany each year about 45 million male chicks are killed shortly after hatching. This is standard practice in the breeding of laying hens, since the male chicks cannot become laying hens and are also not profitable for meat production. Killing the male chicks is widely considered unethical and unconstitutional, though. Since 2002, animal protection has been acknowl-

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[11] Ibid.

[12] B Bradley, *Well-being and Death* (New York, Oxford University Press, 2009).

edged as an explicit aim in the German constitution. One of Germany's federal states aimed at stopping the killing of male chicks by enactment. Two breeding facilities complained and won the case. In June 2019 the German federal administrative court ruled that the killing of male chicks will be permitted to continue for a while, but only until it becomes possible to perform sex selection in the egg and to destroy the eggs that carry the male chicks. It is forbidden to cause pain, suffering or harm in non-human animals without any reasonable justification and the economic interest in breeding efficiency does not in itself count as a reasonable justification, or so the court argued. The court thus seems to view the chicken's premature death as harmful, which suggests acceptance of the deprivation view rather than the frustration view on the harm of death.

While nonhumans are granted some rights these days in many parts of the world, we are still a far cry from giving them what they are due, according to utilitarianism. Utilitarians have traditionally argued (and still argue) in favour of equal consideration of human and animal interests. Jeremy Bentham said:

> Other animals, which, on account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of things […] The day has been, I grieve it to say in many places it is not yet past, in which the greater part of the species, under the denomination of slaves, have been treated […] upon the same footing as ... animals are still. The day may come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of legs, the villosity of the skin, or the termination of the os sacrum, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps, the faculty for discourse? […] the question is not, Can they reason? nor, Can they talk? but, Can they suffer? Why should the law refuse its protection to any sensitive being? […] The time will come when humanity will extend its mantle over everything which breathes.[13]

For more than 40 years, the influential utilitarian Peter Singer and many others have conveyed the same message to a contemporary public. But whether and when the day will come on which harm to non-humans is no longer discounted is still unclear.

The correct view about the harm of death together with the relevant empirical facts tell us whether and to what extent death harms the individual that dies. We already saw that theories about the harm of death help explain utilitarian verdicts about certain practices, such as killing non-human animals, euthanasia and infanticide. But other considerations, to be discussed in the next section, also need to be considered in a utilitarian ethics of killing.

4. POPULATION ETHICS

We already saw that utilitarians compare outcomes in terms of goodness, where goodness refers to wellbeing. But wellbeing can be understood as either a personal or an impersonal good. A personal good is a particular kind of good. It is what is good from a particular perspective: the perspective of an individual welfare subject. 'Impersonal good', in contrast, refers to what is good from the impersonal perspective, or, as it is often called, from the point of view of

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[13] J Bentham, *Introduction to the Principles of Morals and Legislation*.

the universe. Of course, the universe does not literally have a point of view. Thus, one should not talk about 'perspective' literally in this context. But personal and impersonal good are two fundamentally different types of good.

What kind of goodness is the goodness that determines the goodness score of an outcome? In other words: what kind of goodness determines what we have reason to do? What kind of goodness is morally *significant*? According to *impersonal views*, this is impersonal goodness. Personal good is only considered to be ethically *relevant* (but not significant) and it is connected to impersonal good via a conversion function, as will be explained below. In contrast, according to *person-affecting views*, personal goodness is morally significant.[14]

Proponents of impersonal views tend to accept both kinds of good, but to consider only impersonal good ethically significant. Personal good, then, has to be converted into impersonal good via a conversion function. This is analogous to converting one kind of currency into another. Even if the conversion rate were 1:1, we still had two different currencies. For example, the conversion function from personal good to impersonal good that the impersonal total utilitarian accepts is linear: one unit of personal good counts for one unit of impersonal good. This means that according to impersonal total utilitarianism an outcome is better (in terms of impersonal good) the more personal good it contains. Each additional unit of personal good makes the outcome better from the point of view of the universe, as it were, by exactly one unit.

To clarify this, it may help to consider prioritarianism, by way of contrast. Prioritarianism can be viewed as an impersonal theory with a different, namely strictly concave, conversion function: The more units of personal good one already has, the smaller the contribution of each additional unit of personal good to impersonal good. Prioritarians thus understood hold that the same additional amount of personal good counts differently towards the impersonal value of the outcome, depending on whether it goes to a better or a worse-off individual. Yet, the *value function* at the level of impersonal good is the same for both theories: they simply add up the impersonal good in order to determine the goodness of the outcome.

For impersonal total utilitarianism, the *value function* at the level of impersonal good is simply additive. The aggregate amount of value of a distribution is determined by adding up the impersonal value in the distribution. Alternatives to the total view are the average view, variable-value views and critical-level views. These are all impersonal views. For most of these impersonal views, it is obvious that personal good and impersonal good can come apart in the evaluation of outcomes. For example, on averagism, if only miserable people exist, it can make an outcome better to add a group of somewhat less miserable people, since this raises the average level of welfare. Yet, the latter outcome is not better in any way *for people*. It does not improve lives in any way. In the case of impersonal total utilitarianism, it may be less clear how these things can come apart. I will therefore explain this in more detail in what follows.

Different impersonal and person-affecting views in conjunction with utilitarianism have different implications for the ethics of killing. A counterintuitive implication of an impersonal average view would be that one could make the outcome better by killing all but the best-off individuals. After all, that would (at least *ceteris paribus*) raise the average level of welfare. I am not aware of anyone who defends this position, though.

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[14] R Bader, 'Person-Affecting Utilitarianism', in K Bykvist and T Campbell (eds) *Oxford Handbook of Population Ethics* (Oxford, Oxford University Press, 2022).

The impersonal total view implies the replaceability argument. Classical utilitarians were proponents of the impersonal total view, which is still the most commonly accepted view among utilitarians today. Peter Singer famously discussed this argument in relation to the ethics of killing non-human animals.[15] If one kills a cow that would otherwise have had a pleasant future, the killing diminishes the overall amount of welfare in the universe. Thus, it makes the outcome impersonally worse. But if one brings another cow into existence that would not otherwise have existed and whose life is at least as good as the future life of the killed cow would have been, the overall amount of welfare remains the same. The replaceability argument has been used to justify the routine killing of animals in practices such as meat and dairy production, aquaculture and animal experimentation. Peter Singer also mentions it in relation to a possible practice of breeding human babies as sources of spare organs.[16] A precondition of the replaceability argument is that the involved animals' lives are good. If they were bad, the killing would not present a welfare loss after all, and nothing would need to be replaced. Simply killing the miserable individuals would improve the situation. In practice, it is questionable whether the animals in the above-mentioned practices have pleasant lives. But at least in principle, there could be practices in which individuals would routinely be killed that would meet the conditions. In these practices, the impersonal total view would allow routinely killing and replacing animals, at least if one brackets other negative effects on overall welfare.[17]

According to a (wide or narrow) person-affecting view, killing an animal that would otherwise have had a pleasant future reduces welfare, understood as a personal good. In other words: it makes a life worse. Bringing an animal into existence that has a pleasant life and would not otherwise have existed does not benefit this animal, assuming non-comparativism. According to non-comparativism, existing cannot be better or worse or equally good for a welfare subject than never existing. This is because existence and non-existence are non-comparable in terms of personal goodness. Thus, bringing an animal into existence rather than never bringing it into existence does not improve this animal's life. So, according to the person-affecting view, the practice of killing and replacing an animal makes a life worse while it makes no life better, *ceteris paribus*. Therefore, proponents of person-affecting views reject the replaceability argument.

Issues such as whether to value welfare as a personal or an impersonal good and how to evaluate outcomes that contain different individuals or even different numbers of individuals are discussed in a notoriously difficult field of ethics called 'population ethics'. As we saw, the stance that utilitarians take on these issues affects their verdict on killing, as was illustrated in a brief discussion of the replaceability argument in animal ethics. We will now turn to a last dispute within utilitarianism that bears on the ethics of killing.

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[15] P Singer, *Practical Ethics*.

[16] Ibid.

[17] The practices' effects on the environment, climate, health and resource use would of course need to be considered in a full utilitarian evaluation. Singer takes these effects to count heavily against the practices in any realistic scenario.

5. ACTS AND RULES

Utilitarians are concerned with bringing about the best outcome, but what exactly are the things that utilitarians evaluate on the basis of their effects on the outcome? So far I assumed that *actions* are the evaluative focal points. But in fact there are different utilitarian views on what focal points should be evaluated. *Act-utilitarianism* is the standard version of utilitarianism. It evaluates acts directly on the basis of their consequences and holds that we have overall normative reason to perform the act that has the best consequences. This is called the 'optimific' act. But it is possible for utilitarians to evaluate other evaluative focal points, besides acts, on the basis of their consequences. For example, one could also or instead evaluate rules or attitudes directly on the basis of their consequences. *Rule-utilitarianism*, for example, holds that we have overall normative reason to establish a set of rules, which has the best consequences. Acts are evaluated only indirectly, on the basis of whether they conform to this optimific set of rules. Whether one evaluates an act of killing directly on the basis of its consequences, or rather only indirectly on the basis of whether it is in line with the optimific set of rules can make a difference with regard to the ethics of killing.

Assume that killing Jack gave Sue more wellbeing than Jack was deprived of and that no other individuals were affected. Under these circumstances, killing Jack would be the right act on an act-utilitarian basis. However, on a rule-utilitarian basis, killing Jack would still be wrong, assuming that the optimific set of rules contained the rule not to kill others in the pursuit of self-interest. It is likely that the optimific set of rules contains such a rule. More generally, acting on the basis of the optimific set of rules can lead to verdicts that differ from those of act-utilitarianism. This is because the optimific set of rules cannot be overly complex, otherwise it would be very costly to inculcate to the effect that it would no longer be the best set of rules. Thus, an act of killing that is right according to act-utilitarianism can be wrong according to rule-utilitarianism.[18]

But one need not be a rule-utilitarian in order to accept and maintain certain rules against killing. Consider the so-called transplant case, a thought experiment that is often used to pump anti-utilitarian intuitions. In this case, a doctor could kill a healthy patient who entered the hospital for a standard health check. The patient's organs could then be used in order to save the lives of five other patients. Should the doctor kill the healthy patient? Upon first glance, an outcome in which five people survive is better than an outcome in which one person survives. An outcome in which one person dies is better than one in which five people die. Does this mean that the doctor has all-things-considered normative reason to kill the healthy patient? Not necessarily. Even act-utilitarians can point to long-term and indirect effects of actions that need to be taken into account. In this case, for example, killing the patient might contribute to people's reluctance to undergo routine health checks out of fear not to survive. This would have negative effects on wellbeing that needed to be considered along with the more direct effect of saving five lives. Critics might not be convinced that the main normative reason against killing the innocent patient is that it might affect wellbeing due to reducing the number of people that attain routine health checks. Doesn't the normative reason against killing the patient rather consist in this patient's moral right to life? This is a view that utilitarianism typ-

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[18] B Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality* (New York, Oxford University Press, 2002).

ically doesn't share, but more recently utilitarianism has been developed to account for moral rights, as we will see in the remainder of this section.

In his book *Taking Utilitarianism Seriously*, Chris Woodard distinguishes two kinds of normative reasons for action.[19] He argues in favour of a pluralist theory of normative reasons for action, according to which there are 'act-based' reasons, that is, reasons to make outcomes better, as well as pattern-based reasons, that is, reasons to contribute to good patterns of action. Woodard argues that utilitarians should accept and accommodate both kinds of reasons within their theory. The purpose of his book is to show how this helps utilitarianism to successfully deal with all major objections that have been brought forward against this theory.

Woodard defines act-based reasons as follows:

> ABR There is an act-based reason for agent *S* to do action *X* if and only if and because it is possible for *S* to do *X* and *S*'s doing *X* would be good.

Note that this is about prima facie reasons, not about all-things-considered reasons. Furthermore, *X* could also be an omission.

Pattern-based reasons, in turn, are defined as follows:

> PBR There is a pattern-based reason for agent *S* to do action *X* if and only if and because it is possible for *S* to do *X* and doing *X* is *S*'s part in an eligible pattern of action *P* that would be good.

Pattern-based reasons are the things that we refer to when we say that we act in a particular way because we want to have 'no part' in some bad practice or when we say that we want to do our part in some good practice. They are arguably present in Kant's theory as well as in collective consequentialism and in rule consequentialism. They are also part of team reasoning in Economics and Decision Theory, part of the doctrine of possibilism in deontic logic, and of Edward McClennen's idea of resolute choice in decision theory.[20] As Woodard puts it:

> But the idea that one reason for doing something is to join in with others in doing something worthwhile, or that one reason for not doing something is to avoid joining in with others in doing something bad, also makes sense. It reflects a way of thinking of actions that is not alien or contrived: they can fit together with others to form larger patterns, and their being part of these larger entities can be an ethically significant fact about them of the sort that could generate a reason.[21]

Woodard says more about what he means by 'pattern'.[22] In a technical sense of pattern, any arbitrary combination of token actions is a pattern. An example could be 'everyone keeping his promise, except for me'. But in an ordinary sense of 'pattern', not all arbitrary combinations of actions are patterns. A pattern is more akin to a practice or an established activity. On this understanding, according to Woodard, it is not the case that there is an act-based reason to do *X* whenever there is a pattern-based reason to do *X*.

In his definition of pattern-based reasons, Woodard speaks of an action that is part in an *eligible* pattern of action that would be good. What makes a pattern 'eligible'? In order to

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19 C Woodard, *Taking Utilitarianism Seriously* (New York, Oxford University Press, 2019).
20 Ibid., 183.
21 Ibid., 94.
22 Ibid., 208.

be eligible, according to Woodard, the action in question should in principle be realizable and there should be a sufficient chance that the pattern would be realized, were the agent to play his part in it. Even though rule-utilitarians also accept pattern-based reasons, the version of rule-utilitarianism that I described derives these reasons from taking part in patterns that would be optimific if (nearly) everyone participated. So, according to those idealized forms of rule-utilitarianism, it doesn't matter whether enough people would actually participate in order for a pattern-based reason to exist. Furthermore, rule-utilitarians hold that pattern-based reasons are weightier than act-based reasons, unless a disaster can be prevented.[23] Woodard, in contrast, is not committed to the lexical priority of pattern-based reasons and he holds that for a pattern to be eligible, there has to be a sufficient chance that enough people actually participate.

Woodard conceives of moral rights as pattern-based reasons for action.

> [W]e can explain moral rights using the concept of pattern-based reasons. The basic idea is that there exists a valuable practice which is such that playing one's part in it amounts to respecting other's moral rights, and that we have sufficient (pattern-based) reason to participate in this practice.[24]

If, for example, it generally has good consequences that rights are respected and if these consequences are sufficiently likely to materialize if we join others in bringing about this beneficial pattern of action, than we have pattern-based reason to do just this. In cases in which pattern-based reasons and act-based reasons point in different directions, the relative strengths of the reasons determines what we have overall reason to do. So, proponents of such a pluralist theory would need to say more about the relative strengths of the two kinds of normative reasons.

It may not happen often that act-based and pattern-based reasons point in different directions, in particular if we take long-term and indirect effects of our actions into account. For example, in the transplant case, we saw that we may not need to appeal to moral rights in order to say that the doctor should not kill the patient. The above-mentioned indirect and long-term effects, such as making people reluctant to enter hospitals, would do the trick. However, the appeal to moral rights aligns utilitarianism with common-sense morality and some consider this an advantage. Furthermore, one cannot always plausibly appeal to indirect effects, as I did in my discussion of the transplant case. If one assumes that nobody ever learns about the doctor's action, then the indirect effects do not play any role. Under such circumstances, act-based and pattern-based reasons can point into different directions. Within utilitarianism, there is a discussion about so-called esoteric morality. It deals with the question whether it can be right to break rules secretly if doing so has better consequences. Act-utilitarians accept esoteric morality and are not convinced that their theory provides the wrong verdict in these cases.[25] They would agree that it would be right for the doctor to kill the healthy patient if complete secrecy could be assumed. Of course, in most real-life cases, such secrecy cannot be assumed.

Utilitarian and non-utilitarian reasoning can be distinguished in many political debates about killing and letting die, including the debates during the coronavirus crisis. One such

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[23] B Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality*.

[24] C Woodard, *Taking Utilitarianism Seriously*, 32.

[25] K Lazari-Radek and P Singer, *The Point of View of the Universe. Sidgwick and Contemporary Ethics* (New York, Oxford University Press, 2014).

issue is how to distribute scarce medical resources, such as ventilators, in case of emergencies. A utilitarian approach would be, roughly, to maximize (quality-adjusted) life years, and some countries have proposed criteria along those lines. In Germany, this suggestion is widely depicted as unconstitutional and unethical. Non-utilitarian and even anti-utilitarian reasoning dominates the debate. Also, when it comes to evaluations of various policy measures, such as lockdown, most German politicians seem to focus on narrower aims related to what they see as their responsibilities, rather than taking all foreseeable welfare consequences of various options into account. Early in the COVID-19 response, one politician argued that the lockdown saves lives predominantly of people who would have died soon anyway, but may foreseeably cause the additional deaths of millions of children in Africa due to poverty. This remark caused an emotional outpouring of disgust across the political spectrum, which attests to the taboo on utilitarian reasoning in Germany. At least in this country, utilitarian reasoning is widely considered unconstitutional and unethical. This is probably due not only to religious influences, but also to some misguided association of utilitarianism with Nazi ideas and practices.

6. CONCLUSIONS

Initially, the utilitarian ethics of killing seems simple and straightforward: killing is right whenever it maximizes welfare; otherwise, it is wrong. Utilitarians evaluate acts of killing on the basis of their effects on the welfare of all concerned individuals.

As such, utilitarians need to take into account, among other things, the extent to which killing harms or benefits the killed individual. One prominent account of the harm of death focuses on the frustration of desires, another on the loss of future wellbeing. These views have different implications, in particular when it comes to the harm of death for individuals that do not have many future-directed desires. According to the frustration view, death is a lesser harm, or no harm at all, for babies, severely mentally disabled individuals and many sentient non-humans. The deprivation view (or life-comparative view), in contrast, implies that death can be harmful, even for individuals without future-directed desires.

Even if an act of killing harms the killed individual, that harm can in principle be outweighed. What matters, according to proponents of the impersonal total view, is the overall quantity of wellbeing that an action brings about. If an act of killing allows another individual to live, whose life contains at least as much welfare as the future of the killed individual would have contained, then it does not reduce the overall amount of wellbeing in the universe. Proponents of the impersonal total view thus accept this replaceability argument, which can be used as a justification of various practices of animal husbandry, among others, provided that the animals in question are granted pleasant lives. In contrast, proponents of person-affecting views do not accept the replaceability argument, since they focus only on betterness and worseness of lives. Since killing in the relevant cases brings about that a worse life rather than a better life is lived, while bringing an additional individual into existence does *not* imply that a better rather than a worse life is lived, the welfare loss due to the killing cannot be outweighed by bringing an additional individual into existence. Thus, the position that utilitarians accept in the field of population ethics (or whether they focus on wellbeing as a personal or an impersonal good) also influences their stance on the ethics of killing.

Lastly, utilitarians cannot only evaluate actions on the basis of their consequences; they can also accept other or additional evaluative focal points. Rule-utilitarians, for example,

unlike act-utilitarians, do not evaluate actions directly on the basis of their consequences, but only indirectly on the basis of whether they conform to the optimific set of rules. Prohibitions against killing in the pursuit of self-interest are likely to be part of the optimific set of rules. What is more, utilitarians may even accept moral rights. These can be understood as pattern-based reasons for action, that is, reasons to do one's part in bringing about a beneficial pattern of action. Utilitarians who argue along those lines are likely to accept the right to life of sentient humans as well as non-humans, which influences their stance on killing. However, even those utilitarians who accept rules or rights against killing are likely to allow for exceptions if necessary to avoid disaster.

Thus, we see that the utilitarian stance on killing is not as simple and straightforward as it might initially seem. In fact, there is not one utilitarian view, but different positions that a utilitarian might accept.

17. Health crises from a utilitarian perspective

Xavier Bioy

Intellectuals and politicians may be tempted to invoke 'utilitarian' thinking to determine what should be done in a time of 'health crisis', such as when a pandemic threatens many lives or the health deterioration of many, and States consider slowing down human activities to limit that risk. Utilitarianism, however, which historically oscillates between describing and prescribing behaviours, is neither a system of thought (even though it rejects any transcendent conception of moral good) nor a univocal doctrine (as it is made up of several, classical or contemporary, schools of thought) but a pragmatic, consequential and universal moral philosophy of action. It is mainly looking for norms that could maximise well-being (man wants and should only want well-being), utility, for the greatest number of members of the body politic (maybe, beyond, to the profit of non-subjects[1]), by taking into account the consequences of choices made either individually or collectively. The priority is therefore not so much to be virtuous, or to conform to a normative rule, as to appreciate the idea and its merits from the point of view of its concrete effects.[2]

Utilitarianism calls for an assessment of that well-being and thus sometimes an economic quantification which reduces the morality of action to the result of calculations. Nonetheless, utilitarian economists reason rather in terms of cardinal value ('the cost or the price' of a thing, that of a psychological hedonism) or of ordinal value (depending on the preferences that everyone declares they have to avoid a risk or prioritise one's desires, a utility per preference). Thus, correcting the objectivist interpretations of Bentham's thought, the school of thought derived from Mill's introduces the idea that the pursuit of moral virtuous values from an altruistic perspective may also be one of the goods considered in the calculation. Today's utilitarianism moves away from Bentham and Mill yet again, by defining utility as a criterion that is more objective than the mental state, that is, as the satisfying of preferences, which supposedly represent the well-being of the individual.[3] In any case, utilitarianism accepts and integrates those limits. Knowledge is finite, or even limited; a useful decision is made within a given context and conditions; thus the solution resulting from the utilitarian reasoning varies depending on circumstances, including emergency and uncertainty, and does not result only from understanding. Utility comes from the will and prescription that the law neutrally shapes.

Utilitarianism therefore analyses the ends of action, and not, like ethics, the respect of *a priori* principles. Similarly, it is the value of the act and not that of the subject which matters. However, it collides with the separation of the current happiness of everyone and its collective

[1] See C Audard, 'Avec le tri des malades, va-t-on vers une éthique "utilitariste"?' (25 March 2020) *Le Nouvel observateur*, available at www .nouvelobs .com/ idees/ 20200325 .OBS26589/ avec-le-tri-des-malades-va-t-on-vers-une-ethique-utilitariste.html; P Singer, 'Utilitarianism and Vegetarianism' (1980) 9/4 *Philosophy & Public Affairs*.

[2] RE Goodin, *Utilitarianism as a Public Philosophy* (Cambridge, Cambridge University Press, 1995).

[3] R Nozick, *Anarchy, State and Utopia* (New York, Basic Books, 1974) 43–5.

maximisation and looks for the conditions of both coexisting, mainly through a system of adapted sanctions. Therefore, a rule is not better than another in itself but rather when their effects are compared, which leads to the difficulty of combining prudential rationality and universal prescriptiveness. Bentham managed to do it in his famous formula, 'Ethics at large may be defined as the art of directing men's actions to the production of the greatest possible quantity of happiness for those whose interests are in view'.[4]

There results a strong criticism of human rights as natural and formal subjective rights, the guarantee of which interferes with the principle of utility, which seems better placed to produce equivalent individual benefits. Conversely, those against utilitarianism denounce the fact that, from a radical perspective, some individuals, and not only their rights, without distinction, could be sacrificed on the altar of complete well-being. For example, quarantined patients who would be too contagious to come near would not be treated. In response to that position, some authors distinguish between the utility of rules and that of acts, and give priority to the former, which allows to provide for and go beyond particular cases which would put the individual directly at the mercy of society.

Thus, health could be not a 'right' but a utility, a guarantee for other utilities, that one and the actions of the State ensure. Health even tends to be assimilated with the idea of 'well-being':[5]

> Well-being lies in a general feeling of pleasure, of fulfilment, which is created by the full satisfaction of the needs of the body and/or the mind. The English word 'well-being' is more comprehensive than the French word *bien-être* since it also contains the dimension of wealth and prosperity. That multiple meaning introduces an ambiguity in the understanding of well-being, the meaning of which oscillates between income and goods on the one hand, and 'utility' and happiness on the other. However, an objectivist conception of happiness implies a diversity of human goods, which are not only material ones, but also talents, personal relations, self-esteem, capacities and private or personal goods such as reflection, imagination, aesthetic sense, etc. […] Modern tradition shows that well-being is based on the notions of desire, preference and need.[6]

Health is therefore seen as a good that, most of the time, everyone prioritises for themself. The global character of that tendency results in health being a collective and common good.

1. OF HEALTH AS A UTILITY FROM A MORAL POINT OF VIEW

In principle, adopting an impersonal approach, utilitarianism does not rank subjects nor types of worthy or unworthy lives but relies on pleasures and pains – which are to be decided by individual will – upon which the collective order is built, and which tend to favour well-being. Bentham's 'felicific' calculus,[7] which revolves around a conception of the useful reduced to

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4 J Bentham (1780) 282.

5 JP Cléro, 'Bentham, Stuart Mill et la santé publique' (2011) 32/1 *The Tocqueville Review*, 113–41.

6 C Guibet Lafaye, 'Bien-être', *Dictionnaire du corps* (Paris, PUF, coll Quadrige, 2007) 127–31.

7 J Bentham, *An Introduction to the Principles of Morals and Legislation* (Garden City, Doubleday, 1789).

pleasure, draws upon several criteria, which are combined and may oppose or reinforce one another: duration (prevalence of long and sustainable pleasure), intensity, certainty (prevalence of positive pleasure on hypothetical pleasure), proximity (prevalence of immediate pleasure, which goes along the previous point), scope (a pleasure that is experienced with others is more useful than one that is experienced alone), fecundity (prevalence of a pleasure that triggers other pleasures), purity (a pleasure which does not entail later pain is more useful than one that may cause some).

In the domain of health, those criteria apply with some specificities, which are more or less extended depending on the chosen definition, from the simple technique of care aiming for recovery from some pathology to the complete state of well-being which is proposed by the World Health Organization.[8] Health represents a fundamental asset, not least because it indirectly conditions a lucid and autonomous will exercised by fighting the illness which weakens the subject and its productive strengths. It is supposed that everyone only wants to be in good health. However, as a private good, or even as the right to self-determination, utilitarianism will apply differently depending on the meaning that is conferred upon that word, in terms of whether one speaks of health in an objectivist, positivist or statistical way, as conforming to or at variance with a supposed biological norm which is presented in categories which are more or less arbitrarily decided,[9] as opposed to a more subjective conception which assesses the state of health in relation to normalisation, the constant adaptation of the physical individual norm.[10] In the former case, the calculation of the highest good may be done outside the person; in the latter, preferences will be personalised and chosen together with the concerned party. According to Rawls' criticism,[11] the neutral and impersonal perspective of utilitarianism, which is confused with impartiality, undermines taking into account the moral subject, which is reduced to its status as a support for utility. One should not add utilities collectively as is done for a same individual. However, a strict reading does not make health an aim in itself but, as usual, an object supporting utility, and consequently happiness; it may thus vary from one individual to another, depending on the conditions weighing on its sensitivity. Consequential logic will therefore balance it with other utilities without making it sacred.

Health does not always come alone. It may involve the life of the subject itself. Putting someone in danger by exposing them to a pathology or depriving them of care may destroy the subject itself, possibly in the name of a higher collective utility. Life must therefore be introduced as a utility apart from and first among others, the sacrifice of which would be detrimental to global utility, a utility that weighs so much in the calculus that it determines it to a large extent – which amounts, practically speaking, to a sort of deontology or rule utilitarianism.

As a public good, as an aim of public health policies, the calculus imagines some 'collective health'. The State has an interest in everyone remaining in good health and protecting that of others, for the productive effort or even the war effort, which can also harm life and health, but are also, incidentally, a source of innovation and development. The State acts as guarantor and

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[8] Preamble to the Constitution of the WHO adopted by the International Health Conference on 22 July 1946.

[9] See C Bernard, *Introduction à l'étude de la médecine expérimentale* (Paris, Champs Flammarion, 1865).

[10] Cf. G Canguilhem, *Le normal et le pathologique* (Paris, PUF, 1966).

[11] J Rawls, *Théorie de la justice* (Paris, Seuil, 1971) 279.

promoter of public health and hygiene.[12] Utilitarians are sometimes reproached as imagining there is some collective health and not only the addition of individual healths which may be the object of preventative and care actions.[13] The 'biopolitics' of Bentham and his disciples[14] focused on education and care in the interest of the majority and only took into consideration the results of that effort for the success of economic liberalism, without caring for the bodily or moral integrity of the individual. 'As Foucault noted, though utilitarianism was a theoretical matrix of *bio-politics* – as a way of rationalising phenomena proper to a group of living beings established as a population – it was nonetheless a challenge to liberalism.'[15]

Discipline (in Foucault's meaning) goes along with the frugality of the State in a liberal economy but, paradoxically and logically, utilitarianism seems to call for more intervention from the government. The utilitarian foundation of individual freedom as supported by a traditional economy would therefore be fundamentally deficient. Whereas economic science has recommended that the State abstain in order to leave individuals free to make their own choices, the results of social sciences, which consider that the individual is not capable of making rational and responsible choices, have reoriented that paradigm. Behavioural economics[16] concentrated on the biases and inconsistencies of individual behaviour. On the basis of those developments, governments prescribe many virtuous behaviours under cover of prevention, especially as to health, which correspond to what Foucault would have called 'discipline'. Thus individual freedom could become not an adjustment variable of the utilitarian economy but an end in itself, which should be re-established as a central value of our society.[17]

Moreover, utilitarianism, with its 'cynicism', its pragmatism and call for quantifying everything, may hurt sensitivities, especially in the domain of health – the domain of vulnerability, pain, death and therefore empathy and solidarity. As a counterpoint, it is nonetheless a way of speaking which doctors, scientists of the biomedical world, public administrations and health or insurance companies like, because of its technocratic, objectifying, complex and elitist content.

> There is a freedom-killer element in utilitarianism. It is a technocratic, overhanging moral philosophy for scientists. English philosopher Henry Sidgwick said it is a moral philosophy for rulers because it goes against common sense. It reasons on the basis of the collective, on aggregates. That explains why it is so pervading in the medical world […] there results a discrepancy between the expectations based on the maximisation of preferences or well-being and individual behaviours.[18]

The rationalisation of decision-making increases its predictability and reassures a medical world which is ever more costly and technology-dependent. One should however nuance that statement by explaining that the calculus must also take into consideration the medical

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[12] JS Mill, *On Liberty* (1859).

[13] V Guillin, 'Biopolitique, utilitarisme et libéralisme: John Stuart Mill et les Contagious Diseases Acts' (2010) 73 *Archives de Philosophie*, 615–29.

[14] See M Foucault, *Histoire de la sexualité* (Paris, Gallimard, 1976).

[15] V Guillin, 'Biopolitique, utilitarisme et libéralisme', 615.

[16] A Tversky and D Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185/4157 Science, New Series.

[17] G Saint-Paul, *The Tyranny of Utility: Behavioral Social Science and the Rise of Paternalism* (Princeton, Oxford, Princeton University Press, 2011).

[18] C Audard, 'Avec le tri des malades, va-t-on vers une éthique "utilitariste"?'.

staff's support of the system, when they may feel there is an important loss of meaning in an impersonal and collective utilitarian calculus about a patient who cannot resolve to accept it themselves. Habermas[19] tries to reconcile the deontologist and utilitarian approaches by considering that the validity of a norm depends on how the concerned parties accept its consequences.

Not only is health itself a cost, but it creates wealth:[20] first, because individuals generally consider that health is a 'higher good' and the life expectancy of individuals systematically improves with the increase of income – that is why increasing taxes to the point of limiting that financial capacity becomes counter-productive for the health system (limiting 'free' private income too greatly results in reducing the population's life expectancy); second, because medicine draws on very diverse knowledge and technologies which generate growth and activity.

2. OF HEALTH AS UTILITY FROM AN ECONOMIC POINT OF VIEW

If it comes down to it, a purely economic analysis allows for giving life a price.[21] In 2020, Mathieu Mucherie, the head economist at BNP Paribas Cardif, explained about the Covid-19 pandemic that 'not adopting a unique value of human life, applied in a consistent manner in all the areas of action, leads to the death of many persons who could have been saved using the same means'.[22] He explained that the value of human life in France had been 'calculated' in 2013 at 3 million euros per person based on the 'Quinet report' of the General Commissariat for Strategy and Forecasting.[23] Two methods may produce this type of result: either by referring to the human capital that society has lost when someone dies (that is, the sum of the future production of the person – a method that is used in the judicial context, especially for damages awarded to the families of victims of terrorist attacks), or by referring to the 'individual consenting to paying to avoid an increase of risk' (for example, the compensation employers pay for risky positions, for a job for which there is a 1/100000 chance of dying within the year, which therefore leads to $900 higher compensation per year than for an equivalent position without risk – which results in the price of life being about 9 million dollars).

Utilitarian calculus has been used in public health policies[24] for more than half a century. As early as the 1970s in the United States, decision-making was rationalised (for technical investment as well as individual care) by combining efficiency and cost based on the 'HTA' calculation. In 1999, NICE (National Institute for Health and Clinical Excellence), the British

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19 J Habermas, *De l'éthique de la discussion* (Paris, Cerf, 1992).

20 JP Cléro, Calcul moral. Ou comment raisonner en éthique? (Paris, Armand Colin, 2011).

21 A Colonomos, *Un prix à la vie – Le défi politique de la juste mesure* (Hors collection, Philosophie, 2020).

22 M Mucherie, 'Sauver l'économie ou sauver des vies? Pourquoi les citoyens occidentaux ne sont pas plus au clair que leurs gouvernements' (30 March 2020), Atlantico online.

23 'Elements for a revision of the value of human life' (2013).

24 M Gadreau, 'Économie et éthique en santé, Du calcul au jugement de valeur' (2009) 10 *Revue de philosophie économique*, 3–17; C Thébaut, 'Méthodes d'évaluation économique de trois agences publiques d'évaluation des stratégies de santé (NICE, IQWiG et KCE): quels fondements en matière de justice sociale?' (2011) 1/2 *Économie publique/Public Economics*, 219–47.

assessment agency, considered that economic assessment was the central element of the HTA model. However, faced with oppositions to economic determinism, the ethical issue was solved by multi-criteria analyses (mainly cost/usefulness and cost/benefit ones) including some equity criteria. Then the unit of measure of benefit is usually the QALY (*Quality-adjusted life year*) which presents a value between 0 (amounting to state of death) and 1 (perfect health). Any intermediary value corresponds either to a fraction of a year in good health, or to one year in a deteriorated state of health, or to a combination of both. Passing, through aggregation, from subjective individual preferences to a socially objective QALY indicator remains problematic. For example, patients who suffer a pathology to which therapeutic means may bring an answer which substantially improves their life expectancy and quality of life will be favoured over those who suffer a pathology for which medicine can only marginally improve life conditions and quantity of life. Moreover, the scientific rigour of those approaches is being challenged today.

Over a few years and following a two-stage process of rationalisation of health policies, the public economic calculus, in the domain of health, has taken on a major importance by imposing the economic criterion as the main decision-making one. In so doing, it has focused on a highly technical utilitarian approach, imposing a form of ethics and social justice widely challenged on the methodological, theoretical, practical and operational levels.[25]

Whereas in the United Kingdom the use of utilitarian logics seems to be quite developed, in France, Opinion 101[26] of the Comité Consultatif National d'Ethique asks: 'Should […] if necessary, the principle of universal equality in the face of sickness be swept aside so as to achieve a more equitable distribution of health resources and services?' A 'utilitarian' approach, which conforms to distributive justice, would answer positively to 'highlight the contradictory interests in society' and would thus enlighten the democratic debate. The Comité nonetheless thinks that the value of utilitarianism does not match that of deontology, which is the unconditional guarantor of the human person. According to the Comité, 'The ethical and economic constraints of the hospital system – which is also true for the more general context of democracy […] – in fact reside in the opposition between two apparently mutually exclusive concepts: the "unconditional value" of an individual and "satisfying the greatest number".'

With regard to the notion of cost-effectiveness, it considers that public health is not an ordinary good, but 'the very backbone of a public service which keeps an essential relation with citizens'. 'The utilitarian principle […] cannot meet the requirements of justice if it is realised at the cost of a great misfortune for a small number of people.' As a social policy, the establishment of health services draws on significant considerations of redistribution and social justice which set off among 'prioritarianist' utilitarians quite a few lists of arguments, mainly in favour of the poorest.[27]

During debates on how to price care, the choice of paying per medical act was deemed both positive, since it allows to give medical staff a sense of responsibility and to encourage them

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[25] P Abecassis, 'Le calcul économique en santé: leurre ou boîte à outils à l'intention du décideur?' (2014) HS 3 *Les Tribunes de la santé*, 43–50.

[26] Avis 101 'Santé, éthique et argent: les enjeux éthiques de la contrainte budgétaire sur les dépenses de santé en milieu hospitalier' (Opinion 101 'Health, ethics and money: the ethical issues of budget constraint on spending in hospitals').

[27] A Sen and B Williams, *Utilitarianism and Beyond* (Cambridge, Cambridge University Press, 1982).

to be more productive, and negative in that it may lead to not taking care of costly patients as it does not take into account the role of hospitals in society, that is, welcoming and taking charge of suffering (not only curing but also caring). Medical staff involved in choices would be diverted from their compassionate role towards guilt, leading to bad management. Beyond that, a more complete reading integrates the management and economic considerations of the healthcare facility which delegates to the head of department the concern for the cost-effectiveness of the health service. The interest of the patient is combined with that of the service in the positioning of the care offer. Depending on the salary methods and ethics of the facility, depending on whether it is deemed better to have a high level of bed occupancy or fast rotation, or to keep a patient who needs acts which can be charged for rather than another who brings no benefit, the patient themselves becomes a utility for the system, which affects the calculus. Here, all the parameters count: the cost burden (the patient, their insurance, the community), the methods of financial and technical endowment of the service, how necessary care is, the existence of other services which might take the patient, what another patient requires. It is not certain that rationality is explicitly set by the decision-maker.

Charging per act has already been approached through leading heads of services refusing or 'getting rid' of patients who might occupy beds when they do not need charged care: that is the case for people in a long-term coma state who may be left in their families' care or sent to unsuitable medico-welfare establishments, or quite simply have their treatment stopped, leading to their death. In France the Vincent Lambert case ended in this way when a minimally conscious patient – a patient who had left no instruction and whose family disagreed on the testimony of his wishes, but who might still live for many years without waking up, in a light coma – was no longer fed.[28]

In health issues, as well as in general, the assessment of collective utility concentrates a number of difficulties. Thus, the main criticisms against utilitarianism are about practical realisation. Even when utility is not reduced to pleasure, and even without resorting to preferences, it is difficult to establish the latter at the individual level and even more at the collective one (see *optimality* of Pareto). It is difficult to set a choice in a reasoning when there are no unanimous preferences which also depend on initial capacities – in the health domain even more than in general. It is then tempting to go back to an analysis in terms of needs and emergency,[29] via a form of objectivation which is outside volition, which 'common' utilitarianism uses a lot. In medical ethics, some authors try to make situations comparable (by calling upon the capacity to 'put oneself in someone's shoes') or to combine collective utilities by applying coefficients to choices of rejection or demand.[30] It is therefore complex (even when one has a lot of time to devote to the matter) to determine which utility must really give a purpose to choices: economic development, social cohesion, advancement of youth …

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[28] B Romefort, *Maintenir la vie? L'ultime décision: réflexions sur l'arrêt de l'alimentation des patients en état végétatif chronique* (Rennes, Presses de l'École des hautes études en santé publique, 2015).

[29] D Wiggins, *Needs, Values, Truth: Essays in the Philosophy of Value* (Oxford, Oxford University Press, 1998).

[30] J Harsanyi, *Essays in Ethics, Social Behavior and Scientific Explanation* (Dordrecht, Springer, 1976).

3. A SIMPLIFIED UTILITARIANISM FOR CRISIS TIMES

It is not possible to describe the utilitarian analyses of health in their entirety here, especially when permanent indicators and complex analyses may be needed, but we are going to try and test how to mobilise them in case of crisis, in emergency situations and when faced with an influx of cases. Uncertainty becomes higher. Though one may think that utilitarianism remains a somewhat unsophisticated, simple stance, which is less elaborated than other social justice moral philosophies such as that of Rawls, the advantage of that method, which is adaptable and without definitive conclusion, is that it may be used in times of crisis and emergency.

It is easy to apply a utilitarian reading to measures against the spread of disease when the issue is to compare a health security policy, which saves lives here and now, to its economic consequences (see French president Emmanuel Macron's 2020 formula 'whatever it takes'). Often mixed up with radical capitalism, utilitarianism globally focuses on saving companies, jobs and resources without which other situations would be threatened, among which the health of people. During pandemics, some governments adopt the theory that contagion should be left to operate in order not to deliberately weaken the system. They are however often required to take precautionary measures due to public opinion which does not accept the random sacrifice of their health. Utilitarianism is not pure economism.

In the context of a health crisis, rules which avoid the transmission of pathologies (which are more or less serious or contagious) and allow, by defining a necessity threshold, access to care services must be adopted. That makes it possible, at least, to avoid the degradation of the health state, and at best to re-establish the former, statistical state, which is never 'ideal' in itself.

One may first note three types of radical reading which may pride themselves on utilitarianism in a health crisis situation and which have different motivations but look for the same type of effect.

In a version that may be called 'hedonistic', which applies to behaviours that people rarely boast of, the pleasure of the greatest number may come before the fate of elderly or frail people, at the price of a little risk-taking which is reasonable to accept. This would seem to amount to accepting that a part of the population be sacrificed to the happiness of the majority. A radical interpretation, combined with a Kantian approach, even denies any interest or legitimacy to individuals who are permanently deprived of consciousness (coma) or even of reason (mental illnesses, severe disabilities). But that could play in different directions: letting the population go free and letting frail people be exposed, or forcing them to be vaccinated. However, that radical simplistic utilitarianism does not apply when one considers as an essential and primary condition that everyone has the right to live.

In a second conception, which is used by epidemiologists on the basis of the so-called collective immunity theory, it is acceptable to expose the population without trying to isolate people from the beginning, at the risk of thousands of deaths among frail people. One will only need to reinforce care services. The long-term aim of the strategy is a lower global number of deaths and economic cost than that which would be caused by stopping the march of society. There have been two models of it:[31] the 'philanthropic State' pays for lives by making concessions, especially by imposing lockdown, which implies suspending, for however long, many

[31] A Colonomos, *Un prix à la vie – Le défi politique de la juste mesure*.

economic activities; the 'patriarchal State' pays with lives for the pursuit of its interests by refusing to implement measures that are economically counter-productive.

According to a third, strictly economic reading, the most liberal heads of companies, refusing to engage in implementing efficient means to adapt the production system to the new health constraints, opt to maintain a standard of living which is supposed, in the long run too, to entail fewer social issues than a harder economic crisis resulting from lockdown measures. More generally, the supporters of the least-effort approach will fatalistically claim the need to adapt to the virus and 'live with it' without trying to avoid its effects. Conversely, the economic weighing of the long-term costs of the management of patients with after-effects of the illness may carry weight.

Utilitarianism, however, even when reduced to economic calculation, could not be content with a short-term calculation which would only take into consideration the cost of healthcare and the life expectancy of the patient. In practice, a more moderate approach is adopted, taking into consideration what the patient brings to other members of a family, a society or an economy, and maybe to the system of care itself, which improves through contact with them. For example, the care system progressively institutionalises the role of the 'expert patient' (and may even pay for it), especially in the domain of chronic diseases or long-term illnesses or even cancer. Those people, who are patients or former patients, make the work of medical staff easier by transmitting information or accompanying patients. They participate in essays and ethics committees, which improves performances. Similarly, rare or specific 'cases' stimulate research and innovation. The alternative in case of crisis is therefore not limited to the simplistic formula 'save lives or the economy'.

Calculus is used for the allocation of means of protection in case they are scarce. Where a deontological stance would lead either to deprioritising their allocation and therefore letting the market operate, or to allowing moral philosophies of protection protect vulnerable people first, utilitarianism calls for rationality from the State. The latter may opt for the protection of medical staff, more broadly those who may assist patients, for they will be more available and will maximise well-being. Since 2020, the Covid-19 pandemic has thus led to a rhetoric of 'essential missions', of the 'frontline' – expressions which are diversely appreciated from a principlist point of view because of the implicit hierarchy which is thus underlined.

Moderation thus prevails from the point of view of social control. Admittedly, utilitarianism would also adapt to deprivation of freedom providing health security. Is the autonomy of the person, which is here temporarily against public utility, an end in itself, or only a parameter of the calculus to maximise well-being in an illiberal society? A classic approach would undoubtedly answer with the primacy of utility, since it aims *in fine* at the interest of all. But other answers exist, for which health is thought of as a freedom. Today, freedoms appear as 'primary goods', in relation to the opportunity of realising one's potentialities, that is, to subjective determinations, needs and well-being (insofar as the advantage which is obtained from a good, by an agent, is not mainly pleasure, but potentialities that they may enhance; in short, objective capacities, or *capabilities*[32]). That conception is found in disaster or pandemic medicine *when resources are too scarce to be fairly distributed* and those who have the best chance of benefiting from them, but also those who have a more open future – such as young people and

[32] S Anand, F Peter and A Sen, *Public Health, Ethics and Equity* (Oxford, Oxford University Press, 2004).

people in good health – are chosen. The calculus aims at the greatest good of the community by maximising saved lives (of quality); it operates in the same way at the individual level by preferring death to life in bad health. Let us remember that that choice is not the individual's, except if they refuse care.

At the end of the 1860s there was a debate in England on the repeal of the Contagious Diseases Acts[33] which gave the police the power to force prostitutes to have a medical exam, in order to reduce the number of troops that were unfit for service due to venereal disease. Although that system seemed to satisfy the utilitarian model, John Stuart Mill firmly opposed it, and deployed utilitarian arguments in favour of individual liberty.[34] Even though it is useful, fighting epidemics must not result in abuses of social control, violation of women's dignity and of their equal rights with men's. Mill preferred that the clients of the prostitutes be monitored, not least in order to avoid their contamination of their own families. Last, integrating the moral value of prostitution in the calculus of utility, Mill thought that making the activity secure would amount to supporting it as a 'lesser evil' whereas controlling prostitution would result in it becoming underground and its potential increase. From that perspective, liberalism and utilitarianism complement each other and set the individual as the ultimate support of value and reality with regard to which the merits of state ethical or social interventions must be assessed. The calculus must therefore integrate freedom as a priority parameter, well-being not being only health but also the respect of the individual's will.

Freedoms are also ranked, more individually than collectively, because of the principle of equality. Some favour 'home' freedoms – those of intimacy and private life, recreational activities or freedom of religion – while public powers often favour freedom to work, freedom of trade and therefore transportation. The arbitration between minimising health risks (a corollary of the principle of maximising health benefits) and respecting some fundamental rights also depends on the preferences of everyone. Whereas freedom of movement was eventually accepted, restrictions on funeral rites were strongly challenged.[35]

4. TRIAGE ETHICS

The utilitarian decision-making model tries to save the highest number of lives by allocating resources to patients for whom intervention has the most chance of success and who as a consequence have the highest number of years of life to save. A principlist ethics of dignity, which refuses any calculus, would thus be an obstacle to any rationalisation in that particular context.[36] Although there are other moral models – such as that of Rawls,[37] which introduces more equality (by giving more resources to the most disadvantaged to improve their life conditions, even if that implies diminishing the global quantity of well-being of the community

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[33] Act of 1864 (27 and 28 Victoria C85) and Act of 1866 (29 and 30 Victoria C96).

[34] JS Mill, *Essays on Equality, Law, and Education.* Edited by J.M. Robson, with an Introduction by S. Collini (London and Toronto, Routledge & Kegan Paul, University of Toronto Press, 1984), 349–71.

[35] P Audegean et al., *Le bonheur du plus grand nombre. Beccaria et les Lumières,* (Lyon, ENS Éditions, 2017).

[36] JP Cléro, Calcul moral. Ou comment raisonner en éthique?

[37] J Rawls, *Théorie de la justice*.

as a whole) – the utilitarian model seems to be more efficient in an emergency context which identifies priority patients based on the sole medical prognosis (survival probability, number of saved years, quality of life upon release). Though choices are most often made following a collegial procedure which allows staff to support them, doctors follow guiding principles regulating those choices.[38] Because of the impersonality of that assessment and its egalitarian appearance, people tend to be convinced that there is some equality of chances which creates support among the public opinion.[39]

When care resources are scarce, usual rules are replaced by a cost–benefit reasoning drawing upon utilitarianism. On the model of war or disaster medicine, heads of intensive care units follow guidelines for the allocation of care resources. That 'triage' (which is often called 'prioritisation' to avoid the negative meaning of the word) is effected via the 'clinical frailty score' which tries to maximise saved lives, or even years of life, and which partly provides the selection grid.[40]

Triage ethics, although criticised for its utilitarian nature, is apparently even becoming a usual mode of decision-making and care management outside crisis times. It is evidenced by the increasing international literature on the notions of 'quality of life' and 'uselessness of treatments':

> Triage is home to a tension between utilitarianism and egalitarianism. It belongs to utilitarian moral philosophy, which prescribes to save or care for the greatest number of patients, and egalitarian moral philosophy, which prescribes to treat them equitably. Even in the domain of end-of-life management, the lack of resources allocated to palliative care is considered as a loss of chance of being treated with dignity at the end of one's life. The utilitarian principles called upon in triage direct towards strategies of maximisation of good, for example of the number of lives or years of lives that are saved, or of the whole social happiness, and are thus opposed to very liberal visions (minimal ethics of Ruwen Ogien[41]) or libertarian ones (as defended by Robert Nozick[42]) in which individual rights (among which the right to have control over one's body) prevail over collective freedom and in which only the vision of one's or the other's safety allows for the right of the Leviathan State to interfere.[43]

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[38] RD Truog, C Mitchell and GQ Daley, 'The Toughest Triage – Allocating Ventilators in a Pandemic' (2020) 382 *N. Engl J. Med*, 1973–5; S De Montgolfier, A Lamblin and C Leport, 'Recommandation professionnelle multi-disciplinaire opérationnelle (RPMO). Aspects éthiques et stratégiques de l'accès aux soins de réanimation et autres soins critiques (SC) en contexte de pandémie COVID-19' (2020), accessed May 2020 at www.coreb.infectiologie.com/UserFiles/File/procedu-res/rpmo-ethique-rea-covid-19-vf-24-corr26-mar20-2.pdf; C De Jong, AH Chen and B Lo, 'An Ethical Framework for Allocating Scarce Inpatient Medications for COVID-19 in the US', (2020) 323/23 *JAMA*, 2367–8.

[39] C Lefève, G Lachenal and VK Nguyen, 'Médecine du tri. Histoire, éthique, anthropologie' (2014) 6 *Les Cahiers du Centre Georges Canguilhem*.

[40] N Daniels and JE Sabin, *Last Chance Therapies and Managed Care. Pluralism, Fair Procedures, and Legitimacy* (Hastings Cent Rep., 1998) 27–41.

[41] R Ogien, *L'éthique aujourd'hui. Maximalistes et minimalistes* (Gallimard, coll. Folio essais, 2007).

[42] R Nozick, *Anarchy, State and Utopia*.

[43] K Bréhaux, 'Une réalité institutionnelle du tri en médecine ou comment faire au mieux ?' (Sep. 2015) 12/3 *Éthique & Santé*, 182–9.

'Triage' is fully expressed in an institutionalised way, for example in the right to organ transplant, and, more exceptionally, in intensive care units. It implies the standardisation and normalisation of practices towards the elderly in particular, to the detriment of distinctiveness and at the risk of discrimination. Age is in fact systematically and mainly used among other criteria. It is not in itself an indicator of the state of health or its perspective in itself, though. It is only a practical element which, based on a large number (with a statistical objective), gathers comorbidities (overweight, chronic ailments, psychiatric issues), which alone are relevant. Using it results in a simplistic utilitarianism which contradicts the non-discrimination principle developed by most of the human rights corpuses.

In Italy, the intensive care college, for example, noted that 'it may be necessary to set an age limit to entry to intensive care units. This is to […] keep resources that could be limited first to those who have the most chances of survival and then to those for whom the highest number of years would be saved. The objective is to maximise the advantages for the greatest number'.[44] In France, several academic societies, followed by different organisations (for example Agence Régionale de Santé d'Ile-de-France and healthcare facilities), recommend using the frailty and autonomy scores to decide whether to admit patients to intensive care.

Admission in intensive care is then guided, among others, by taking into account the former state of the patient, their frailty assessed based on a Clinical Frailty Scale, their age, their comorbidities, their neurocognitive state, the degradation kinetics of their global state over the past months, the current clinical seriousness of their state (by assessing the number of organ deficiencies when the decision is being taken), and so on, which are all elements upon which the usefulness of care for the person is founded, while prioritising, or not, care in relation to others. From a utilitarian perspective, what is even sometimes taken into consideration is favouring caring for 'useful' people such as medical staff, or, conversely, penalising people who are deemed to have put themselves in danger and who are faced with illness, or who have disregarded a health protection measure and put others in danger. That would amount to approving of 'virtuous' behaviours which are community-oriented. Conversely, some underline that utilitarianism is a form of paternalism which is deaf to the patient's will (can they decide to let other more 'useful' people be cared for before themselves?).

5. THE CASE OF THE VACCINATION OF POPULATIONS

The production and administration of vaccines, for purposes of prevention and eradication of some pathologies, can easily use utilitarian calculus, which is strongly resorted to in periods of health crisis. A vaccine may entail more or less serious side-effects for a few individuals, but these side-effects are, intentionally speaking, for their own good, and, generally speaking, for everybody's utility. Then, administering it calls for a differentiated calculation depending on whether one wants to measure the 'sum' of utilities strictly speaking and require the maximisation of its utility or of the whole well-being (following Bentham's and Sidgwick's classical utilitarianism), or whether one chooses, as in Mill's or Harsanyi's utilitarianism, to divide the sum of utilities by the number of individuals and therefore require maximisation of

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[44] Di lavoro Gruppo et al. (2020), as quoted in C Thébaut, 'Les théories de la justice sociale en santé à l'épreuve de la crise sanitaire du COVID-19' (2020) available at https://halshs.archives-ouvertes.fr/halshs-02995678/document.

utility per person. In the first case there is a risk of sacrificing the physically and economically most vulnerable; in the second, one will not vaccinate if too many people risk suffering from serious side-effects.

Conciliating utilities, as an objective need, is easy; conciliating utilities as they are felt and expressed by each person is much less so. On the one hand, epidemiologists underline that obtaining a vaccine avoids contagion and hospitalisations. It prevents illness, benefits the economy and protects the vaccinated individual and others in solidarity at the same time. However, if one looks at it more closely, through a utilitarian lens, vaccines are not all the same. They do not all prevent illnesses, but sometimes only reduce symptoms or the risk of transmitting those illnesses to others; some only protect the individual without limiting their contagiousness. In the eyes of rulers who calculate common utility, all of the vaccines are good to reduce risks. On the other side, the individual notes that it is possible to theoretically distinguish vaccines which only protect the vaccinated person (but which also avoid spreading), those which only protect against transmitting illnesses to others and those – the most common ones – which have both qualities (in reality things are more complex). It is therefore possible to classify vaccines, following a terminology which, from a utilitarian point of view, is already a moralising one, by distinguishing 'selfish' from 'altruistic'. An individual, who is aware that injecting a health product is never without small or important risks, may want to prioritise their vaccination choices and only accept what only protects them, or, on the contrary, may choose to protect others as well, without getting any direct benefit themselves (while hoping maybe that others will do the same to protect them). On their own weighing scale, their bodily freedom, which guarantees their integrity, is as important as, and maybe more than, their altruism. Many are thus tempted to use their freedom to adopt the 'free-rider' attitude, which passively profits from the vaccination of others without taking any risk. Conversely, utilitarianism may also result in 'efficient altruists',[45] who only agree to donate money or an organ or to risk their health, when measuring that their body is not worth more than others'; on the contrary, in fact. Thus a kidney donor justifies his choice by saying that the risk of dying in that case is 1 out of 4,000, that is, 4,000 times lower than for the recipient. The same type of calculus could justify being vaccinated regardless of one's own risks.

In health matters especially, the progressive giving up of medical paternalism and the fast transformation of the patient into a client consuming medical acts has modified the decision-making parameters in favour of a prevalence of individual utilities and their determination by the lay people. The medical corporation, which is often strongly interlinked with the administrative system of the hygienist State (according to a very Benthamian model[46]), must also modify its behaviour and choices. Things become more complicated when they are about parents who have a duty of care towards their children and do nothing to protect them, calculating as if it were about them while their child is a different person and will, who is entitled to some protection that the State may impose to realise its own objectives.

Lastly, States sometimes adopt even more refined utilitarian positions. Thus, collective utility does not require total vaccine coverage: a significant threshold may put an end to an epidemic. When a deontological stance would require the same sacrifice from all, governments

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[45] P Singer, *L'altruisme efficace* (Paris, Éditions Les Arènes, 2018).

[46] J Bentham, *An Introduction to the Principles of Morals and Legislation* (Garden City, Doubleday, 1789, 1961).

deem it useless to implement little efficient means of constraint on a recalcitrant few, when resorting to pedagogy and nudge, through presents or threats, is what is needed for most of the population to be vaccinated. They thus appear to be liberal without bearing the cost of an open conflict with part of or the whole population. Threats and sanctions also respond to a calculus set out famous by Beccaria.[47] As to vaccination, constraint is realised by restrictions of action and not through forced execution. Following the nudge logic,[48] liberal regimes do not resort to forcible vaccination, but reduce the means of opponents via removal from school, travel or job refusal and additional economic charges. The individual's consent remains legally intact, but nudges are changed into autonomous obligations: the individual accepts the vaccine to retain the utilities that they deem superior to physical integrity. In some way, the State thus obtains the adjustment of individual utilities to public utility after building the latter, which integrates respect of bodily autonomy, into the calculation.

Another utilitarian-like analysis, which is common in epidemiology, consists in defining different types of populations based on their exposition to (or even their integration into) the risk. Thus, as with care, the vaccine will be kept for 'frail' people (if it is rare) or they may even be forced to have it, collective utility then being not to have to care for them in addition to usual care. That can also apply to types of situations (for example, travelling to infected zones) and occupations (for example, biologists and medical staff). Here too obligation is not only about the protection of the person in their interest but also in the interest of others and the health system itself. Vaccine obligation goes against the right to respect for bodily integrity and personal autonomy. Judges having to decide those questions in Europe usually do not have the political authority nor reasoning techniques that would allow them to realise a complete utilitarian calculus. Proportionality control, between abstraction (depending on the degree of remoteness in relation to a particular case) and margin left to the political, does not allow for the implementation of legal utilitarianism.

Anyway, different levels and types of reasoning that can claim they are utilitarian may make it possible to adapt to the political conditions of a specific political system. When a legal system sets firm and specific limits to the power of a government, the latter's choices will be limited. Thus, some have explained the absence of constraining measures in Sweden during the Covid-19 pandemic by constitutional dispositions which forbid exceptional norms (like house arrest) outside of wartime. Similarly, the role of consensus on moral values, and especially the internalisation of discipline, plays a major role.

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[47] C Beccaria, *On Crimes and Punishments* (1764).

[48] RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven, CT, Yale University Press, 2008).

18. Medical ethics and utilitarianism

Alicia Dorothy Mornington and David Smadja

1. INTRODUCTION

This chapter is aimed at presenting utilitarian arguments used by philosophers, lawyers and physicians in the field of medical ethics and bioethics. It emphasizes the growing debate that has been occurring since the end of the Second World War about medical decisions, research on human subjects (or embryos), organ transplants and the like.

Even though these arguments are not always formulated by lawyers, the relation to the law as a collective decision remains a core issue in utilitarianism. As Jeremy Bentham established in *Introduction to the Principles of Morals and Legislation,* legislation is related to the sum of individual satisfaction in a society. Therefore, each particular debate concerning medical ethics leads us to put under scrutiny the theoretical and practical uses of the utilitarian framework. The question is how to know which individual or collective decision – or conduct – conforms to the principle of utility and, hence, is deemed right or wrong.

In the first main section of the chapter, we will focus on the utilitarian approach used in medical ethics in order to highlight the diversity of arguments involved and their critics. In the second, we will present and discuss two cases that reveal unexpected views on the use of utilitarianism in bioethics.

2. THE MAIN UTILITARIAN ARGUMENTS IN BIOETHICS

2.1 Utilitarianism: Between Philosophy and Cynicism

According to Jeremy Bentham and his seminal theory, utilitarianism evaluates any individual or collective action by applying the principle of utility. Actions are considered right or legitimate to the extent that they allow achieving pleasure and avoiding pain. On a social level, an action is right if it maximizes the sum of individual pleasures and if it minimizes the sum of individual pains. In other words, utilitarianism necessarily entails consequentialism.

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality, he will remain subject to it all the while. The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law.[1]

[1] J Bentham, *Introduction to the Principles of Morals and Legislation* (1789) chapter I.

The rationality of this approach has to be understood as mathematical – or arithmetical. It entails apprehending every individual as absolutely equal, without distinguishing her in any way. *Prima facie*, the principle of utility is framed as political or legal. As the law or the rule, it leads us to emphasize the collective dimension of individual action instead of apprehending it, all other things being equal. Despite the fact that it also shapes a moral theory, utilitarianism is mainly concerned with the political realm composed by collective decisions.[2]

> By the principle of utility is meant that principle which approves or disapproves of every action whatsoever according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words to promote or to oppose that happiness. I say of every action whatsoever, and therefore not only of every action of a private individual, but of every measure of government.[3]

On the one hand, from Hippocrates to the contemporary codes of deontology, medical ethics provides a principle of beneficence ('do not harm', 'maximize possible benefit and minimize possible harm'[4]). It is generally accepted and raises no criticism. To the extent that it is linked with the alternative principle of consent and autonomy, the utilitarian principle is not deemed controversial. On the other hand, understood as a political principle, it can lead to substantially different practices involving the sacrifice of individuals (consent or liberty). Seen under that perspective, it is clearly linked to the Nazis' atrocities ('torture and barbarities'[5]) in concentration camps, and therefore sparks moral indignation. In other words, the same idea, seen at different levels – medical and then political – turns out to be embodied in two uses, radically polarized.

According to the principle of beneficence, the physician has to pursue the patient's interest and to favour her wellbeing. Technical and medical tools, made available by the progress of medical science – such as dialysis or transplantation technologies – must be used in order to achieve the patient's best interest (to cure or prevent their disease, to relieve suffering). However, it is not the case that these aims have to be reached without any further scrutiny,

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[2] 'The obligations of beneficence affect both individual investigators and society at large, because they extend both to particular research projects and to the entire enterprise of research': 'Belmont Report' (1979) National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, available at www.hhs.gov/ohrp/regulations-and-policy/belmont-report/index.html. According to the Belmont Report, the risk–benefit assessment can be understood strictly speaking by apprehending physical and psychological harm but also, more generally, by encompassing social or economic harm, and so on. After the surge in awareness of the Tuskegee scandal – a syphilis study which involved government scientists and physicians experimenting on human beings belonging to African-American communities without their consent – a National Commission For the Protection of Human Subjects of Biomedical and Behavioral Research was instituted by the National Research Act of 1974, mandated to deliberate and formulate ethical principles and guidelines, that was soon to become the Belmont Report.

[3] J Bentham, *Introduction to the Principles of Morals and Legislation* (1789) chapter I.

[4] '*Hippocratic Oath*'; 'Belmont Report' (1979) National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research,

[5] P Amiel, 'Code de Nuremberg', trad., in *Des cobayes et des hommes: expérimentation sur l'être humain et justice* (Paris, Belles Lettres, 2011), available at www.inserm.fr/wp-content/uploads/2017-11/inserm-codenuremberg-tradamiel.pdf.

since they might give birth to a set of unpredictable risks for the patient as well as for the rest of society.[6]

The Nuremberg Code endorses a restrictive approach that is designed to oppose the utilitarian framework, seen as being too permissive. As long as an action is judged correct if it achieved the larger sum of individual satisfaction, it becomes crucial to discard this argument and to make room for an alternate aim grounded on the respect for human beings, persons or subjects of research or treatment. According to the first article of this international code: 'The voluntary consent of the human subject is absolutely essential.'[7] Hence, the pursuit of a collective goal cannot justify the sacrifice of the individual, as stated by the fifth article: 'No experiment should be conducted where there is an a priori reason to believe that death or disabling injury will occur.' For the same reason, 'during the course of the experiment, the human subject should be at liberty to bring the experiment to an end, if he has reached the physical and mental state where continuation of the experiment seems to him to be impossible'.[8] According to article 8 of the Declaration of Helsinki: 'While the primary purpose of medical research is to generate new knowledge, this goal can never take precedence over the rights and interests of individual research subjects.'[9]

The main conclusion that one can draw from the history of bioethics in the United States lies in the fact that utilitarianism and medical ethics cannot be blended in the same framework. In his famous article 'The birth of bioethics', A.R. Jonsen sets a new ethics of medicine requested by the social consequences of medical technologies such as the 'chronic hemodialysis program'.[10] More precisely, the gap between patients' needs and available means has created a context of scarcity that poses a new set of sensitive questions about who must live and who must die. Facing this ethical issue, the utilitarian solution consisting in accepting to sacrifice individuals is increasingly perceived as a policy in the sense that it does not really prevent physicians – and beyond them, democratic society – from risking becoming similar to the Nazis in their view of the human being. This period demonstrates clearly that utilitarianism (both medical with the principle of beneficence and political) has to be controlled by public debate, both ethical and political, because it failed to provide theoretical and practical tools likely to regulate 'the new medicine'. In 1966, Henry Beecher of Harvard Medical School wrote an important article in the *New England Journal of Medicine* that emphasizes the 'very nature of biomedical research'.[11]

Similarly, the debate about organ transplantation, which began after the first heart transplant was achieved by Professor C. Barnard in 1967, has deeply challenged the utilitarian framework. It made clear that the medical use of organs was problematic to the extent that the organs came from brain-dead people for whom it was technically possible to maintain blood circulation. More generally, ethical problems of another kind were about to be posed by the new technical possibility of conciliating brain death and organic life. Medical utilitarianism

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6 T Beauchamp and J Childress, *Principles of Biomedical Ethics* (Oxford University Press, 2001).

7 P Amiel, 'Code de Nuremberg'.

8 Ibid., article 8.

9 WMA Declaration of Helsinki (1964), art. 5, available at www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/.

10 AR Jonsen, 'The Birth of Bioethics' (Nov.–Dec. 1993) 23/6 *Hastings Center Report.*

11 Ibid.

argues that human organs would be more useful if they are transplanted in order to save lives. This approach was entirely consistent with the social movement after the Second World War, fully oriented towards scientism or positivism (or behaviorism). But, however consistent this argument may be, it did not appear acceptable to a growing section of the public. A need arose for an alternative ethical framework that would put the person and his autonomy first. This need was fulfilled by the publication in 1970 of the Protestant theologian Paul Ramsey's *The Patient as Person*.[12] It allowed for refreshing the Kantian argument according to which the person has to be considered as an end in itself.

In his article of 1969[13] about experimentation, Jonas provides an in-depth analysis of utilitarian arguments used in the case of medical research. While recognizing the idea of a social need or contract justifying the limits of liberty – the 'advantage of being familiar'[14] – he shows the limits of such a claim. In spite of its self-evidence, the social interest has to be clarified in order to determine what corresponds to its real content. This need is justified by the fact that, for Jonas, society is essentially an 'abstract' and not, as the individual, 'the primary concrete': 'The unknown in our problem is the so-called common or public good and its potentially superior claims, to which the individual good must or might sometimes be sacrificed, in circumstances that in turn must also be counted among the unknowns of our question.'[15]

In particular, apprehending public good by the calculus of interest – and the determination of 'the cumulative weight of the interest of the many' – may lead to a terrible confusion between right and wrong, due to the vagueness of this notion. This may compel us to accept, together with 'the appeal of numbers', the 'dangerous' reign of force and violence. Among other things, it ignores the crucial fact that 'the individual interest in its own inviolability is in itself a public interest'.[16]

2.2 Liberal Utilitarianism – John Stuart Mill

Utilitarianism is a theory composed of distinct threads united by the use of the concept of utility.[17] J.S. Mill, who is alongside Bentham one of the most famous utilitarians, therefore also sees utility as the most legitimate principle to guide action. Mill was a philosopher as well as a member of the British Parliament, where he pressed for social change and more equal conditions for the working class, as well as the emancipation of women.[18] In a nutshell, utilitarianism allowed him to argue against Victorian prejudices concerning class and gender.

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[12] P Ramsey, *The Patient as Person, Exploration in Medical Ethics* (Yale University Press, 2002).

[13] H Jonas, 'Philosophical Reflections on Human Experimentations' (Spring 1969) 98/2 *Daedalus,* Ethical Aspects of Experimentation with Human Subjects, 219–47.

[14] Belmont Report, 221.

[15] H Jonas, 'Philosophical Reflections on Human Experimentations'.

[16] Ibid.

[17] For a discussion on utilitarianism and its critiques, see W Kymlicka, *Contemporary Political Philosophy* (Clarendon Press, 1990) chapter 2. On rule utilitarianism, see RE Goodin, *Utilitarianism as a Public Philosophy* (Cambridge University Press, 1995). On animal rights utilitarianism, see P Singer, 'Utilitarianism and Vegetarianism' (Summer 1980) 9/4 *Philosophy & Public Affairs*.

[18] See N Capaldi, *John Stuart Mill: A Biography* (Cambridge University Press, 2004).

Unlike Bentham's classical understanding of utility, which is entirely consequentialist and does not ascribe *a priori* moral worth to individual preferences Mill's interpretation of the concept appears to differ. Over the course of four years, Mill published two central pieces: *On Liberty* in 1859, and *Utilitarianism* in 1863. The first is recognized as one of the embodiments of classical liberalism, the other as the foundation for utilitarianism. The two come into sharp contrast for this very reason, as utilitarianism is a theory which does not recognize the existence of individual rights, while liberalism does. As Crisp argues: 'on the face of it, On Liberty is radically inconsistent with Utilitarianism'.[19] Is Mill contradicting his own arguments or are they compatible? Isaiah Berlin argues Mill was more a liberal than a utilitarian but decided to remain within utilitarian theory out of fidelity to his father, James Mill, a utilitarian philosopher and early disciple of Bentham.

To understand the different facets of Mill's utilitarianism and its limits, chronologically, his first central argument features in *On Liberty,* where he says the following: 'I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.'[20] The second part of this quote makes it that clear Mill's understanding of utility differs from Bentham's. Utility is not absolute but contingent on the idea of man as a 'progressive being', which may be interpreted as possessing the ability to self-reflect and deliberate.

Mill's understanding of utility leads to several theoretical challenges. First, in *On Liberty* he puts forward a strong argument in favour of individual autonomy and individual rights, which appears to contradict the very idea of utility. Indeed, Mill argues that is weary of the 'tyranny of the majority', a concept he borrows from Tocqueville. Mill argues that '"the tyranny of the majority" is now generally included among the evils against which society requires to be on its guard'.[21] The object of Mill's work, he states, is to identify the legitimate sphere of state intervention. He pinpoints what he believes to be the greatest political danger of his times – the majority's tendency to compel individuals to act in conformity with its preferences. The tyranny of the majority is 'more formidable than many kinds of political oppression, since […] it leaves fewer means of escape, penetrating more deeply into the details of life'.[22] Individual freedom is to be protected from the state, which pervasively attempts to shape people's lives by imposing specific visions of the good life on minorities.

The reasoning he uses to justify the imperative of protecting minorities from the majority's influence is in part utilitarian. Indeed, Mill disputes that society itself benefits from individuals being able to purse their own preferences, even if they irritate the majority by doing so. All necessarily benefit from social *laissez-faire*, for '*it is only the cultivation of individuality which produces, or can produce, well-developed human beings*'.[23] Originality and diversity lead to discoveries, which in turn convey comparative advantages to countries, through scientific research and artistic progress. Mill claims that geniuses fare better if they are free from external interference, and that eccentricity plays an essential role in preventing society from being mediocre. This argument in favour of autonomy is entirely compatible with utilitarianism.

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[19] R Crisp, *Routledge Philosophy Guidebook to Mill on Utilitarianism* (Taylor and Francis, 2002) 174.

[20] Ibid., 17.

[21] JS Mill*, On Liberty* (1859) 10.

[22] Ibid., 11.

[23] Ibid., 73.

However, Mill also puts forward a much more liberal argument in favour of autonomy, which creates a conceptual tension, which explains why Mill is celebrated as a classical liberal as well as a utilitarian. He coins a powerful narrative of autonomy by devising a conceptual apparatus designed to protect the individual from society's reach – the *harm principle*.

Although he never claims that individuals are perfectly rational, he argues that they should be left to decide for themselves, for man, he claims, is 'the proper guardian of his own health, whether bodily, or mental or spiritual'.[24] Therefore, an individual's liberty can only be interfered with when he is infringing on another's liberty. Mill describes his principle in the following way:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[25]

An individual may be coerced if and only if his actions harm others. This position necessarily rejects paternalism, that is, when the state treats citizens as if they were children. Coercion may be justified, but not to protect individuals from their own choices, as long as they do not harm others by acting on such choices.

As such, Mill's argument is liberal, as the harm principle reinforces the idea of innate individual rights which the state should respect. Mill uses deontological reasoning, contending that there exists an *a priori* moral boundary of what a state should or should not do to an individual. He distinguishes between two types of act – self and other-regarding actions – and argues the latter solely constitute sufficient motive for public action.

His argument can be read as a contradiction of Bentham's utilitarianism. First, the harm principle is incompatible with the idea of a utilitarian state imposing on its citizens a specific perfectionist policy, on the grounds that it will produce the most utility overall. In other words, Mill draws a protective border around the individual, whose preferences cannot be bypassed. Utilitarianism, in its crudest form, allows for no such guarantee concerning individual autonomy, favouring the greater social good over private choices. Second, utilitarianism is a consequentialist doctrine – the socially optimal choice is revealed *a posteriori*, after individuals express their preferences. The harm principle contradicts this rationale by postulating that there exist boundaries which place certain aspects of individuals' lives beyond the reach of utility.

However, Mill also uses consequentialist reasoning to argue against paternalism. First, he argues that state intervention in one's private sphere is bound to fail. From an epistemological perspective, paternalism is wrong, as no agent can know what is best for himself aside from himself. The state has no way of discerning what is good for specific people. Second, even if it were possible to implement morally correct choices for people, coercing them would fail in its purpose as it would prevent people from learning by trial and error – a position described as the 'moral muscle' argument in the literature. Thus, intervention is mistaken as it will be detrimental to the development of a person's capacity to choose.

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[24] Ibid., 19.
[25] Ibid., 16.

If applied in medical ethics, this approach of liberty emphasizes its right consequences. Aside from the fact that creativity and innovation are often apprehended as a necessary part of human nature[26] that leads, for instance, 'to recognize the importance of freedom of scientific research and the benefits derived from scientific and technological developments',[27] the respect of a patient's autonomy implies not only listening to his or her preference or acting in accordance with a principle of autonomy no matter what the consequences of such respect would be; behind the autonomy stands the informed consent[28] of the patient that has to be understood not as static content, but merely as a process of inquiry linked to the nature of a 'progressive being'. For instance, the individual freedom of the sick person is defined by his continuous ability to obtain the relevant information related to his or her illness and to interpret his/her situation of weakness and fragility in a manner that would be eventually, and hence consequently, meaningful in his/her own eyes. This is why the consent 'may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice'.[29] Inversely, taking for granted a preference, whether it be an individual or collective preference – in the case of the choice of a majority – would be illegitimate to the extent that it would lead to increased risk and damage and fuel domination as a consequence.[30] Mill's utilitarian argument would lead to the rejection of any formal procedure designed to recall the consent of a patient. It would incite endorsing an informal approach grounded on a concrete interaction between the physician and his patient in order to reach a liberty based on the awareness of being sick.

In *On Utilitarianism*, Mill's argument engages more clearly with utilitarianism. In this book he offers a rebuttal of Bentham's understanding of utility, who famously argued that poetry was on par with pushpin, by putting forward a perfectionist argument of pleasure. Types of pleasure should be ranked according to merit. He claims:

> It is quite compatible with the principle of utility to recognise the fact, that some kinds of pleasure are more desirable and more valuable than others. It would be absurd that while, in estimating all other things, quality is considered as well as quantity, the estimation of pleasures should be supposed to depend on quantity alone.[31]

Mill defends a dichotomy between higher and lower pleasures, the former originating from an acquired, informed type of preference and the latter from animal or merely physical preferences. Intellectual pleasures rank higher than bodily types in Mill's hedonism. The distinction

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[26] 'Bearing in mind that cultural diversity, as a source of exchange, innovation and creativity, is necessary to humankind and, in this sense, is the common heritage of humanity, but emphasizing that it may not be invoked at the expense of human rights and fundamental freedoms' (Universal Declaration on Bioethics and Human Rights (October 2005) UNESCO).

[27] Ibid.

[28] Ibid., article 6: 'Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information.'

[29] Ibid., article 6.

[30] T Beauchamp and J Childress, *Principles of Biomedical Ethics*.

[31] JS Mill, *On Utilitarianism* (1861) 4–5.

between the two has been accused of vagueness, as one type easily collapses into the other.[32] It may also be thought of as elitist, precisely because Mill's view is not axiologically neutral, as he argued that 'it is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied'.[33]

An attempt to bridge Mill's arguments in *On Liberty* and *Utilitarianism* would go beyond the scope of this chapter. What appears clear however is that Mill's theory rejects axiological neutrality while at the same time defending the existence of a quasi-unbreachable private sphere. The two notions may not be as dissonant as it appears – the general principle to decide on human matters is utility, defined as a spectrum of pleasures. At the same time, this very utility does not justify sidestepping individual autonomy. Coercion does not constitute a illegitimate of state intervention in the private sphere. As Mill argues in *On Liberty*, a state may use education to shape children's preferences.[34] It may also warn individuals of impending danger – Mill discusses the example of a man about to cross a bridge which you know is dangerous. You have no time to warn him. Mill argues that in this specific situation, coercion is legitimate: you are allowed to physically seize him. By doing so, you are not restricting his freedom because as far as one can tell, he does not wish to fall into the river, given his ignorance of the risk of crossing. Yet if you are not certain of the risk, or if he claims he wishes to cross nonetheless, there can be no moral justification to coerce him.[35]

> His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.[36]

Regardless of the risk, as long as the pedestrian crossing the bridge is not harming others, society should respect his right to autonomous choice.

3. TWO CASES OF SPECIFIC UTILITARIAN ARGUMENTS

3.1 Utilitarianism and Solidarity

However, in response to the cynical conception of utilitarianism as unconcerned with moral values, the bioethics movement did not discard *all the utilitarian arguments*. On the contrary, it maintained them in another framework by displacing the perspective. Far from deviating from Bentham's way of thinking, this inflexion of the purpose, both legal and ethical, has implied a return, if not to the letter, at least to the spirit of Bentham's philosophy. Utilitarian arguments show up, first, within the articles of the Nuremberg Code under the form of individual calculus of the good, and second, under the form of permissive derogation to the restrictive principle of respect of the person.

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[32] See, eg, GE Moore, *Principia Ethica* (Cambridge, 1903) 77–81; or H Sidgick, *The Methods of Ethics*, 7th edition (London, 1907) 94–5.

[33] JS Mill, *On Utilitarianism* (1861) 2.6.

[34] JS Mill, *On Liberty* (1859) 119.

[35] Ibid., 109.

[36] Ibid., 16.

At the individual level, a decision is deemed right if it minimizes the sum of individual pain and this effort of limitation is required by the law and the principle of utility, including the harm principle of Mill. For instance, article 3 states: 'The experiment should be so conducted as to avoid all un-necessary physical and mental suffering and injury.'[37]

But, more significantly, the same utilitarian approach is issued though reorientation towards the interests of the most subaltern individuals or groups (patients and beyond simple human beings). In this new context, it is interesting to notice that the alleged 'public interest' is revisited from another perspective. Ironically, it excludes the abstract version of cumulative interest criticized by Jonas, by encompassing the concrete interest of the most vulnerable concerned by the humanitarian dimension of the decision. According to the Nuremberg Code, 'The degree of risk to be taken should never exceed that determined *by the humanitarian importance of the problem* to be solved by the experiment'.[38]

The research is justified if it minimizes risk, not only for the individual, but also for a new category of group of subjects: 'All medical research involving human subjects must be preceded by careful assessment of predictable risks and burdens to the individuals and groups involved in the research in comparison *with foreseeable benefits to them and to other individuals or groups affected by the condition under investigation*.'[39]

This part of the Declaration provides a new frame of interpretation by overriding the former logical boundary between individual and social (or collective) interest. A new qualification is issued here, that reunites the social and the individual by introducing the new entity of the 'group affected by the affection under investigation'. This move from the individual to the collective, in order to apprehend the sacrificed goods, is congruent with another move relating to the benefits itself which no longer concerns the whole society but, more restrictively, groups of patients ('with foreseeable benefits to them') and, by extension, the society of the persons who are likely to belong to the group of patients.

This use of utilitarianism is more complex than the Benthamite doctrine discussed in the first section of this chapter and only focused on preference maximization. Instead of looking at the social good as an abstract, able to encompass all types of individual interest, it proposes to distinguish between two kinds of interest – first, the interest of the strong; second, the interest of the weak (individual or group) – and to put the latter first. According to Bentham's philosophy, the right decision entails favouring the situation of those who have lost a crucial good and who are in need of assistance (for instance, in need of medical treatment). On the contrary, those who are not in need of help – and who are simply likely to satisfy their preferences – must not benefit from the same treatment. Far from being discriminatory, this inequality of treatment is fair to the extent that it maximizes the feeling of protection and of security in society. The expectation of the group of vulnerable persons (for instance the patients directly involved) who bear such a loss is more serious and relevant than the one felt by non-vulnerable persons who are not facing the same sensitive problems. The disarray brought by the loss of a crucial good (such as health) differs radically from the simple disappointment felt when preferences are not met. In the first case, the deception caused by the loss of health is stronger than the

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[37] P Amiel, 'Code de Nuremberg'.

[38] Nuremberg Code (1964) World Medical Association, art 5, available at www .wma .net/ policies -post/ wma -declaration -of -helsinki -ethical -principles -for -medical -research -involving -human-subjects/.

[39] Ibid.

one caused by the absence of benefits. In other words, human and social situations matter and have an influence on the content of advantages and risks and their calculus. Unlike a zero-sum game, in which the gain of the strong is identical to the loss of the weak, the advantage of the strong has to be less important than the need of the weak.

A similar use can be observed in the Belmont Report, in the part dedicated to the principle of beneficence. After defining the content of the principle of beneficence understood as 'an obligation' and not as 'kindness or charity', it emphasizes the ambiguity of its medical application by recalling that the 'learning of harm' itself implies taking the risk of 'harming' individuals: 'avoiding harm require learning what is harmful; and, in the process of obtaining this information, persons may be exposed to the risk of harm.'[40]

Using the same argument, the French philosopher Paul Ricoeur uncovers the core meaning of the principle of beneficence. It has to be apprehended by looking at its consequences as opposed to focusing on the intent of physicians. Regardless of the medical intention to achieve patient wellbeing, the real problem lies in the fact that curing entails objectifying patients. In other words, for Ricoeur, if intentions are set aside, there is no clear distinction between medicine and 'torture'.[41]

Here the utilitarian scheme is transformed. It is used, first, to recognize the real world of medicine defined by the importance of action or decision, and hence by assuming the centrality of risk. Second, it allows to clarify the idea of an appropriate risk that could be clearly distinguished from others: 'The problem posed by these imperatives is to decide when it is justifiable to seek certain benefits despite the risks involved, and when the benefits should be foregone because of the risks.'[42] To illustrate this nuance, the Belmont Report mentions another 'hard case': 'research involving children', particularly when the link between treatment and experiment becomes problematic. In such a case, research 'presents more than minimal risk without immediate prospect of direct benefit to the children involved'.[43] At this point, one can grasp a new boundary, with nothing between the 'inadmissible' on the one hand and the terrible possibility of 'research promising great benefit to children in the future' on the other.[44] Again, the utilitarian claim that has been stated above – which is primarily based on solidarity – is put forward.

3.2 Utilitarianism and Organ Selling

Since the 1980s, a global black market for organs has emerged, where non-vital organs, principally kidneys, corneas and liver lobes, are traded on a daily basis. Several factors explain the demand for organs. First, progress in transplantation techniques and anti-rejection drugs have made transplants a common procedure. Second, ageing populations and the upsurge in diabetes in industrialized countries have caused an increase in renal diseases, which has amplified the demand for kidney transplantation in particular. Third, this upsurge in demand has not been met with an increase in supply. Cadaveric organ donations are insufficient, as families

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[40] Ibid.

[41] P Ricoeur, 'Préface à Médecins tortionnaires, médecins résistants', *Lectures, livre I, Autour du politique* (Seuil, 1993).

[42] Belmont Report.

[43] Ibid.

[44] Ibid.

are often reluctant to authorize organ removal. Moreover, there is also a shortage of living or *in vivo* donors as few people are altruistic enough to give a kidney or cornea to a stranger out of disinterested generosity. In fact, many countries have made *in vivo* donations illegal outside the family circle to prevent organ sale. Organ shortage is thus a serious health issue.[45] People die every day waiting for vital organs.[46]

At the same time, inequality around the world has risen, leading the poorest to accept any type of work to escape poverty.[47] Most organ sellers come from lower income countries. The major exporters are India, Pakistan, the Philippines and China.[48] Other countries where kidneys are reportedly sold are Bolivia, Brazil, Iraq, South Africa, the Republic of Moldova, Peru, Turkey and Columbia. Organ prices depend on exporting countries: kidneys can be bought for $750 in Iraq or India, $2,700 in Moldova to $7,500 in Turkey.[49]

Organ sale is illegal in most countries but there are exceptions. Iran has legalized organ trade since 1988, and this has eliminated waiting lists there.[50] Other countries, such as Israel for example, reimburse medical costs linked to purchasing organs on the black market.[51] India originally legalized organ sales but, after widespread issues concerning fairness to donors, decided to ban the practice in 1994. Many countries are currently envisaging different options to increase organ supply, such as making cadaveric donation the default option.[52]

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[45] Y Shimazono, 'The State of International Organ Trade: A Provisional Picture Based on Integration of Available Information' (December 2007) 85/12 *Bulletin of the World Health Organization*, 955.

[46] On this issue, see Bentham's advocacy for medical experiments. Concerning his own body, he decided to let it available for scientific research after his death. Despite the substantial difference of political and scientific contexts, with medical experimentation on brain-dead people existing since the end of the 16th century and the 'Birth of Bioethics', it remains crucial to recall Bentham's statements and proposals related to the use of dead bodies. See G Tusseau, *La guerre des mots* (Dalloz, 2011).

[47] See B Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press, 2016).

[48] About 2,000 Indians sell kidneys per year, Pakistan would have roughly the same amount, the Philippines had 468 kidney transplants in 2003, and China had 12,000 kidney and liver transplants. Y Shimazono, 'The State of International Organ Trade: A Provisional Picture Based on Integration of Available Information', 957.

[49] J Whitehead, 'The Harvest: Human Organs and Human Security' (Spring 2008) 6 *Human Security Journal* 20.

[50] For a more detailed analysis, see: B Hippen, 'Organ Sales and Moral Travails, Lessons from the Living Kidney Vendor Program in Iran' (20 March 2008) 614 *Policy Analysis*; or A Nobakht Haghighi and N Ghahramani, 'Living Unrelated Kidney Donor Transplantation in Iran' (2006) 2 *Nature Clinical Practice Nephrology*.

[51] See J Lavee, T Ashkenazi, A Stoler et al., 'Preliminary Marked Increase in the National Organ Donation Rate in Israel following Implementation of a New Organ Transplantation Law' (2013) 13/3 *American Journal of Transplantation* 780–5.

[52] Nudges are being used to provide for more organs. In the UK for example, the behavioural unit helped increase the number of donations. See also: GS Becker and JJ Elias, 'Introducing Incentives in the Market for Live and Cadaveric Organ Donations' (2007) 21/3 *Journal of Economic Perspectives* 3–24; See J Lavee, T Ashkenazi, A Stoler et al., 'Preliminary Marked Increase in the National Organ Donation Rate in Israel following Implementation of a New Organ Transplantation Law'.

Although there is increasing lobbying in favour of legalizing organ sale, states regularly reaffirm their commitment to fight against it. There are many main sources of international law on the question. The EU, the Council of Europe and the World Health Organization have banned it and since the 1990s regularly reaffirm their fight against organ sales, with a multitude of conventions, resolutions and declarations signed.[53] The two main texts on organ sales come from, first, the World Health Assembly, which holds that organs should not be sold, as such a trade constitutes exploitation of the poorest: 'Committed to the principles of human dignity and solidarity which condemn the buying of human body parts for transplantation and the exploitation of the poorest and most vulnerable populations and the human trafficking that result from such practices.'[54]

Second, in 2008, experts from 178 countries, mandated by the World Health Organization, signed the non-binding Declaration of Istanbul on organ transplantation, which claims:

> Organ trafficking […] violate(s) the principles of equity, justice and respect for human dignity and should be prohibited. […] Practices that induce vulnerable individuals or groups (such as illiterate and impoverished persons, undocumented immigrants, prisoners, and political or economic refugees) to become living donors are incompatible with the aim of combating organ trafficking.[55]

The consensus that emerges from international legislation is twofold. An organ seller's consent is invalid because organ sellers are coerced into selling by poverty and are thus exploited.[56] Consent is understood as invalid and not reflective of an autonomous choice. Moreover, organ sales violate human dignity. The human body should not be sold, out of principle.

Sale of organs typically questions whether there are limits to what an individual legally may consent to, or rather how far reaching is consent in legitimizing contractual exchanges. Organ sale poses a serious philosophical challenge: on the one hand, based on Mill's classical liberalism, autonomous choice is generally perceived as valuable, and state interference invalid. Yet from a strictly utilitarian Benthamite reasoning, legalizing organ selling may be more socially desirable than the status quo. Indeed, if organs are sold freely, lives will be saved. Of course, sellers may experience some loss of functioning, and evidence shows this to be widely the case;[57] yet overall, the net utility gain would be positive. The utility loss from having only one kidney is clearly outweighed by the utility gain of living as opposed to dying of a renal disease.

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[53] For a complete list of international legislation on organ sale, see 'Legal Framework', The Council of Europe –European Directorate the Quality of Medicines and Healthcare, available at www.edqm.eu/en/legal-framework.

[54] Human organ and tissue transplantation, 63rd World Health Assembly (21 May 2010), WHA63.22, Agenda item 11.21, available at www.poltransplant.org.pl/who.html.

[55] Participants in the International Summit on Transplant Tourism and Organ Trafficking convened by The Transplantation Society and International Society of Nephrology in Istanbul, Turkey (30 April–2 May 2008) The Declaration of Istanbul on Organ Trafficking and Transplant Tourism 3.

[56] See also: 'Trafficking in human organs' (2015) European Parliament, Policy Department, Directorate-General for External Policies, available at: www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)549055_EN.pdf.

[57] M Goyal, R Mehta, L Schneiderman, et al., 'Economic and Health Consequences of Selling a Kidney in India' (2002) 288/13 *Journal of the American Medical Association* 1589.

This utilitarian reasoning explains why arguments in favour of legalization have become increasingly audible in the past decade among health practitioners and within academic circles in the US and in the UK, where utilitarianism continues to inspire public policy. The cost–benefit rationale has become ubiquitous in public policy, Jonathan Wolf argues.[58] As Debra Satz argues: 'the idea of establishing a kidney market is now attracting unprecedented support among those involved in transplantation, as well as among economists and medical ethicists.'[59] A 2013 literature review claimed that 71 per cent of economists writing on the subject in the English language were in favour of legalizing it.[60]

Yet international law firmly rejects the utilitarian argument in favour of legalizing. Even if legalizing organ sale would yield more utility, it should be banned. There are several key principles put forward by this legislation.

First, organ sellers do not appear to be sufficiently informed of health consequences. Their consent to selling cannot therefore be taken at face value. In India, people selling their kidneys are among the poorest. They have had no secondary or even primary education.[61] It is unlikely that they grasp the wide array of consequences removing a body part may entail. The Declaration of Istanbul on Organ Trafficking and Transplant Tourism (2008),[62] which bans organ sale, states that illiterate people are likely to be targeted by organ trafficking. Their inability to read makes them more vulnerable to fraud. The WHO concludes that for consent to be valid in organ donation, 'Live donors should be informed of the probable risks, benefits and consequences of donation in a complete and understandable fashion; they should be legally competent and capable of weighing the information'.[63] Because it is not possible to ensure sellers are fully informed, banning the trade is justified.

Second, following from this lack of information, international law presents sellers as victims of trafficking. They are described as vulnerable individuals who are not in a position to turn down selling an organ, out of sheer desperation. The United Nations General Assembly resolution 71/322 on organ sale highlights the ubiquity of coercion in its preamble, which states that its parties are 'alarmed at the potential growth of exploitation, by criminal groups, of human needs, poverty and destitution for the purpose of trafficking in human organs, using force, coercion, abduction, fraud or deception'.[64] In other words, states hold that most sellers are coerced into selling and victims of trafficking.

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[58] J Wolff, 'Making the World Safe for Utilitarianism' (2006) 58 *Royal Institute of Philosophy Supplements* 1–22.

[59] D Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford University Press, 2010) 189.

[60] T Beard, D Randolph, DL Kaserman, et al, *The Global Organ Shortage: Economic Causes, Human Consequences, Policy Responses, Economic Causes, Human Consequences, Policy Responses* (Stanford University Press, 2013).

[61] J Whitehead, 'The Harvest: Human Organs and Human Security', 24.

[62] The Declaration of Istanbul on Organ Trafficking and Transplant Tourism, 3.

[63] 'WHO Guiding Principles on Human Cell, Tissue & Organ Transplantation' (2008) World Health Organisation 3.

[64] Resolution adopted by the General Assembly on 8 September 2017, United Nations, 71/322, *Strengthening and promoting effective measures and international cooperation on organ donation and transplantation to prevent and combat trafficking in persons for the purpose of organ removal and trafficking in human organs*, available at www.edqm.eu/sites/default/files/medias/fichiers/Transplantation/Legal_Framework/who_res71-322_e-september2017.pdf.

Third, organ sellers are described as vulnerable. They are inevitably people in financial difficulty: all commentators, even those in favour of legalization, point to this fact.[65] The WHO argues that poverty leads to diminishing autonomy,[66] with people therefore not in a position to act according to their best interest. This position has been criticized as paternalistic towards the poorest members of society, whose consent is deemed worthless simply because they are poor. This argument is made by Ruwen Ogien, for example.[67] Michael Sandel refutes this claim, and defends the argument of vulnerability in the following terms:

> It points to the injustice that can arise when people buy and sell things under conditions of severe inequality or dire economic necessity. […] a peasant may agree to sell his kidney or cornea in order to feed his starving family, but his agreement is not truly voluntary. He is coerced, in effect, by the necessities of his situation.[68]

Lack of meaningful options negates the capacity of making an autonomous choice, according to this view. Legalizing organ sale would therefore not lead to increased utility for the peasant. On the contrary, it would rob him of the protection of the law. By preventing him from selling, legislation is protecting him from an option he cannot refuse, which is a quintessentially paternalistic argument: the law limiting autonomy to protect individuals from harmful choices.

Third, international legislation asserts that selling infringes upon the principle of human dignity, as does trafficking. A telling illustration of this combination of the argument from coercion and dignity is the European Parliament's 2008 Resolution 2007/2210 on organ donation and transplantation: Policy actions at EU level.[69] It uses the term "trafficking" 30 times, which highlights the focus on lack of consent and the illegal nature of the trade. This resolution mentions the word 'dignity' only three times, claiming for example that 'organ trafficking, commercialism and transplant tourism […] are inconsistent with respect for human dignity'. International legislation rejects the idea that sellers are autonomous agents whose freedom should not be curtailed, hence bypassing Mill's harm principle discussed above.

Lastly, international legislation uses utilitarian reasoning to justify banning by arguing that legalizing this trade would lead to negative externalities. In other words, contrarily to the argument put forward by advocates of legalization, states concur that a cost–benefit analysis on organ sale leads to maintaining a ban. Utilitarian reasoning is used against decriminalization. The EU Parliament's resolution mentioned above claims in paragraph 49 that

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[65] N Schepper-Hughes, 'The Global Traffic in Human Organs'(April 2000) 41/2 *Current Anthropology* 191–211; MJ Sandel, 'What Money Can't Buy: The Moral Limits of Markets', in *The Tanner Lectures on Human Values* (Oxford, 1998) 25, available at https://tannerlectures.utah.edu/_documents/a-to-z/s/sandel00.pdf; J Rapoport, A Kagan and M Friedlaender, 'Legalizing the Sale of Kidney Transplantation: Suggested Guidelines' (December 2002) 4 *The Israel Medical Association* Journal 1131–4.

[66] 'WHO Guiding Principles on Human Cell, Tissue & Organ Transplantation'.

[67] R Ogien, *L'Ethique Aujourd'hui* (Gallimard, coll. folio essais, 2007) 184.

[68] MJ Sandel, 'What Money Can't Buy: The Moral Limits of Markets', 8.

[69] European Parliament Resolution, 22 April 2008, on organ donation and transplantation: Policy actions at EU level (2007/2210) available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0130+0+DOC+XML+V0//EN.

> organ trafficking undermines the credibility of the system for potential voluntary and unpaid donors; emphasises that any commercial exploitation of organs is unethical and inconsistent with the most basic human values; stresses that organ donation motivated by financial considerations degrades the gift of an organ to a mere commodity, thus constituting a violation of human dignity.

This paragraph states that organ trade should remain illegal because it violates human dignity but also because it would undermine the donation system, by cheapening altruism.

Similarly, the preamble of the Council of Europe Convention against Trafficking in Human Organs, signed in Santiago de Compostela in 2015, states that 'the trafficking in human organs violates human dignity and the right to life and constitutes a serious threat to public health'.[70] Such reasoning is found in most international texts: the UN states that

> trafficking in persons for the purpose of organ removal and trafficking in human organs have a profound impact on the health both of those who sell their organs and of victims of trafficking in persons for the purpose of organ removal, as well as on organ recipients who may fall victim to deception, and that both crimes might represent a threat to public health and may, in some cases, affect the integrity and the functioning of health-care systems.

Again, the net impact of legalizing would be negative overall, as it poses a direct threat to healthcare systems.

From this analysis it may be concluded that utilitarian reasoning is a tool used both by advocates and opponents of organ sale legislation. Moreover, if states use classic Kantian arguments on human dignity, they also continually reassert their belief that legalization would yield less utility than the status quo. The banning of this trade is therefore in part justified by utilitarian arguments.

4. CONCLUSION

By presenting the debate on utilitarianism and medical ethics, this chapter has put forward a more complex discussion. On the one hand, utilitarianism is considered as a realistic, if not cynical, approach that leads directly to sacrifice of individuals. This view has been fostered by the 'strictly utilitarian Benthamite reasoning' and the 'cost–benefit rationale'.[71] It is illustrated by the use according to which any means is legitimate if it maximizes the sum of pleasure, whatever its individual value might be. Another use is also likely to be observed, however. It emphasizes the moral principles, such as respect of the person – by taking seriously her consent and ensuring her full information – as long as there is solidarity for the weakest. First, it implies a different approach to Bentham's philosophy that stresses not only the objective effect, but also the more subjective *tendency* which the action 'appears to have to augment or to diminish the happiness of the party whose interest is in question'.[72] In this manner, the dimension of *security, understood as a representation*, becomes a crucial ingredient of

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[70] Council of Europe Convention against Trafficking in Human Organs (Santiago de Compostela 25.03.2015), available at www.coe.int/en/web/conventions/full-list/-/conventions/rms/09000016806dca3a.

[71] See p.15 of this chapter.

[72] J Bentham, *Introduction to the Principles of Morals and Legislation* (1789) chapter I.

the principle of utility. Aside from subsistence, abundance and equality, security is the most crucial governmental goal.[73] In other words, the best collective decision, which maximizes the sum of pleasure, is the one that guarantees the highest security for individuals. This decision either maintains or enhances the global amount of security and hence fosters trust and liability within the whole society. Second, it borrows from John Stuart Mill the argument according to which the best mean to maximize utility is to apprehend it 'in the largest sense, grounded on the permanent interests of man'.[74] It implies respecting moral values or virtues such as responsibility or solidarity. If research on children or banning of organ selling are deemed right, it is also because of their good consequences. Those consequences are right because they contribute first to assisting the weakest. In other words, this utilitarianism stands in favour of helping the more vulnerable individuals, for instance patients waiting for a medical treatment, instead of simply satisfying individuals defining themselves as consumers.

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[73] J Bentham, *Leading Principles of a Constitutional Code, For Any States* (1823), Extract from *The Pamphleteer* (London, AJ Valpy) 44. Cited in G Tusseau, *Democracy and Information: The Perspective of Jeremy Bentham's Political Panoptism* (Duncker & Humblot, 2003).

[74] R Crisp, *Routledge Philosophy Guidebook to Mill on Utilitarianism*, 17.

19. Transhumanism, politics, ethics and utilitarianism

Jean-Yves Goffi

1. INTRODUCTION

Transhumanism is not generally raised in the legal debate; transhumanists are regarded as mad scientists or computer engineers who do not pay much attention to the current state of society, seeing it and its legal institutions only as matters to be surpassed. The law indeed is intended to enact rules of justice and to specify the articulation between them. But, in a future of superabundance such as the one which the transhumanists talk about and prophesy, the rules of justice will have become useless and obsolete. David Hume suggested that justice is an artificial virtue, grounded in social conventions:[1] human needs and abilities are such that people, roughly equal in strength and power, must join together because of their natural dependent condition. But in this joining together, one must take account of two constraints. The first is the fact of human nature: that people exhibit only a limited generosity. The second is the fact of the world: that a resource-poor environment involves a relative or moderate scarcity of desirable assets and goods. Therefore, the rules of justice and the law which codifies them are intended to manage scarcity. Hume is quite clear that if human nature manifested either perfect moderation and humanity, or perfect rapaciousness and malice (as two extremes), the virtue of justice would become useless. But, if the world were either so poorly designed that one could only confront a squalid necessity, or so fortunately designed that one would always enjoy a wonderful abundance (as another two other extremes), the virtue of justice would become useless too. However, transhumanists dream of precisely such a wonderful abundance – provided by means of radical technological progress. At the very least, in this world of superabundance the law will become pointless, because in a world of plenty, flowing with milk and honey, the rules of justice designed to manage scarcity will fade away and finally disappear. Highly representative of this kind of utopian vision is FM-2030 (born Fereidoun M. Esfandiary), probably the first modern transhumanist. He dreams of a life in which people, having relinquished every allegiance to traditional identity (including their ancestry, ethnicity, nationality and religion), freely float in an universe open to fulfilling their slightest desire, thanks to technologies likely to abolish space and time. Here, the time-honoured problems raised by legal philosophy give way to radical new considerations. These emerging issues are intended to match an unprecedented situation whereby, thus far, people could enjoy the benefits of technology while at the same time preserving their natural state – that is, complying with Darwinian selection. But, with technologies bringing much more than benefits – that is, bringing authentic blessings – they have to turn themselves into something completely different from an evolutionary point of view if they want to take advantage of their own technologies. This fresh issue has

[1] D Hume, *A Treatise of Human Nature*, ed. DF Norton and MJ Norton (Oxford, Oxford University Press, 2000).

been raised with perceptiveness by Langdon Winner,[2] and is only one example among many which show that it is difficult to adapt transhumanism to traditional categories and standard classifications. It seems, therefore, that it is pointless to attempt to build connections between law, transhumanism and utilitarianism: if transhumanists do not, in any way, care about law, they will shift even further away from philosophy of law or legal theory, whether utilitarian or otherwise. However, utilitarianism is much more than just a theory or a philosophy of law. Its 'founding father', Jeremy Bentham, is quite clear:

1. Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand, the standard of right or wrong, on the other the chain of causes and effects are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw out our subjection, will serve but to demonstrate and confirm it.[3]

Bentham notoriously confuses motivational hedonism with normative hedonism here, but this is a point of minor importance. What is really important is that he is not only talking about law and legislation. His argument encompasses any and all aspects of human existence which deal with right or wrong, as far as standards pertain to them. Under these circumstances, every sector of human activity may be involved, including technical thought, aesthetics, economics, management, medicine, pedagogy, and so on. Here we will limit ourselves to a few issues traditionally associated with utilitarianism, namely politics and ethics. We intend to show that there is no single stance common to every transhumanist in either field. In the political sphere, one can often find beyond-politics technocratic or quasi-anarchistic libertarian options outweighed by utilitarian-inspired considerations. In the ethical sphere, we can see aristocratic or radically individualistic approaches mixed with utilitarian analyses. In any case, the arguments brought forward by transhumanists do not seem very robust: they rest on shaky foundations or on implicit assumptions which fail to support clear articulation.

In this chapter, I shall first propose a definition of transhumanism. I shall then discuss the politics of transhumanists. Finally, and to conclude, I shall speculate on the nature of transhumanist thought, which seems to be based on an extraordinarily vague concept, contrary to what is seen in the different versions of utilitarianism.

2. WHAT IS TRANSHUMANISM? A COMPARATIVE DEFINITION

In seeking to build a definition of posthumanism and transhumanism, several difficulties arise. First, the terms themselves are controversial or suggest misleading directions. For example, as noted by Alexandre Moatti, in the French-speaking world the most conservative sectors use the term 'transhumanist' to signify any attempt to circumvent 'natural' procreation, through strategies ranging from contraception through to medically assisted procreation and ending

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[2] L Winner, 'Are Humans Obsolete?' (Fall 2002) 4(3) *Hedgehog Review* 25–44.

[3] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. JH Burns & HLA Hart (London, The Athlone Press-University of London, 1970), 11.

with surrogate motherhood.[4] Posthumans are often thought of as science fiction characters, just interesting enough to excite the imagination of film directors who lack imagination. Another difficulty is that the transhumanist corpus is diverse in terms of the themes addressed and the media used, which include classic editions of texts but also the internet, which means that successive different versions of the same text exist. Its boundaries are sometimes difficult to trace, as certain writings take up typically transhumanist concepts and themes even though they were written by simple 'travelling companions'; symmetrically, transhumanists mobilize arguments belonging to the philosophical tradition, or at least to certain far-from-marginal philosophical traditions. This corpus is growing very quickly and is being continuously corrected and modified: transhumanists have apparently understood that certain triumphal and peremptory assertions, which may be suitable for manifestos, are unlikely to serve their cause in the long term. Under these conditions, one might be tempted to conclude that transhumanism is not a homogeneous block of well-defined theses and that transhumanists constitute a movement which is by nature plural and fragmented, and which can only be spoken of contextually. In reality, it seems that there is a common intention, or even a common project shared by all the forms and variants of transhumanism, from the most radical to the most attenuated. It is therefore necessary here to explain what this project is.

We shall proceed by making explicit the meaning of the words 'transhumanism' and 'posthumanism'. In both cases, a posthuman condition is envisioned, but is it the same condition in both cases? At first glance things are simple. In both cases we have the term 'humanism', prefixed. We could then consider that it is the meaning of the prefix that will make the difference, and reason as follows:

- The prefix 'post' in Latin means 'what comes after'. Posthumanism would then be a programme aimed at establishing values and standards for what comes after humanism.
- The prefix 'trans' in Latin means 'what goes beyond'. Transhumanism is therefore a programme aimed at establishing values and norms intended to go beyond humanism.

Under these conditions, posthumanism could be regarded as essentially positive as it seeks to further open up the liberation potential which technologies (especially biotechnology) have and to take up the immemorial human aspiration for a more fulfilled, fertile, and liberated existence, essentially through enhancement medicine and NBIC technologies. It aims to bring an end to the plagues of illness, premature death, misery, and the like. This vision is more or less set out in the early 2000s report *Converging Technologies for Improving Human Performance*.[5] Such a conception implies that there is only a difference of degree, not of nature, between posthumanism and transhumanism. Transhumanism, indeed, is a form of posthumanism which goes too far, for want of knowing where to stop: where we can legitimately expect technology to be developed which can improve the lot of a humanity left essentially unchanged, even if its capacities are increased, transhumanists seek to deliver the

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[4] A Moatti, *Aux racines du transhumanisme. France 1930–1980* (Paris, Odile Jacob (Histoire), 2020).

[5] 'Converging Technologies for Improving Human Performance. Nanotechnology, Biotechnology, Information Technology and Cognitive Science', ed. MC Roco and W Sims Bainbridge, National Science Foundation (June 2002, Arlington, Virginia), available at https://iatranshumanisme.com/wp-content/uploads/2016/03/nbic_report.pdf.

man to technology, within the framework of an insane project of the erasure of all borders. In the French-speaking world this thesis was defended by Luc Ferry, who is more famous for his eloquence than for the accuracy of his argument.[6] Can we really claim that transhumanists are posthumanists who go too far? No one disputes that more or less radical postures are adopted by individuals claiming to be transhumanist. The question is whether the distinction between posthumanism and transhumanism adequately expresses this diversity. It seems not to. The theologian Philip Hefner, for example, formulates this by distinguishing between transhumanism written in upper-case letters (upper-case transhumanism) and transhumanism written in lower-case letters (lower-case transhumanism).[7] The characteristic of the first is to develop more or less fantastic scenarios on the radical transformation of the human race, while the second 'only' advocates a systematic use of biotechnologies for the purpose of improving the human condition. Where Ferry speaks of posthumanism and transhumanism, Heffner simply distinguishes two forms of transhumanism. It seems that it is more relevant to reserve the term 'posthumanism' to speak of another type of literature.

We will consider posthumanism here not as a forecast relating to a development or an evolution which would lead beyond humanity as it currently exists, but as a metaphor which expresses the erosion of the subject of the humanism of the Enlightenment. More specifically, according to some contemporaries, the subject of Enlightenment humanism has long since reached its limits and been surpassed on all sides by new modes of subjectivation. Of course, the subject of this kind of humanism, Man, is an entity that is difficult to define and to which it is difficult to assign a perfectly clear silhouette. It is not exactly the Cartesian *cogito* or the Kantian transcendental ego, which are too heavily dependent on particular epistemic and metaphysical considerations; rather, it comprises their expression in the psychological, ethical, political, aesthetic and economic fields, and so on. Kant, in his most 'popular' writings, has it that being a person, as opposed to a thing, gives one dignity as opposed to value – however high the latter may be – and asserts that one can never dispose of this as he pleases.

In general, the subject of the Enlightenment or liberal humanism is conceived as a being of freedom existing in a universe subject to the strictest causality. He is capable of practical rationality, unlike beings in nature, which are acted upon from the outside by physical laws or instincts over which they ultimately have no control. Consequently, these beings are at the disposal of Man; nature then is seen as a space to be arranged and conquered rather than a cosmos before which it is possible to marvel. The means of this conquest, collectively, constitute technology. However, Man can also take a disinterested view of the world. When this point of view implements a cognitive and theoretical aim, we are dealing with the subject of science; when this aim produces pure satisfaction, isolated from any utilitarian context, we are dealing with the aesthetic subject, capable of judgements of taste. For some, the contemplation of reality, when it is completely freed from the common demands of the struggle for life, leads to infinity, and then constitutes a religious experience. The public space in which the arbitrariness of the will of the subjects and the exclusive character of their interests are subject to rules is the law: the subject is then considered a legal person. His rights are the remainder of what can be socially preserved from his natural, unlimited autonomy; the violent

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[6] L Ferry, *La Révolution transhumaniste. Comment la technomédecine et l'uberisation du monde vont bouleverser nos vies* (Paris, Plon, 2016).

[7] P Hefner, 'The Animal that Aspires to be an Angel: Challenge of Transhumanism' (Summer 2009) 48(2) *Dialog: Journal of Technology* 158–67.

return of such freedom constitutes an offence or a crime, criminal law being responsible for the assessment and sanction of the criminal act – or the management of offenders. The most suitable political system on this subject is liberalism which stipulates that state authority should only apply to guarantee that the freedom of some will not be exercised at the expense of the freedom of others. Consequently, the choice between the various possible conceptions of the good life belongs to the individual and the state cannot impose on them a lifestyle or values to which they do not adhere, as long as this adhesion or lack of such does not cause any objective damage to others. The 1789 French Declaration of the Rights of Man and the Citizen and the subsequent Civil Code may be considered legal embodiments of the above liberal vision. It is almost universally accepted that the subject is not given to itself from the start. Individually, it is built by education, which above all is education for freedom. Insofar as education is a work on oneself which connects an individual with the works and the exemplary achievements of other subjects, especially those of the past, it is an expression of culture and opposes the vulgarity and coarseness of pursuing immediate satisfactions. Collectively considered, the path of the subject of liberal humanism constitutes history. During this, what was always already a given, but originally remained implicit (that is, the essence of Man), becomes more and more explicit, even if it is a process without limit of duration. Finally, the friends of liberal humanism consider that language provides indisputable access to reality because truthful discourse immediately manifests a unity of form and content; thus, Man is a faithful mirror of nature. This ideal type has been deemed inadequate, for a variety of reasons. First, it is assumed to be of universal application; but a careful examination of the constitution of effective subjects shows that this is not so. For example, gender, colour, status and social situation, position in a system of power relations and possible incapacities are all elements classical humanist thinkers take insufficiently into account in their analyses or even disregard entirely. Likewise, new practices or more sustained attention paid to old practices show that the exceptional status from which the subject of humanism is supposed to benefit is, in reality, largely illusory. Many authors[8] therefore believe that we have never been human (akin to Bruno Latour's claim that we have never been modern). Therefore, in an important sense, we are arguably already beings who come after the human. The authors who defend such an interpretation do not, however, define themselves as posthumans, but rather as posthumanists: they claim 'simply' to have exceeded the categories and themes constituting humanism or the means by which it has spread and transmitted, namely the humanities.[9]

There is also a very different literature, which places the posthuman not as a radical intellectual freed from the anthropocentrism of Enlightenment humanism, but as a being who has at least a posthuman capacity, that is to say, at least a general capacity power far exceeding the maximum accessible to any current human being who would not have recourse to new techno-

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[8] KN Hayles, *How we Became Posthuman: Virtual Bodies in Cybernetics, Literature and Information* (Chicago, The University of Chicago Press, 1999); R Marchesini, *Post-human. Verso nuovi modelli di esistenza* (Turin, Bollati Boringhieri, 2002); R Marchesini, *Il Tramonto dell'uomo. La Prospettiva post-umanista* (Bari, Edizioni Dedalo, 2009); C Wolfe, *What is Posthumanism?* (Minneapolis, London, University of Minnesota Press, 2010).

[9] Sloterdijk 'Rules for the Human Park: a Response to the Letter on Humanism', trans. M Varney Rorty (2009) 27 *Environment and Planning D: Society and Space* 12–28.

logical means.[10] Under these conditions, a transhuman is both a transitional human, a sort of bridge between the human and the posthuman[11] and also a human being seeking to transcend his humanity, taking over the immemorial work of biological evolution and concerned with realizing new possibilities of his human nature, or new possibilities for it.[12] In both cases, human nature appears to be a work in progress. Max More indicates what these general capacities offering scope for great improvement could be, and the types of improvement that could be brought to them:[13] the development of perceptual capacities beyond what is accessible to living beings and the creation of new senses; improved memory and intelligence; access to an increased level of self-awareness; the correction of emotions to eliminate irrational reactions; ever more refined incorporation of new technologies; reconfiguration of the form and functions of the body so as to go beyond the intellectual and physical capacities of historically constituted humanity, via the elimination of the individual and specific defects inherited from biological evolution; and ultimately, the reversal of the tyranny of aging and death.

It almost goes without saying that such transformations cannot be obtained by 'traditional' means (frequenting works of the past, a critical retreat from prejudice and intellectual routine, moral exhortation, and so on). In fact, transhumanists strive for the implementation of radical brain and body transformations, obtained through technology. It is no longer a question of getting rid of the illusions of humanism through increased attention to the presuppositions or the cultural unthought or unthinkableness of it. Rather, it is a question of getting rid of the biological limits preventing human beings from accessing new modes of existence. In other words, what is to be transcended is *humanity* and its biological foundation, not *humanism* and its ideals; this is why some take the expressions 'transhumanist enterprise' and 'radical enhancement' as being equivalent.[14]

There is a gulf between these two approaches, as shown by the judgement of K. Hayles on the transhumanist conception of the body:

> If my nightmare is a culture inhabited by posthumans who regard their bodies as fashion accessories rather than the ground of being, my dream is a version of the posthuman that embraces the possibilities of information technologies without being seduced by fantasies of unlimited power and disembodied immortality, that recognizes and celebrates finitude as a condition of human being, and that understands human life is embedded in a material world of great complexity, one on which we depend for our continued survival.[15]

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[10] N Bostrom, 'Why I Want to Be a Posthuman when I Grow Up' in B Gordijn and R Chadwick, *Medical Enhancement and Posthumanity* (Dordrecht, Springer, 2008) 107–36.

[11] FM-2030 (Esfandiary, Fereidoun M.) *Are you a Transhuman: Monitoring and Stimulating your Personal Rate of Growth in a Rapidly Changing World* (New York, Warner Books, 1989).

[12] J Huxley, 'Transhumanism', in *New Bottles for New Wine* (London, Chatto & Windus, 1957) 13–17.

[13] M More, 'A Letter to Mother Nature', in M More and N Vita-More, *The Transhumanist Reader: Classic and Contemporary Essays on the Science, Technology and Philosophy of the Human Future* (Chichester, Wiley-Blackwell, 2013) 449–50.

[14] N Agar, *Humanity's End. Why we Should Reject Radical Enhancement* (Cambridge (MA) and London, The MIT Press, 2010); N Agar, *Truly Human Enhancement: A Philosophical Defense of Limits* (Cambridge (MA) and London, The MIT Press, 2014).

[15] K Hayles, *How we became Post-human*, 5.

There have, however, been attempts to reconcile the two approaches. We will cite, for example, Rosi Braidotti, who has trouble convincing because of a lack of rigour.[16] We will also cite the much more interesting Stefan Sorgner, who coined the term 'metahumanism' to characterize the synthesis, or rather the overcoming, that he envisions.[17]

Let us conclude that the transhumanist enterprise consists in bringing into existence people – or rather beings, as there is no guarantee that the term 'people' will adequately denote post-human entities – freed from their current biological constraints and that the transhumanists are those who recognize themselves in this enterprise or who animate it. But it must also be understood that they are not carried by the intention of raising (in the literal sense of 'putting above the lot') a superhuman type through education, within new educational establishments or new intellectual communities. This is something that Bill Hibbard, an artificial intelligence specialist at the University of Madison, saw clearly in drawing a parallel between the Nietzschean Overhuman and the Transhumanistic Posthuman: 'The overhuman is an ideal rather than an achievable reality. Posthumans, as envisioned by most transhumanists, will be real successors to humans and still struggling to improve.'[18]

Some Transhumanists bluntly express this endeavour in saying that it will amount to monitoring biological evolution; humankind has inherited the task of implementing a new phase of evolution in which intelligent life rebuilds itself by conscious thoughtful design. That idea may dangerously sound like the self-direction of human evolution, that is to say, old-fashioned eugenics. The difference, however, is that eugenics does not seek to go beyond the genetic datum considered to be an insurmountable limit. Transhumanists, on the contrary, may well imagine a radically enhanced humanity that reaches new modes of existence by going beyond biology and hence beyond genetics. The above quotation is interesting because it highlights an very important element of the transhumanist worldview: that transhumanism is not a quest for perfection conceived of as a stable state where all the initial potentials are optimally developed. The intellectual framework of transhumanism is that of perfectibility, which, in the memorable terms of Godwin, 'not only does not imply the capacity of being brought to perfection but stands in express opposition to it'.[19] Perfectibility indeed is understood here as 'the faculty of being continually made better and receiving perpetual improvement'.[20] This helps us to understand how the transhumanist project is a utopian project. Everything depends, of course, on what is meant by utopia. If we admit that utopia means to establish a state of closure and completion where everything remains stable, in a condition of an immutable perfection, then transhumanism is obviously not a utopian project. But we can also estimate, like H.G. Wells, that the utopias imagined in the past cannot be the same as those imagined after Darwin, who gave an accelerated step to thought.[21] Previously, it was a question of designing

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[16] R Braidotti, *The Posthuman* (Cambridge (UK) & Malden (MA), Polity Press, 2013).

[17] J Del Val and SL Sorgner, 'A Metahumanist Manifesto' (2016), available at <https://metabody.eu/wp-content/uploads/2016/02/A-METAHUMANIST-MANIFESTO.pdf>.

[18] B Hibbard, 'Nietzsche's Overhuman Is an Ideal Whereas Posthumans Will be Real' (January 2010) 21(1) *Journal of Evolution and Technology* 9–12, available at https:// jetpress .org/ v21/ hibbard.pdf.

[19] W Godwin, *Enquiry Concerning Political Justice and its Influence on Modern Morals and Happiness*, (Harmondsworth, Penguin Books Penguin Classics, 1985) 145.

[20] Ibid., 145–6.

[21] HG Wells, *A Modern Utopia* (London, Everyman, 1994 [1905]).

perfect and static states, achieving forever a balance opposed to the forces of disorder, which are inscribed in things themselves. In these utopias, each generation enjoyed the fruits of the earth soberly and virtuously and passed on to the next generation a fundamentally unchanged world. Post-Darwinian utopias are no longer static but dynamic, in that they lead to a succession of indefinitely ascending stages. They no longer take place on a preserved island, in an enclosure of stability and permanence: their scale is that of the planet, even of interplanetary space. Transhumanists seem to be utopians precisely in this sense.

It is therefore the project of accessing, through technology, a posthuman condition where the capacities of humanity that we know would be extraordinarily increased that characterizes the contemporary transhumanist enterprise. It is in relation to such an objective that the ethical and political conceptions of transhumanists must be evaluated.

To sum up the present discussion, it may be noted that the above definition is perfectly neutral with regard to possible utilitarian options. This is easily understood: transhumanists are, in a way, opportunists. Fully absorbed in their programme of radical reconstruction of the human being, they are more concerned with efficiency than truth. They are prone to manifest a catch-all attitude. They glean what interests them from each theory. The only transhumanist to have explicitly claimed to be utilitarian is David Pearce, who boldly defended a version of negative utilitarianism.[22] Negative utilitarianism aims to reduce suffering rather than increase happiness and the obvious argument against it is that the most radical way to reduce suffering is to remove it and that to do so, the immediate, instantaneous and painless destruction of the human race (and perhaps even of sentient life) would be the most efficient means. True to the utopian inspiration of transhumanism, Pearce expects biomedical technologies (for example, intracranial self-stimulation, designer drugs and genetic engineering) to abolish pain. However, he appears isolated in the transhumanist nebula, even if other transhumanists speak of him with respect. Further, he does not show a marked interest in politics and law; one could rather say that he is in line with moral utilitarianism.

3. TRANSHUMANIST POLITICS

3.1 The Libertarian Pole

To put it very briefly, we can say that, in terms of politics, transhumanists range between a libertarian pole and a technocratic–utilitarian pole. In general, the libertarian theses were initially put forward, with the technocratic–utilitarian theses appearing later, within the framework of what could be called a mitigation strategy.

First, a few words are needed to define transhumanist libertarianism. Following suggestions made by others,[23] James Hughes has suggested a classification in terms of familiar political categories, distinguishing between conservatives and progressives.[24] Someone can be a conservative or a progressive on economical or cultural issues. Economic conservatives

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[22] D Pearce, *The Hedonistic Imperative* (1995), available at www.hedweb.com/hedonist.htm.

[23] WS Maddox and LA Stuart, *Beyond Liberal and Conservative: Reassessing the Political Spectrum* (Washington, D.C., Cato Institute, 1984).

[24] J Hughes, *Citizen Cyborg. Why Democratic Societies Must Respond to the Redesigned Human of the Future*, (Boulder (CO), Westview Press, 2004).

(EC) support free enterprise and hate the welfare state and trade unions; they consider that economic justice is adequately ensured by the free market. In contrast, economic progressives (EP) favour redistribution and taxation and do not believe in a social anatomy of the invisible hand. Cultural conservatives (CC) adhere to traditional values as embodied in national communities and expressed by religious beliefs; they distrust individual liberties, which they consider destructive of the social order. Cultural progressives (CP) are secular and cosmopolitan; they support individual and minority rights (for example, they favour sexual liberty, or disgusting promiscuity according to their CC foes). Hughes wants to extend these categories to biopolitics, by which he means a spectrum reflecting diverse positions towards the social and political consequences of the so-called biotech revolution. Biopolitical conservatives (BC) distrust biotechnologies and wish to implement strong restrictions on their use and even on their development. Sometimes, but not always, this attitude is tied to a stance of defiance towards technology in general. Biopolitical progressives (BP), far from expressing this kind of technophobia, are much more in favour of technological interventionism. They consider that, rather than undermining values, technologies and especially biotechnologies open up new fields for new values. The important point is that one can be a conservative or a progressive in any of the three areas – economics, culture, biopolitics – meaning that are eight possible combinations of the different criteria. Libertarian transhumanists correspond to the formula:

EC+CP+BP

Two figures are particularly representative of libertarian transhumanism: FM-2030 and Max More. An eccentric and expansive character, F.M. Esfandiary, who goes by his adopted name of transhumanist FM-2030, represents a hedonistic and playful version of transhumanism, within which the transgressive dimension and the utopian dimension of the movement are omnipresent. He uses the term 'transhuman' with a certain sense of provocation where he proposes to help, in an interactive way, the reader to improve his rhythm of personal growth and to enter the age of transhumans, a stage beyond the human.[25] According to him, we need a completely new philosophy, which conforms to the monumental advances of our time. These advances are not just technical; they also translate into psychological and social transformations. Furthermore, they are so radical that none of the visions of the world previously developed allows them to be thought of adequately. They foreshadow a new situation of human beings in space and time. Indeed, technical progress is taking humanity to a new stage in evolution by freeing it from these immemorial chains of space and time. Esfandiary does not mean that technology will enable human beings to access a mode of existence where space and time would, in the literal sense, be abolished. Even the artefacts of the post-industrial age that lie ahead are inscribed in space, in the trivial sense that they take up space, and in time in the sense that even the speed of light is expressed by a quantity measuring the ratio of distance to elapsed time. But, if we stop being deadly animals and can extend human life indefinitely, then time will run out. And, if technology makes it possible to access the infinite resources of the universe, then it is this spatial limitation which is the rarity which will disappear, since a thing is rare when it is out of reach of its desirers. Humans have managed to loosen the shackles of space and time somewhat, by acting on their environment and their own biology.

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[25] FM-2030 (Esfandiary, Fereidoun M.) *Are You a Transhuman. Monitoring and Stimulating your Personal Rate of Growth in a Rapidly Changing World*.

Contemporary communities, regardless of the presence of technophobes, have more freedom and fluidity, and greater control over nature, than previous communities; individuals are seen as more equal, as freer, and are treated in a more humane way than ever before. The next step is to 'de-animalise humans', that is, to replace our animal organs with pain-resistant implants that will no longer be made of flesh. All the parts which support (enhance) a rapid evolution can be kept. As for the rest, we can do without it. If constructivism is, in a way, the trade mark of transhumanism, it is taken here to an extreme point. Against 'biological fundamentalism', blind to the evolution that will lead from human to posthuman, Esfandiary calls for rebellion against the vulnerability of the human body, which constitutes our most serious obstacle to an evolution leading us higher to a higher plane of existence. In these conditions, the tried and tested categories of the political cease to operate, or at best, become confused: thus, there are conservatives and progressives, people on the right and people on the left. Yet, how can we classify researchers whose work (in genetic engineering, in computer science, and so on) questions apparently incontestable principles which are supposed to organize human nature? No matter their position on the political chessboard, they are the real revolutionaries, unlike the most 'radical' politicians who simply want to modernize these archaic systems of parenthood, family, school, money, work, dominant positions, governments and nations. Esfandiary thus abruptly dismisses the apparently most radical forms of protest of the old world, as they still fundamentally adhere to what they are supposed to criticize and are – to use an idiom which is not his – nothing but the abstract negation of what they oppose. The immemorial left–right opposition is replaced by the opposition between up-wingers and all the other nuances of the political spectrum, which are down.[26]

Another brand of libertarian transhumanism is represented by Max More's extropianism. British citizen, philosopher and political scientist by training (St Anne's College, Oxford) Max More (real name M.T. O'Connor) emigrated to the United States in the late 1980s to work on a philosophy thesis. At the same time, he participated in the launch of a periodical initially entitled *Extropy*: *Vaccine for Future Shock*, an obvious allusion to Alvin Toffler's work *Future Shock*.[27] This newspaper presents itself as an antidote to the anxiety caused by the hectic pace of post-industrial society. But very quickly a new title was chosen: *Extropy: The Journal of Tranhumanist Thought*, the first being perceived as too timid or not ambitious enough. More presents the main lines of a transhumanist philosophy which he completes by formulating the principles of extropianism, defined as a particular form of transhumanism, the latter defined as an attempt to go beyond humanism. According to More, humanism is a philosophy of life that rejects religion, not insofar as it presents an interpretation of the world giving meaning to existence but insofar as it emphasizes beliefs and worship, assimilated to authoritarianism and stagnation. The terms 'entropy' and 'stagnation' are almost considered to be synonyms. Consequently, transhumanism in general can be understood as an indefinite development of human capacities, as the tendency to realize the potentialities of the individual pushed ever further. It is an optimistic, dynamic philosophy of life, aiming at surpassing or transcending everything that can be perceived as a limit. Concretely, this means that humanity as we know it is only a temporary step on the path of evolution within which we are not the finished form

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[26] FM-2030 (Esfandiary, Fereidoun M.), *Up-Wingers. A Futurist Manifesto* (New York, Popular Library, 1977 [1970]).

[27] A Toffler, *Future Shock* (New York, Random House, 1970).

of natural development. Compared to transhumanism in general, extropianism is distinguished by its own principles of action: unlimited expansion, self-transformation, optimistic dynamism and intelligent technology. These principles, which have been supplemented and clarified many times since 1990, authorize and even make desirable, for example, the colonization of space and the biological and neurological modification of human beings. Supporters of extropianism see too far and change too quickly to regard the shock of the future as a misfortune. Of course, from such a perspective, anything reminiscent of the welfare state and social legislation is seen as an unbearable restriction and as such must be removed or abolished. More defended a principle of proaction in opposite to precaution. This principle aims to protect the freedom to innovate, experiment and progress. It allows a cost–benefit analysis where the shortfall resulting from the non-introduction of innovative technology is calculated more generously than according to conventional methods. The replacement of the precautionary principle by this new principle of proaction may seem something relatively benign; after all, industrial societies subsisted for a long time without being subject to the precautionary principle, introduced late into the legislation. In France, for example, the precautionary principle was only enshrined in domestic law with the Barnier law.[28] However, earlier societies were not governed by brutally libertarian principles. The principle of proaction as understood by Max More and others amounts to an almost total lifting of social control over innovation, in an unprecedented version of libertarianism. Michael Hauskeller closely and critically examined[29] a work by Samuel Fuller and Veronika Lipińska,[30] two sociologists who, without being strictly speaking transhumanists in the historical sense of the term, take up the principle of proaction and argue that we should no longer let our policies and legislation on scientific research be guided by the precautionary principle. The results speak for themselves, in that we should 'concur with the default libertarianism of most transhumanists who encourage risky personal experiments',[31] 'conceptualize our genetic material as property that one is entitled, and perhaps even obliged to dispose of as inherited capital',[32] and so on. A criticism like that of Hauskeller relates to transhumanist libertarianism considered in itself. But we can also notice that the libertarianism displayed by certain transhumanists is very easily transformed into its opposite (according to the most elementary laws of dialectic!). For example, FM-2030, the champion of individual freedom conceived as a break with everything that could resemble any adherence to tradition, represents posthuman education as a kind of *bildungsroman*, where young people go from one *mobilia* to the other in order to widen the field of their knowledge and their relations. A *mobilia* (plural: *mobilias*) could not be better described than as a hippie community, but it is also technophile to the highest degree, and equipped with the most efficient technologies allowing them to be in constant contact with each other; thus the sclerotic forms of social organization that are cities, states and supranational institutions are supposed to be transcended. So far, so good. But, faithful to his utopian inspiration, FM-2030 is fairly precise about the origins of young people thus educated. He affirms that human life is such

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[28] Loi no. 95-101 du 2 février 1995 relative au renforcement de la protection de l'environnement, known as the Barnier Law.

[29] M Hauskeller, *Mythologies of Transhumanism* (Cham, Springer, Palgrave Macmillan, 2016).

[30] S Fuller and V Lipińska, *The Proactionary Imperative. A Foundation for Transhumanism* (Basingstoke, Palgrave Macmillan, 2014).

[31] Ibid., 4.

[32] Ibid., 33.

a precious thing that one cannot let chance decide its coming into existence; the quantity and quality of births must therefore be controlled. He therefore recommends the creation of Child Centers, coordinated worldwide, from which, under the control of geneticists, biologists and gynaecologists, gametes from all sources are taken. Demographers, environmental and social scientists, assisted by powerful computers, would in turn determine the earth's capacities to welcome new human lives. After fertilization, the zygotes would be implanted in the uterus of women wishing to know the experience of pregnancy. As in the Platonic *Kallipolis*, the newborns would be raised together in children's homes before moving from one *mobilia* to another and finally, once they have become autonomous, being invited to lead the type of existence that seems most appropriate to them.

It is not so much the fact that F.M. Esfandiary deploys the most classic themes of utopia that seems most surprising here, nor even that the fluidity of life in mobilia is the visible aspect of a solidly eugenic society. It is, rather, the fact that a society thus conceived is able to maximize individual freedom only because a whole bureaucracy operates behind the scenes. Yet, such a bureaucracy would exist in order to implement decisions that it did not make itself. It was neither demographers nor environmental scientists – much less their powerful computers – who stipulated that births would be a function of the earth's ability to accommodate human lives; their expertise is limited to saying whether, at any given time, such births are possible (and in what quantity). We can consider this as a concession to the reality principle, that even if *mobilias* only exist in the imagination, their operation implies taking into account certain limits imposed, despite everything, by the relative scarcity of certain goods. However, as properly political decisions were made somewhere upstream – even if we don't know by whom, nor according to what precise criteria – there is also something like a return of the political repressed, even among the transhumanists most inclined to libertarianism.

4. THE TECHNOCRATIC–UTILITARIAN POLE

Libertarian inspiration still remains an important element of the transhumanist conception of politics. For example, Zoltan Itsvan was a candidate in the 2016 American presidential election under the self-conferred banner of transhumanism; but he also claims that he is a libertarian and his novel *The Transhumanist Wager*[33] is obviously inspired by Ayn Rand's classic novel *Atlas Shrugged*.[34] However, there is a growing perception of a tendency to attenuate the radical nature of such options. In other words, the formula EC+CP+BP seems to be gaining the approval of more and more followers. In France, for example, the association AFT + Technoprog, which aims to be the embodiment of the transhumanist movement (the acronym AFT stands for 'Association Française Transhumaniste'), is defined in an extremely modest way: its vocation is said to be to scrutinize society on questions relating to current changes in the biological and social condition of human beings. Its avowed objective is to improve this condition by radically lengthening the human lifespan in good health. With the exception of the adverb 'radically', such an objective could correspond to the immemorial aim of medicine. Here we are at the limit of consensual platitude, and the libertarian–utopian

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[33] Z Itsvan, *The Transhumanist Wager* (Futurity Imagine Media LLC, 2013).

[34] A Rand, *Atlas Shrugged* (New York, Random House, 1957).

dimension of transhumanism seems completely lost from sight. However, this is not the case. In any event, transhumanists want to achieve a complete liberation of the human being. This liberation relates, in all versions of transhumanism, to the biological condition inherited from an awkward, slow and often inept evolution. However, libertarian transhumanists (almost) put this tyranny of nature and the domination exercised by human beings over other human beings on the same level. Transhumanists who have departed from libertarianism accept that power relations exist within a humanity freed from the tyranny of nature. Simply, these relationships must not be pure domination: limits and standards must be set. As might be expected, they are sometimes utilitarian in nature, although not systematically. Some are simply 'technocratic', in a sense that needs to be clarified.

A recent book by David W. Wood is very useful in making the above issues clear.[35] Wood was a pioneer of the smartphone industry and co-founded Symbian; he is also one of the founders of the UK Transhumanist Party. Before indicating what this work contains, it is interesting to note that the title includes the word 'transcending'. Here we once again find the idea that transhumanism, even when transformed into technoprogressism, aims to go beyond what currently exists. As a good technoprogressist, Wood explains that he positions himself against fundamentalisms of all kinds. All fundamentalists have in common that they believe something sacred, which we cannot touch on any pretext, even to improve it. They stand out when it comes to saying what is sacred, and specifying the reasons which make their sacred something sacred in the first place. According to Wood, there are four types of fundamentalism:

- Religious: Humanity is already the end point of divine creation, so Man is sacred.
- Humanist: Human character and human consciousness are sacred because of the eminent position that man occupies in the universe.
- Cultural: it is permissible to act on the cultural environment of human beings, but it is sacrilegious to act directly on what they have inherited from nature.

Finally, and paradoxically, there is a market fundamentalism: 'Market fundamentalists believe that free markets are absolutely the best way to decide the allocation of resources.'[36] Here, we realize that Wood seems to confuse fundamentalism and absolutism because it is not properly explained why it would be sacrilege not to follow the laws of the market. (However, this is a point of little importance.) What is important is that the market, like any other human institution, is the product of evolution, and therefore can be improved. Thus, we cannot trust it to establish rules of justice, and libertarianism is wrong. The improvement needed will be provided by technology; in this sense, the position defended by Wood is a technocratic one. However, he takes great care to distinguish his own conception from an old-fashioned technocracy, where power would be exercised by the experts' bypassing politics. Wood is not so naive as to imagine that citizens would accept the decisions made by experts left to their own devices without resistance: experts are fallible, not always in agreement with one another, and can be victims of the biases which are those of the common man as soon as they leave their field of competence. The technocracy he is talking about must therefore be compatible with an enhanced, inclusive form of democracy, allowing the expression of a genuine pluralism. Even

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[35] DW Wood, *Transcending Politics. A Technoprogressive Roadmap to a Comprehensively Better Future* (Delta Wisdom, 2018).

[36] Ibid., 203.

so, it is still a technocracy in the sense that, according to him, 'The mechanics of politics are themselves a form of technology which can be improved (or, alas, in some cases worsened) as a result of the attention of innovators, entrepreneurs and engineers.'[37] Transcending politics means, in fact, fixing politics: the term 'fixing' is indeed used as a leitmotiv in the first chapter of the book. Why, then, does such an ambition still deserve to be called 'transhumanist'? In reality, if such a goal may seem extremely modest, and very far from the grandiose initial declarations of the transhumanists, Wood does not give things away: according to him, one cannot fix politics without radically acting on human nature: he takes over the programme of radical improvement of the human being, passing through the systematic correction of all the deficiencies that biological evolution has left in us, like unwanted slag.

Other transhumanists are closer to utilitarian theses in that they skip the 'technocratic' stage. But utilitarian in what sense? In a way, utilitarianism has been a victim of its own success, as quasi-utilitarian elements have been disseminated in theses relating to public policies which are not officially utilitarian. We will take inspiration from Matti Häyry[38] and consider that there are utilitarian elements in political or legal theories in which one or more of the following principles are found:

- The greatest need–satisfaction principle.
- The principle of hierarchical need.
- The principle of other-regarding need frustration.
- The principle of necessary and contingent ends.
- The principle of awareness.
- The principle of autonomy.

This set of principles means, in short, that it is right to maximize the satisfaction of needs, provided that the satisfaction of the most basic needs is not prevented by the satisfaction of less basic needs. The case of meeting the needs of autonomous beings is separate.

- The principle of act-utilitarianism.
- The principle of symmetry between acts and omissions.
- The principle of foreseeable consequences.
- The principle of actual or prospective existence.
- The principle of positive utilitarianism.

To which we add:

- The principle of equal consideration of the interests of all sentients.

This second set of principles focuses on the application (in terms of the scope and limits) of the doctrine.

Some transhumanists are inspired by utilitarianism in that they take over, sometimes without realizing it or explaining why, at least some of these principles. They take for granted that new technologies will be implemented sooner or later and that they are likely to bring positives and negatives at the same time. Their main concern is to ensure that the distribution of

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[37] Ibid, 265.

[38] M Häyry, *Liberal Utilitarianism and Applied Ethics* (London, Routledge, 1994).

these ills and goods is reasonably equitable. They therefore rediscover the venerable question of distributive justice, which is at the heart of utilitarianism. The sociologist, transhumanist and Buddhist monk James Hughes is typical of those who accept and even call for a broader democratic intervention to control the potentially damaging effects of such technological advances.[39] He thus affirms that if human enhancement represents the next stage of individual evolution, then global governance represents the next stage of human social evolution. The enlarged democracy which he is thinking of must be essentially a deliberative democracy and integrate into its deliberations the new forms of intelligence, whether of human origin or not, that biotechnologies will inevitably bring into existence, exactly as it began to take into consideration formerly neglected life forms (animals, in particular; or, according to generally accepted vocabulary, 'sentient life'). This perspective is classically extensionist in the sense that it extends to new entities (computers and networks, augmented humans, and so on) arguments which were traditionally mobilized about 'classic' entities (human beings). It is perhaps this extension of moral and political consideration that best characterizes contemporary utilitarianism, at least in its most militant forms. Already sketched among the classic British utilitarian of the 19th century (Jeremy Bentham, John Stuart Mill, Henry Sidgwick), it was theorized by Peter Singer, to the point of becoming the hallmark of consequentialism (a term more or less synonymous with 'utilitarianism'). The transhumanists who reason in terms of the extension of the community of beings who matter, and whose politics must register the claims (Hughes, Bostrom, the members of *Technoprog* in France), are perhaps those who are the most faithful to the utilitarian heritage, whether they recognize it or not. In any case, it is obvious that this way of approaching the problem presupposes that self-ownership, an essential concept among classical libertarians, must be drastically limited, even if these limitations are likely to be offset by the new benefits brought by technology.

Transhumanists seem very ambiguous in their relation to utilitarianism. For example, in defending morphological freedom as the right to physically modify oneself or not, a typically transhumanist thesis, Anders Sandberg states at the outset: 'This essay will largely be based on an right ethics framework, although I am fairly certain most of the arguments easily carry over to other ethical frameworks.'[40] However, his paper makes this freedom a negative right which 'maximizes personal autonomy'.[41] Up to a certain point, he integrates this thesis into a substantial utilitarian framework. Thus, he seeks to show that if this right were denied, there would be undesirable consequences; for example, a well-intentioned public medicine could force people to undergo medical treatments aimed at correcting an infirmity when they do not wish it and have already accommodated their disability. In fact, he seeks above all to show, against objections from alleged 'bio-conservatives', that '[..] morphological freedom is not going to eliminate humanity, but to express humanity even further'[42]. This is a very general anthropological argument, which seems to rest solely on considerations linked to autonomy and which leaves a conceptual utilitarian framework.

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[39] J Hughes, *Citizen Cyborg. Why Democratic Societies Must Respond to the Redesigned Human of the Future* (Cambridge (MA), Westview Press, 2004).

[40] A Sandberg, 'Morphological Freedom – Why We Not Just Want It But Need It' in M More and V Vita-More, *The Transhumanist Reader: Classic and Contemporary Essays on the Science, Technology and Philosophy of the Human Future* (Chichester, Wiley-Blackwell, 2013) 56.

[41] Ibid., 57.

[42] Ibid., 63.

5. CONCLUSION

We will not develop in detail the criticisms generally addressed to transhumanism here. Everything has been said: it has been asserted that the transhumanist project is dangerous, illusory and, moreover, impracticable; that it is a premeditation of a crime against humanity or a condition for universal robotization; that it is symptomatic of a simplification of the human being, reduced to his brain; that it poorly conceals shameful economic and social interests; that he participates in the siliconization of the world; that there are more urgent things to do, in a world devastated by misery, war, environmental emergencies and inequalities, than to prophesize future forms of life.

To borrow an illuminating distinction from Stephen Liley,[43] we can say that the debate revolves around a situation in which transhumanists and their allies want to *transcend* politics while their adversaries see in this enterprise not a path to transcendence but a *transgression*, and criticize it for this reason. This explains why legal considerations are so allusive among transhumanists and concrete examples from legislation so infrequent; since it is a question of transcending the legal–political framework, the most important issue is elsewhere. Technologies will advance and the law will follow or fade away.

As has been discussed, what makes a theory structurally utilitarian is that it contains a good that must be maximized by agents (moral utilitarianism) or by institutions (political utilitarianism). The nature of this good is notoriously difficult to determine. Pleasure? Satisfaction of preferences? Satisfaction of rational preferences? A mix of intrinsic values? States of the agents which are objectively constitutive of a good life, even if this life is not pleasant for the agents themselves? These critical questions are almost never addressed by transhumanists. They claim that they want to elevate humanity to our true potential, or to accelerate evolution, but that says more about what they refuse to take as objective good than what they think is objective good. This explains why, in general, the description of posthuman existence given by transhumanists remains surprisingly vague. They state that absolutely new modes of existence will be reached. But these are designed by analogy with those we already know and no specific content can be assigned to them. A long description by Nick Bostrom shows this problem almost in caricature:

> You have just celebrated your 170th birthday and you feel stronger than ever. Each day is a joy. You have invented entirely new art forms, which exploit the new kinds of cognitive capacities and sensibilities you have developed. You still listen to music – music that is to Mozart what Mozart is to bad Muzak. You are communicating with your contemporaries using a language that has grown out of English over the past century and that has a vocabulary and expressive power that enables you to share and discuss thoughts and feelings that unaugmented humans could not even think or experience. You play a certain new kind of game which combines VR-mediated artistic expression, dance, humor, interpersonal dynamics, and various novel faculties and the emergent phenomena they make possible, and which is more fun than anything you ever did during the first hundred years of your existence. When you are playing this game with your friends, you feel how every fiber of your body and mind is stretched to its limit in the most creative and imaginative way, and you are creating new realms of abstract and concrete beauty that humans could never (concretely) dream of. You are always ready to feel with those who suffer misfortunes, and to work hard to help them get back on their feet. You are also involved in a large voluntary organization that works to reduce suffering of animals in their

[43] S Liley, T*ranhumanism and Society. The Social Debate over Human Enhancement* (Dordrecht, Springer, 2013).

> natural environment in ways that permit ecologies to continue to function in traditional ways; this involves political efforts combined with advanced science and information processing services. Things are getting better, but already each day is fantastic.[44]

The profusion of undefined expressions (including 'a certain new kind of game', 'various novel faculties', 'you are creating new realms of abstract and concrete beauty that humans could never (concretely) dream of') is intended to show that there exist absolutely unexplored areas which can be opened to perspective. But, in reality, perhaps it instead shows the emptiness of this ideal world which is not empty by chance: it is empty because we do not know exactly what it is structured by. The difficulty here undoubtedly stems from the anthropology – if there is such a thing – of the transhumanists. They see the human being as prone to perpetually transcend his substantial being. Carried away by the flow of evolution that carries everything, he is the only one capable of carrying himself forward. He derives his identity from this ability to go beyond any fixed identity once and for all. In these conditions, it is not possible to describe the objective good which would structure posthuman existence. The tables of the law are always new and always ephemeral, and will remain so until the advent of a Singularity 'which will purportedly allow post-human intelligence to reconstruct the law of nature and thus reorder the entire universe!'[45] Such a vision belongs to mysticism rather than to utilitarianism.

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[44] N Bostrom, 'Why I Want to Be a Posthuman when I Grow Up' in B Gordijn and R Chadwick Ruth (eds), *Medical Enhancement and Posthumanity*, (Berlin, Springer, The International Library of Ethics, Law and Technology, 2008) 107–36, 112.

[45] ME Zimmerman, 'The Singularity: A Crucial Phase in Divine Self-Actualization?' (2008) 4(1–2) *Cosmos and History: The Journal of Natural and Social Philosophy* 347–70, 351.

20. A utilitarian approach to copyright law and generative artificial intelligence[1]

Ryan Abbott and Elizabeth Rothman

1. INTRODUCTION

The role of artificial intelligence (AI) in the creative economy has changed dramatically.[2] AI is now stepping into the shoes of content generators and creating valuable original content in a commercially relevant way. Before the end of the decade, a significant amount of art, literature, news stories, music, software and web content will likely be AI-generated.[3]

This technological evolution will have seismic social and economic impacts. It will prove equally disruptive to the law, including in the field of intellectual property (IP).[4] AI behaving like a person raises numerous challenges in all areas of IP, and with copyright, it has now become critically important to resolve how to legally treat creative work made by a machine: can an AI-generated work receive copyright protection? Who would own the copyright? Who or what would be the author? Is it copyright infringement to use protected works to train algorithms or to create AI-generated works?

These questions have been explored in academic literature for decades.[5] Most commentators believe that AI-generated works should not receive protection, either for moral reasons – because AI-generated works are not the right sort of thing to protect – or for eco-

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[1] This chapter has been adapted from Ryan Abbott and Elizabeth Rothman, 'Disrupting Creativity: Copyright Law in the Era of Generative Artificial Intelligence' (2023) 75(6) *Florida L. Rev.* 1141.

[2] 'Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence' (29 May 2020) WIPO, available at www.wipo.int/meetings/en/doc_details.jsp?doc_id=499504 (last visited 18 Jan. 2023).

[3] See eg, N Bilton, 'The New Generation of A.I. Apps Could Make Writers and Artists Obsolete' (2 June 2022) *Vanity Fair*, available at www.vanityfair.com/news/2022/06/the-new-generation-of-ai-apps-could-make-writers-and-artists-obsolete (last visited 18 Jan. 2023).

[4] See R Abbott, *The Reasonable Robot* (2020) (explaining that in many contexts the law discriminates between AI and human behavior in ways that are socially harmful).

[5] See, eg, P Samuelson, 'Allocating Ownership Rights in Computer-Generated Works' (1986) 47 *U. Pitt Law Review* 1185, 1199–1200 (arguing for protection of AI-generated works, but that AI cannot be an author because AI does not need incentives to generate output: '[o]nly those stuck in the doctrinal mud could even think that computers could be "authors"'); RD Clifford, 'Intellectual Property in the Era of the Creative Computer Program: Will the True Creator Please Stand Up?' (1997) 71 *Tul. Law Review* 1675, 1681, 1702–3 (arguing that AI-generated works cannot and should not be protected by copyright); S Yanisky-Ravid, 'Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era – The Human-like Authors Are Already Here – A New Model' (2017) *Mich. St. Law Review* 659 (debating accountability in this context and suggesting that ownership of AI-generated works should vest in an AI user).

nomic ones – because AI does not respond to financial incentives to create output, because protection is unnecessary for other reasons or because there are greater costs associated with protection.[6] More practically, the US Copyright Office has implemented a 'Human Authorship Requirement' since at least 1973 that has prohibited the registration of copyright for AI-generated works.[7] While the Copyright Act does not explicitly state that an author must be a human being, or that human creativity is a requirement for copyright, there is a long history of jurisprudence framing creativity in human-centric terms.[8] There is no case law, at least in the United States, involving copyright protection of an AI-generated work.[9] It should be noted, though, that other types of artificial authors – artificial persons largely in the form of corporations and sovereign nations – have qualified as authors under the Copyright Act for more than a century.[10]

This chapter argues that AI-generated works should receive copyright protection because they are precisely the right sort of thing to protect using a utilitarian lens.[11] Copyright law, at least in the Anglo-Saxon tradition as opposed to the continental European system of Author's Rights, while often framed in terms of benefiting authors, has primarily broader and more utilitarian social goals – promoting the generation and dissemination of works.

While critics are of course correct that AI is not motivated to work by the prospect of copyright protection, that is a straw man argument. Rather than acting directly on authors, copyright protection will motivate people upstream of the creative act to use and develop AI that will result in more production and dissemination of works. This approach allows copyright law to be harnessed in a way that optimizes social benefits for the greatest number of people, rather than getting lost in metaphysical distinctions that come at the expense of law's beneficiaries.

This chapter goes further to claim that AI should be recognized as an author for copyright purposes. Doing so is not a matter of providing legal rights to machines. An AI is not a legal person and cannot have rights or obligations, and the costs of providing rights to AI would likely outweigh any potential benefits. Rather, accepting AI authors would promote transparency, appropriate entitlement and policymaking. Identifying AI authors would even protect the

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[6] DJ Gervais, 'The Machine as Author' (2020) 105 *Iowa L. Rev.* 2053, 2068, 2093–4, 2106; JC Ginsburg and L Ali Budiardjo, 'Authors and Machines' (2019) 34 *Berkeley Tech. L.J.* 343, 365; CJ Craig and IR Kerr, 'The Death of the AI Author (2019) 52 *Ottawa L. Rev.* 31, 42; J Grimmelmann, There's No Such Thing as a Computer-Authored Work—And It's a Good Thing, Too' (2016) 39 *Columb. J.L. & Arts* 403; A Bridy, 'Coding Creativity: Copyright and the Artificially Intelligent Author' (2012) 5 *Stan. Tech. L. Rev.* 12, 22; R Denicola, 'Ex Machina: Copyright Protection for Computer-Generated Works' (2016) 69 *Rutgers L. Rev.* 251, 283.

[7] US Copyright Office, Compendium of US Copyright Office Practices (First) §2.8.3 (1st ed. 1973).

[8] US Copyright Office, Compendium of US Copyright Office Practices (Third) § 306.

[9] Letter from Copyright Office Review Board, Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071), to R Abbott, Esq. counsel for Dr. S Thaler (14 February 2022), available at www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf.

[10] Copyright Act of Mar. 4, 1909, ch. 320, § 26, 35 Stat. 1075.

[11] Utilitarianism is an important lens to examine legal issues involving AI and all emerging technologies as it forces us to consider how policies impact society as a whole. Jeremy Bentham argued that laws and policies should be evaluated based on how well they contribute to human welfare. J Bentham and J Bowring, *The Works of Jeremy Bentham*, Vol 3 (1843).

moral rights of human authors. Allowing someone to take credit for work done by an AI would not be unfair to the AI, because the AI has no self-interest (or interests at all), but it would be unfair to other human authors.

2. THE STATE OF AI TECHNOLOGY AND AI AUTHORS

2.1 Advances in AI

Many of the terms associated with AI and IP lack standardized definitions, which is perhaps unsurprising given that the term 'artificial intelligence' itself still lacks a standardized definition more than 60 years since it was first introduced. This chapter will define AI as an algorithm or machine capable of completing tasks that would otherwise require cognition.[12]

AI is also categorized in terms of general artificial intelligence versus specific/narrow artificial intelligence. Narrow AI refers to current technologies that are applied to a dedicated purpose, while general AI refers to a hypothetical future AI capable of performing any (or nearly any) intellectual task a person could. For example, AI exists that can operate a vehicle, but that same AI could not play a game of chess without someone separately programming it with that capability. Of course, narrow AI exists on a spectrum. Even narrow AI can have super-human capabilities. For instance, AI can now outperform people at every traditional board game, and this year has proved to be a powerhouse tool for generating creative content. Experts are divided on when, or if, general AI will exist. Some thought leaders, such as Ray Kurtzweil, believe that it will not be long before an AI exists that can broadly operate at human-like intellectual levels, which will be applied to improving its own capabilities, and this will lead to exponential improvement.[13]

Many of the recent advances in AI functionality have come because of improvements to machine learning systems driven by improvements in software design, hardware capabilities and increased access to data used to train such systems. These advances have led to the development of systems such as AlphaGo and AlphaFold that have been able to master the complex game of Go and determine a protein's 3D shape from its amino-acid sequence, respectively. The pace of innovation has been staggering, particularly with large language models (LLMs), a class of deep-learning architectures that can generate content using large datasets, such as GPT-4, which was released in early 2023.

2.2 AI-Assisted versus AI-Generated Creativity

Many of the terms in the world of AI creativity, like AI itself, lack standardized definitions. Even within legal settings, terms are not used consistently, which is a significant issue for regulators attempting to create rules for works created using AI. This is because there is a greater risk of inadvertently unharmonized rules in different jurisdictions as well as a greater risk that rules are being developed without a clear understanding of their underlying regulatory subject

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[12] R Abbott, *The Reasonable Robot* (2020), 22.

[13] See R Kurzweil, *The Singularity Is Near: When Humans Transcend Biology* (2005).

matter. A camera filter and an autonomous text generator such as ChatGPT pose different challenges.

This chapter will use the term 'AI-assisted work' to mean a work created using AI for which a natural person, and not an AI, functionally qualifies as an author of the work under traditional criteria. AI/human-generated work means a work functionally co-authored by an AI and a human being. The term 'AI-generated' will refer to a work created using AI where no natural person qualifies as an author under traditional criteria. As discussed further below, under current US Copyright Office (USCO) policies, AI-assisted works are eligible for copyright registration, AI-generated works are ineligible for copyright registration, and only the human-generated portion of an AI/human-generated work is eligible for copyright protection.[14]

3. AI-GENERATED WORKS AND COPYRIGHT LAW

3.1 *Thaler v Perlmutter*

Despite years of academic commentary on the protectability of AI-generated works, until very recently there had never been a case in the United States either alleging copyright infringement of an AI-generated work or challenging the Copyright Office's Human Authorship Requirement.[15]

Thaler v Perlmutter is part of the Artificial Inventor Project.[16] The project, led by one of this chapter's authors (Ryan Abbott), is

> a series of pro bono legal test cases seeking intellectual property rights for AI-generated output in the absence of a traditional human inventor or author. It is intended to promote dialogue about the social, economic, and legal impact of frontier technologies such as AI and to generate stakeholder guidance on the protectability of AI-generated output.[17]

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[14] This approach does not recognize the contribution of the AI or any financial benefits (eg, co-ownership of copyright) that might flow to the AI's owner. The AI-human joint authorship scenario has been discussed in other papers. See DJ Gervais, 'The Machine as Author' (2020) 105 *Iowa L. Rev.* 2053, 2068, 2093–4, 2106; JC Ginsburg and L Ali Budiardjo, 'Authors and Machines' (2019) 34 *Berkeley Tech. L.J.* 343, 365.

[15] See Letter from U.S. Copyright Office Review Board, Second Refusal to Register.

[16] Thaler v Perlmutter, et al., Case No. 1:2022cv01564, (D.D.C. filed 2 June 2022); The Artificial Inventor Project (10 July 2022), available at artificialinventor.com/ (last visited 18 Jan. 2023).

[17] Ibid. Two patent applications filed in 2018 for inventions made by AI in the absence of a traditional human inventor have since resulted in a granted patent with the AI listed as the inventor and the AI's owner as the patent owner (South Africa Patent No. ZA2021/03242 (issued 24 June 2021), available at https://iponline.cipc.co.za/Publications/PublishedJournals/E_Journal_July%202021%20Part%202.pdf, as well as a series of landmark judicial decisions about inventorship and patentability. See A George and T Walsh, 'Artificial intelligence is breaking patent law' (22 July 2020) *Nature*. For an updated list of cases, see 'Patents and Applications', The Artificial Inventor Project at artificialinventor.com/patent-applications/ (last visited 18 Jan. 2023); 'AI-generated Output and Intellectual Property Rights: Takeaways from the Artificial Inventor Project' (2023) EIPR, 45.4.

In 2019 the Copyright Office refused to register an AI-generated work, 'A Recent Entrance to Paradise', a 2D artwork created autonomously by an AI named the Creativity Machine.[18] The applicant, Dr Stephen Thaler, applied to register the work as its owner on the basis that he is the owner, user and developer of the Creativity Machine.[19] After the work was rejected, two requests for reconsideration were filed appealing the refusal, and on Valentine's Day 2022 the Copyright Office finally affirmed the rejection in a final agency action. The main justification for the denial of registration was that the work lacked a human author. The Review Board concluded that 'human authorship is a prerequisite to copyright protection in the United States and that the Work therefore cannot be registered'.[20] In June 2022 a lawsuit was filed in the Federal District Court against the Copyright Office to compel the registration of the work with the Creativity Machine listed as the author and with Dr Thaler as the owner of the copyright.[21]

On 18 August 2023, after cross motions for summary judgment were filed in *Thaler v Perlmutter*, the court granted the Copyright Office's request for summary judgment, dismissing the case on the grounds that '[h]uman authorship is a bedrock requirement of copyright'.[22] The case is currently under appeal to the US Court of Appeals for the DC Circuit.

3.2 Authors, Writings and Originality

The United States Congress is empowered to regulate copyrights through the Copyright Clause of the Constitution. The clause enables Congress '[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'.[23] Congress has done so by passing the Copyright Act, which protects 'original works of authorship […] fixed in a tangible means of expression'.[24] Neither the Constitution nor the Copyright Act defines the terms 'writings' or 'authors'.

Statutory interpretation is a complex exercise, and there is considerable controversy about whether and to what extent courts should employ textualist versus purposive approaches. In general, however, interpretation is supposed to begin and end with the text if the text is plain and unambiguous. In the case of an undefined term, the Supreme Court generally applies a word's 'ordinary meaning'. There are many canons or techniques employed to determine ordinary meaning, including looking to common usage of a word, case law, parallel reasoning, and so on. Courts typically reference dictionary definitions, which vary, but here Merriam-Webster defines an author as 'one that originates or creates something'[25] and 'one' is

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[18] Letter from Copyright Office, Initial Letter Refusing Registration, to Ryan Abbott, Esq. (12 August 2019) (on file with authors).

[19] Thaler v Perlmutter, et al., Case No. 1:2022cv01564, (D.D.C filed 2 June 2022); Imagination Engines, see www.imagination-engines.com/ (last visited 18 Jan. 2023).

[20] Letter from US Copyright Office Review Board, Second Refusal to Register, at 3.

[21] Thaler v Perlmutter, et al, Case No. 1:2022cv01564, (D.D.C filed 2 June 2022).

[22] Thaler v Perlmutter D.D.C., No. 1:22-cv-01564 (D.D.C 18 August 2023), Memorandum Granting Motion for Summary Judgment at 8.

[23] US Const. art. I, § 8, cl. 8. This clause is also sometimes referred to as the 'Patent Clause' or the 'Patent and Copyright Clause'.

[24] Copyright Act, 17 USC § 101.

[25] 'Author' in Merriam-Webster Dictionary (2022).

defined as 'a single person or thing'.[26] Literally, the Copyright Act is agnostic to the humanity of an author.

The Copyright Act also does not quantify the level of creativity required for originality, but numerous courts have considered the issue. In what has become the leading case on originality, *Feist Publications v Rural Telephone Service*, the Supreme Court noted that originality is 'the bedrock principle of copyright' and 'the very premise of copyright law'.[27] It held that information alone without some creativity cannot be protected by copyright, and that 'some minimal degree of creativity' is required, although 'the requisite level of creativity is extremely low', such that even a 'slight amount' will suffice. 'The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious it might be".'[28]

AI-generated works can meet the minimal creativity standards required for a work to qualify as original – at least if creativity is being considered objectively based on the work.

3.3 The United States Human Authorship Requirement

In 1973, the Copyright Office first published its policy of denying registrations for AI-generated works.[29] The most recent iteration, published in 2021, states:

> 306 The Human Authorship Requirement
> The U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being.
> The copyright law only protects 'the fruits of intellectual labor' that 'are founded in the creative powers of the mind.' Trade-Mark Cases, 100 U.S. 82, 94 (1879). Because copyright law is limited to 'original intellectual conceptions of the author,' the Office will refuse to register a claim if it determines that a human being did not create the work. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).[30]

The citations referenced above come from two cases that took place in the late 19th century – somewhat before the existence of generative AI. In *Burrow-Giles Lithographic Co. v Sarony*, the accused infringer of a famous photograph of Oscar Wilde argued that a photograph did not qualify as a 'writing' or as the work of an 'author' because 'the photograph is the mere mechanical reproduction of the physical features or outlines of some object, animate or inanimate, and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture'.[31] The Court ruled for the photographer, noting that all forms of writing 'by which the ideas in the mind of the author are given visible expression were eligible for copyright protection as an original work of art'.[32] The Supreme Court ended up interpreting 'writing' purposively and consistently with the

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[26] 'One' in Merriam-Webster Dictionary (2023).

[27] Feist Publications, Inc. v Rural Telephone Service Co., Inc., 499 U.S. 340, 347 (1991) (citation omitted).

[28] Ibid., 346.

[29] US Copyright Office, Compendium of Copyright Office Practices (First) (1973) § 2.8.3.

[30] Compendium (Third) § 306.

[31] Burrow-Giles Lithographic Co. v Sarony, 111 U.S. 53, 58–9, (1884).

[32] Ibid., 58.

goals of the Copyright Act, rather than applying a textual approach relying exclusively on a dictionary, literal meaning or common usage of the word.

While there is no case law specifically on AI-generated works, several cases have involved protection for 'non-human' (and non-corporate) generated works – including those involving spiritual mediums. In *Urantia v Maaherra*, the court decided: 'notwithstanding the Urantia Book's claimed non-human origin, the Papers in the form in which they were originally organized and compiled […] were at least partially the product of human creativity.'[33]

In *Penguin Books v New Christian Church Full Endeavor*, the court found grounds for attributing authorship to the humans involved in the 'arrangement and selection of the materials'.[34]

Naruto v Slater concerned copyright protection of 'monkey selfies', a series of photographs taken by Naruto, an Indonesian black crested macaque, using a camera belonging to the nature photographer David Slater.[35] Mr Slater attempted to commercialize the photographs and claimed that he was their author. He was then sued by People for the Ethical Treatment of Animals (PETA) on Naruto's behalf, with PETA alleging that Naruto was the author and that PETA would help administer the copyrights.[36] The Ninth Circuit dismissed the case, but based on standing rather than the Human Authorship Requirement.

The most recent USCO guidance released in March 2023 states: '[i]f a work's traditional elements of authorship were produced by a machine, the work lacks human authorship, and the Office will not register it.'[37] It states with respect to the use of prompts:

> [f]or example, when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the 'traditional elements of authorship' are determined and executed by the technology – not the human user […] When an AI technology determines the expressive elements of its output, the generated material is not the product of human authorship. As a result, that material is not protected by copyright and must be disclaimed in a registration application.[38]

It has been further clarified by the USCO that the obligation to disclose AI-generated elements rests on whether the material in the work generated by AI is appreciable or de minimis.[39] The standard for ascertaining what is appreciable is: 'Would that content be copyrightable if created by a human author?'[40]

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[33] Ibid., 958.

[34] Penguin Books USA v New Christian Church Full Endeavor, 96 Civ. 4126 (RWS) (S.D.N.Y. Jul. 21, 2000), 11.

[35] Naruto v Slater, 888 F.3d 418, 437 n.11 (9th Cir. 2018).

[36] Ibid., 426.

[37] US. Copyright Office, Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 FR 16190 (16 March 2023).

[38] Ibid.

[39] '3 Takeaways From The Copyright Office's AI Webinar' (30 June 2023) JD Supra, available at www.jdsupra.com/legalnews/3-takeaways-from-the-copyright-office-s-2369383/.

[40] Ibid.

3.4 Government Inquiry into AI-Generated Works

In 1966 the US Register of Copyrights, Abraham Kaminstein, identified the possible role of AI in the creative process as one of the major problems confronting the Copyright Office.[41] In 1974, Congress created the Commission on New Technological Uses of Copyrighted Works ('CONTU') to study issues related to copyright and computers, including AI-generated works.[42] CONTU wrote in 1979 that there was no need for special treatment of AI-generated works because they did not exist and were not immediately foreseeable.[43]

In 1986, nearly a decade later, technological advances prompted Congress's Office of Technology Assessment ('OTA') to issue a report emphasizing that the increasing sophistication of AI posed more challenges than CONTU acknowledged. OTA was critical of CONTU's conclusion that AIs were merely 'inert tools of creation' and indicated that in many cases they were at least 'co-creators'.[44] The OTA report did not state that AI-generated works were ineligible for copyright protection, but it did predict problems with determining authorship.[45]

In 2019, the United States Patent and Trademark Office (USPTO) sought public comment on whether a 'work produced by an AI algorithm or process, without the involvement of a natural person […] qualifies as a work of authorship' under the Copyright Act.[46] The report concludes that most commenters agreed there was no need to modify current IP laws.[47] However, the report relies on a series of questionable assumptions about AI.[48] For example, the conclusion that there was no need to change current laws was based on the view that general artificial intelligence had yet to arrive.[49]

More recently, in the US, the Senate Subcommittee on Intellectual Property held a hearing in June 2023 on AI and patent law and AI and copyright law as part of a series on AI and IP.[50] The United States Patent and Trademark Office issued a Request for Comments on AI

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41 See U.S. Copyright Office, Sixty-Eighth Ann. Rep. Reg. Copyrights 4–5 (1966).

42 Ibid., § 201(a)–(b).

43 Ibid.

44 US Congress, Office of Tech. Assessment, Intellectual Property Rights in an Age of Electronics and Information (1986) 70–3.

45 Ibid., 73.

46 See 'Public Views on Artificial Intelligence and Intellectual Property Policy' (October 2020) US Patent and Trademark Office, available at www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf.

47 Ibid.

48 As another example, when asked if an AI work could qualify as a work for hire a commenter responded, 'No. Ownership should vest in the author (or employer of the author, in the case of works made for hire) and may then be assigned to another natural or juridical person.' Ibid., 28–9.

49 Ibid.

50 'Artificial Intelligence and Intellectual Property – Part I: Patents, Innovation, and Competition', US Senate Committee on the Judiciary, see www.judiciary.senate.gov/artificial-intelligence-and-intellectual-property_part-i-patents-innovation-and-competition (accessed June 2023); 'Artificial Intelligence and Intellectual Property – Part II: Copyright', US Senate Committee on the Judiciary, see www.judiciary.senate.gov/artificial-intelligence-and-intellectual-property_part-ii-copyright (accessed June 2023).

and patent inventorship in February 2023.[51] In addition, the USCO held listening sessions on AI and copyright in 2023 with stakeholders and conducted webinars to inform the public and clarify its position and disclosure requirements on AI-generated output and copyright law.[52]

3.5 International Treatment of AI-Generated Works

An in-depth, worldwide review of international approaches to AI-generated works is beyond the scope of this chapter. Many jurisdictions lack clear rules, and some jurisdictions are actively reconsidering their current frameworks.[53]

For example, in 1988 the United Kingdom became the first jurisdiction to explicitly protect AI-generated works.[54] Some current or former commonwealth jurisdictions such as Ireland, New Zealand, South Africa and India subsequently passed legislation like the United Kingdom's to protect AI-generated works.[55] The United Kingdom Intellectual Property Office (UKIPO) conducted two consultations on IP and AI between 2020 and 2022, and ultimately concluded that there should be no change to the existing scheme for the protection of AI-generated works.[56] There is no equivalent to the United Kingdom's system for protecting AI-generated works in European Union (EU) jurisdictions and the EU has yet to formally address protections for AI-generated works.[57]

International agreements governing copyright law do not explicitly authorize, or prohibit, protections for AI-generated works. But if a jurisdiction such as the United States provides protection for AI-generated works, it will be required to protect AI-generated works regardless of where they are made, even if they are made in a jurisdiction, like France, that does not protect AI-generated works.[58] That allows for a situation in which consumers in France,

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[51] 'Request for Comments Regarding Artificial Intelligence and Inventorship', Federal Register (14 February 2023), available at www.federalregister.gov/documents/2023/02/14/2023-03066/request-for-comments-regarding-artificial-intelligence-and-inventorship.

[52] US Copyright Office, 'Spring 2023 AI Listening Sessions, U.S. Copyright Office', see www.copyright.gov/ai/listening-sessions.html.

[53] See eg, 'A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things' (July 16, 2021) Gov. of Canada, available at www.ic.gc.ca/eic/site/693.nsf/eng/00316.html.

[54] R Abbott, 'Artificial Intelligence, Big Data and Intellectual Property: Protecting Computer-Generated Works in the United Kingdom', *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar Publishing, 2017).

[55] Ibid., 330.

[56] Ibid.

[57] Copyright in the EU is generally based on legislative directives, including most recently Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, which does not specifically address AI-generated works; See also T Dornis, 'Of "Authorless Works" and "Intentions without Inventor", The Muddy Waters of "AI Autonomy" and Intellectual Property Doctrine' (2021) 43(9) EIPR 573–5.

[58] Key international copyright agreements include the Berne Convention, which requires countries to offer the same level of copyright protection to nationals of other parties to the convention, and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which established global standards for copyright protection. Berne Convention for the Protection of Literary

but not consumers in the United States, can freely use and copy AI-generated works made anywhere.

Globally, a lack of consensus on AI copyright presents difficulties in applying copyright law consistently across borders. A utilitarian framework provides guidance in promoting welfare and accessibility on issues such as copyright for AI-generated works, but practical policymaking requires adapting to varied conditions across the global landscape.

4. PROTECTING AI-GENERATED WORKS AND ACCEPTING AI AUTHORSHIP

4.1 Should AI-Generated Works Be Protectable?

Whether copyright protection should be available for AI-generated works depends on the costs and benefits of providing protection, including whether and to what extent there is a problem with lack of protection and the alternatives to protection. With human-generated works, there are numerous benefits associated with copyright protection. As discussed earlier, these break down broadly into: (1) economic incentives, namely encouraging the production and dissemination of works; and (2) protection of author moral rights.[59]

There are also numerous costs associated with copyright protection.[60] Copyright allows right holders to prevent others from making or using protected works.[61] It can thus be used to prevent the production and distribution of works because right holders can elect not to make, sell or licence their works and they can prevent others from doing so. Where right holders do elect to commercialize works, copyright allows them to limit competition and charge more for their works than they otherwise could.[62] Right holders can also prevent third parties from making infringing[63] and derivative works (such as fan fiction).[64] Intellectual property rights can thus impede the sharing and further development of knowledge, and there are benefits

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and Artistic Works (9 Sept. 1886, amended 29 Sept. 1979); TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights (15 Apr. 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1994).

[59] See WM Landes and RA Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *J. Leg. Stud.* 325, 325–33, 344–53; TW Dornis, 'Artificial Creativity: Emergent Works and The Void In Current Copyright Doctrine' (2020) 22 *Yale J.L. & Tech*. 1.

[60] See, eg, MA Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harv. L. Rev*. 621, 624; Cf. G Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243, 1244. Whether the costs of IP rights outweigh the benefits is the subject of extensive literature, which suggests the matter is nuanced and context-dependent. See generally, E Ostrom, *Governing the Commons: The Evolution of Institutions For Collective Action* (1990).

[61] 17 US Code § 106.

[62] See WM Landes and RA Posner, 'An Economic Analysis of Copyright Law', 325–33, 344–53.

[63] Those where an infringer had access to the protected work and where the infringing work is substantially similar to the protected aspects of the protected work. Feist Publications, Inc. v Rural Tel. Serv. Co. Inc., 499 U.S. 340, 361 (1991).

[64] M Chatelain, 'Harry Potter and the Prisoner of Copyright Law: Fan Fiction, Derivative Works, and the Fair Use Doctrine' (2012) 15 *Tul. J. Tech. & Intell. Prop.* 199.

to having intellectual property in the public domain – meaning not protected by intellectual property laws.[65]

Even for human-generated works, stakeholders disagree on the appropriate level of protection. But the general view of Congress and the Courts has been that the utilitarian benefits of copyright outweigh the costs. 'The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.'[66]

4.2 A Brief History of American Copyright Law

The first modern copyright law was the Statute of Anne, passed in 1710 in the United Kingdom (then the Kingdom of Great Britain).[67]

The introduction of the printing press was a major technological development and one that inexorably altered the landscape for intellectual property. With the printing press, books could be cost-effectively copied in large quantities, which had profound implications for publishers, authors and governments concerned about the spread of certain information.

In the American Colonies, the Statute of Anne did not apply and there was no general copyright system. The only legal protection for works were ad hoc privileges issued by local legislatures giving printers or publishers exclusive rights over specific texts usually deemed to be of particular interest to the public, such as a collection of colony laws.

Congress passed its first Copyright Act in 1790, which inherited numerous provisions from the Statute of Anne. The Act stated it was 'for the encouragement of learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned'.[68] Authors and proprietors are mentioned, but the public remained the law's primary beneficiaries.

As American copyright law continued to develop, Congress continued to emphasize its public-centric focus. In submitting the bill that became the Copyright Act of 1909, the House of Representatives committee responsible for the bill submitted a report, also adopted by the Senate, noting:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings […] but upon the ground that the welfare of the public will be served and progress of science and useful arts will promoted by securing to authors for limited periods the exclusive rights to their writings.[69]

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[65] See 'Copyright Term and the Public Domain', Libguides At Cornell University, available at guides.library.cornell.edu/copyright/publicdomain (accessed 18 Jan. 2023).

[66] H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909), 5. Plus, most consumers do not require access to a particular work in the way that they might a patented life-saving drug, and so there is a higher degree of fungibility – if Disney charges too much to watch an Avengers movie, consumers can watch Justice League instead.

[67] O Bracha, 'The Statute of Anne: An American Mythology' (2010) 47 *Hous. L. Rev.* 877.

[68] 1790 Copyright Act.

[69] H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909) 5.

Since then, the Supreme Court has explicitly endorsed the supremacy of the public interest as the motivating force behind copyright law.[70]

4.3 Protecting AI-Generated Works and Objections

The history and purpose of the Constitution and the Copyright Act both weigh in favour of the protection of AI-generated works because the public interest trumps any direct benefit to authors. With AI-generated works, allowing protection will encourage people to develop and use creative AI to generate and disseminate socially valuable works, thereby achieving the goal of copyright law. Absent protection, certain AI-generated works will never be created or disseminated. That is because, just like human-generated works, the creation and dissemination of works, or at least certain works, requires significant investments of time and money.

Failing to provide protection also requires producers and distributors of works, at least those for whom copyright is a meaningful incentive, such as movie and music studios, to use a human author even if she is less efficient. For instance, even if an AI can generate an illustration for a movie poster at a fraction of the time and expense as a human artist, and even if consumer focus groups prefer the AI-generated poster, a movie studio will need to employ a human artist to obtain copyright. That is a socially wasteful outcome if an AI can complete a task better, faster and cheaper than a person.

Despite this, some critics nevertheless believe that AI-generated works should not be protected, either due to the argument that copyright law is intended only to promote human creativity, or because the involvement of AI alters the cost/benefit analysis.

4.3.1 Human exceptionalism

The argument in favour of human exceptionalism comes in several forms. First is that human creativity is functionally exceptional – in other words, that an AI cannot autonomously generate an original work. Whether or not accurate in CONTU's time, technology has reached the stage where an argument for functional exceptionalism can no longer be supported – at least not in terms of meeting the very low bar of originality for copyright purposes.

The second version of the argument is that human creativity is ontologically exceptional, namely that even if an AI and a person can generate the same work, the way a person does so is fundamentally different from the way an AI does so. There are at least three problems with this argument. First, there is no scientific, or even philosophical, consensus on the nature of creativity. Without a clear understanding of creativity and thus what the difference is between what an AI and a human being are doing, it seems problematic to argue that only what people are doing counts as creative – and even more problematic to base laws on that assumption. Second, to the extent creativity is understood, there is no consensus that AI cannot exhibit creativity. There is an extensive body of literature on philosophy of mind and computer science that explores the nature of creativity, and at least some seminal thinkers have argued that it is

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[70] 'The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts."' Feist Publications, Inc. v Rural Tel. Serv. Co., 499 US 340, 349 (1991) (alteration in original); Harper & Row Publishers Inc. v Nation Enters., 471 US 539, 546 (1985) ('It is evident that the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value'). Fox Film Corp. v Doyal 286 U.S. 123, 127 (1932); Mazer v Stein, 347 US 201, 219 (1953).

a purely mechanical process analogous to how some AI operates. The claim then that what an AI and a person do to generate something creative is fundamentally different does not reflect a scientific consensus.

The third, and best, reason why the ontological exceptionalism argument fails is that the way a work is made should be irrelevant to its protection. Alan Turing, another pioneering computer scientist, considered a broader version of this question in his seminal work *Computing Machinery and Intelligence*. To Turing, thinking was an impressive but mechanistic phenomenon, and one that would be eventually replicated by a machine.[71] Even if some critics are right that Turing took this too far and that an AI itself is not metaphysically creative, Turing's analysis at least counters the ontological argument in the copyright context because copyright law is utilitarian and should not be concerned with philosophical distinctions that interfere with positive consequentialist outcomes.

The last version of the human exceptionalism argument is that regardless of functional and ontological similarity, there are consequentialist justifications for only encouraging human activity. This is the argument made by Professors Craig and Kerr when they claim that authorship is inherently a relational activity, and that copyright is not about simply generating works but rather about promoting human communication and socialization.[72] But while Professors Kerr and Craig are no doubt correct that some works have relational benefits, their normative goals are not those of the US Constitution or Congress.

4.3.2 Overprotection

Separate from the exceptionalism arguments, protection could be objected to on the basis that the costs and benefits of copyright protection differ between AI- and human-generated works. The benefits of protection may be reduced because no incentive, or at least less incentive, is needed for existing AI to create new works. This line of reasoning might alternately suggest that a more limited copyright would be appropriate for AI-generated works, such as a shorter term of protection.

While less incentive may be needed after an AI has been fully programmed or trained, this ignores some key considerations. First, the initial development of creative AI like Dall·E 2 tends to require substantial investment.[73] The incentive may simply be needed further upstream in the process than is generally the case with human creativity. Substantial investment may also be needed to continue improving an AI to generate better output.[74] Also, even

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[71] This attitude reflects a materialism or physicalism school of philosophy. See www .philosophybasics .com/ branch _materialism .html; see also www .philosophybasics .com/ branch _physicalism.html; M Minsky, *Society of Mind* (1986). He was, incidentally, fond of referring to human beings as 'meat machines'. On this point, see www.wired.com/2016/01/marvin-minskys -marvelous-meat-machine/.

[72] CJ Craig and IR Kerr, 'The Death of the AI Author' (2019) 52 *Ottawa L. Rev.* 31, 42.

[73] D Zhang et al, Stanford Univ., The Artificial Intelligence Index Report 2022, 3 (2022), https://aiindex.stanford.edu/wp-content/uploads/2022/03/2022-AI-Index-Report_Master.pdf.

[74] See, eg, 'OpenAI's ChatGPT Reportedly Costs $100,000 a Day to Run', CIO Coverage, available at www .ciocoverage .com/ openais -chatgpt -reportedly -costs -100000 -a -day -to -run/ (accessed 18 Jan. 2023); 'AI and Compute How Much Longer Can Computing Power Drive Artificial Intelligence Progress?' (7 Jan. 2022) CSET, available at https://cset.georgetown.edu/wp

if less investment is needed to create a work, the same level of investment is still required to disseminate a work regardless of how it is created.

The costs could also be greater in the case of AI-generated works due to negative impacts on (1) technological unemployment and (2) property distribution. The technological unemployment concern is that with AI able to generate certain types of work faster and cheaper than human creatives, this will decrease the need for human labour. It is essentially a more specific version of the automation scare – the concern that automation is going to result in widespread unemployment.[75]

These concerns about automation date back to at least the first industrial revolution, but automation has not historically increased overall unemployment even as it has reduced the need for certain types of labour. For example, at the turn of the 19th century, about 40 per cent of the workforce was in agriculture, while today it is only about 3 per cent.[76] This has not resulted in a 37 per cent increase in the unemployment rate. Technology has made agricultural labour vastly more efficient, and people transitioned to different jobs that have resulted in greater overall productivity. In the present context, it may similarly be the case that some creative tasks are rendered obsolete, but that human creatives will transition to different tasks or types of creative work.

Of course, gains to gross domestic product are likely scant consolation to individual creatives now facing competition from AI and potentially losing their jobs, and society has not traditionally done well at lessening the burden on people rendered technologically unemployed. But the solution to technological unemployment is to provide enhanced social benefits and retraining so that the costs of automation are fairly distributed along with the benefits, not to prevent or discourage businesses from automating. The latter is socially wasteful, like a law that mandates human elevator attendants in lieu of automatic control panels.

The distributional concern is that large corporations may be more likely than small and medium enterprises (SMEs) to have the resources necessary to effectively develop and use generative AI, and that this will result in a consolidation of copyright in the hands of companies like Disney and Meta. In turn, this could be a problem if it exacerbates financial inequality or if it is the result of, or results in, unfair business practices or anti-competitive behaviour.

As a preliminary matter, it is far from certain that generative AI will preferentially benefit large enterprises. It might also be the case that generative AI democratizes copyright ownership. Today's generative AI allows individuals to produce creative works in ways that were previously impractical.[77] But even assuming the financial benefits of generative AI preferentially flow to large enterprises, that is not a reason to prohibit copyright in AI-generated works.

-content/uploads/AI-and-Compute-How-Much-Longer-Can-Computing-Power-Drive-Artificial-Intelligence-Progress_v2.pdf.

[75] R Salkowitz, 'AI Is Coming For Commercial Art Jobs. Can It Be Stopped?' (16 Sept. 2022) *Forbes*, available at www.forbes.com/sites/robsalkowitz/2022/09/16/ai-is-coming-for-commercial-art-jobs-can-it-be-stopped/?sh=1a1888e754b0 (accessed 18 Jan. 2023).

[76] See C Dimitri et al., 'The 20th Century Transformation of U.S. Agriculture and Farm Policy 2' (June 2005), USDA, available at www.ers.usda.gov/webdocs/publications/44197/13566_eib3_1_.pdf?v=41055.

[77] A Reben, 'The Weird And Wonderful Art Created When AI And Humans Unite' (23 Nov. 2022) *BBC Future*, available at www.bbc.com/future/article/20221123-the-weird-and-wonderful-art-created-when-ai-and-humans-unite (accessed 20 Jan 2023).

Large enterprises already hold a disproportionate share of financial resources and intellectual property, and we do not punish entities simply for being large, or for dominating markets due to superior products or business acumen or through historical accident.

If the concern is distributional fairness, namely that it would be a bad social outcome for AI to generate a large amount of wealth that flows disproportionately to the already wealthy (perhaps even at the expense of those with lower socioeconomic status), the solution is a more progressive tax system rather than impeding technological progress.[78]

If the concern is unfair or anti-competitive business practices, there are solutions to this as well. For instance, Disney could, hypothetically, have very powerful AI systems generate countless variations on Marvel comics, characters, movies, and the like. Because copyright exists from the moment of fixation and does not require registration, it could protect a large amount of creative content in this manner. This sort of activity could be used productively to make better Marvel content, say by generating a billion versions of a comic book and having an AI model which version is most likely to be appreciated by consumers.

However, in the hands of a 'copyright troll' instead of Disney, this sort of activity might also be used to make money through strategic litigation, without much investment in distributing works. This could be done by publishing all billion versions of the comic book online, having AI search the internet for works with some similarities to these versions and suing in an unduly aggressive or opportunistic manner to attempt to exclude other content generators from the genre or just to extract rent.

There are solutions to this problem already built into copyright law, which seeks to maintain an appropriate balance between exclusive control and public access through mechanisms such as the fair use doctrine which permits the unlicensed use of protected works in certain circumstances. Perhaps most importantly, AI-generated works may profoundly change the infringement analysis, including in ways that may solve for the copyright troll problem.

4.4 AI Owners Are the Most Appropriate Default Copyright Owners

Regardless of authorship, an AI cannot own copyright or any type of property because it is not a person – legal or artificial. While the law could change to accommodate some form of legal personality for AI, it still would not be an optimal, or even terribly sensical, way to structure rights. Among other things, an AI would not be motivated to create or disseminate works by the prospect of financial gain.

By contrast, people tend to be motivated by the prospect of financial gain. A variety of stakeholders in the AI-generated work ecosystem are potential right holder candidates, including an AI user, owner or programmer. In some cases, the user, owner and programmer may be the same person, or it may be that 'the' programmer is a collection of people spread over time and space. Numerous scholars have considered the most appropriate right holder for copyright in AI-generated works. Some courts have also weighed in on the most appropriate right holder for AI-assisted works involving a variety of human contributors. This chapter argues that the

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[78] See generally, R Abbott and B Bogenschneider, 'Should Robots Pay Taxes? Tax Policy in the Age of Automation' (2018) 12 *Harv. Law and Pol. Rev.* 145 (noting businesses receive incentives to automate and arguing in favour of decreasing taxes on human labour to level the playing field for automation).

AI owner is the most appropriate default for copyright ownership, for both legal and policy reasons.

It is often the case that someone other than a work's author owns its copyright. Authors can transfer their rights to third parties, and rights may transfer automatically. Rights may also vest directly in parties other than an author. For example, in the case of works made for hire (WMFH), employers generally own works made by employees within the scope of their employment.[79] The same applies to certain works made outside of the employment context.

The Copyright Act does not explicitly provide rules for allocating ownership in AI-generated works. However, it also does not prohibit ownership by virtue of common law rules of entitlement. It is generally the case that where property creates additional property, the owner of the original property is entitled to the subsequent property. This rule, sometimes referred to as *accession*, applies in a variety of contexts. If a person owns a cow that births a calf, the cow's owner becomes the calf's owner. If a person owns a fruit tree that bears fruit, the tree's owner owns the fruit. The tree owner derives title to the fruit through the tree, but this does not require the tree to execute a written document that transfers title to the fruit – the title to the fruit automatically transfers or initially vests in the tree's owner by virtue of her relationship to the fruit tree.

If an AI makes a piece of physical property, such as a 3D printer making a painting, the AI's owner would own that painting. There is no reason why someone should be any less entitled to digital art made by an AI. To the contrary, the intangible nature of digital art makes protection more important because it is more easily copied than a physical painting.

First possession could also entitle an AI owner to copyright. '[T]he common and civil law (both of which accept the desirability of private ownership) have responded with the proposition that the taking possession of unowned things is the only possible way to acquire ownership of them.'[80] The rule of first possession is simple, but like accession, foundational to functioning systems of private property. If an AI makes a piece of property, and if no other party is entitled to ownership by virtue of their relationship to the AI, then copyright in a work is unowned property that goes to the first party to take possession of the work.

An AI owner might also be entitled to copyright if an AI-generated work is considered a WMFH. This requires either an employment relationship or a written instrument signed by an independent contractor. An AI cannot execute a contract, and it is not an employee in the sense of labour laws, but it could be treated as an employee for the limited purpose of the WMFH doctrine. The Supreme Court, in *Community for Creative Non-Violence v Reid*, identified factors that characterize an employment relationship under agency law.[81] Those factors, including the employer's control over the work, control over the employee and the status and conduct of an employee, all weigh in favour of AI-generated works being treated as a WMFH. AIs are controlled, are operated at someone's direction and are even owned as property. The central concern with over-application of the WMFH doctrine is that it has the potential to exploit human authors. Employers might acquire copyrights not contemplated at the time of

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[79] 'In the case of a work made for hire, the employer or other person for whom the work was prepared is considered an author for the purposes of this title, and unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all rights comprised in the copyright.' 17 USC § 201(b).

[80] RA Epstein, 'Possession as the Root of Title' (1979) 13 *Ga. L. Rev.* 1221, 1222.

[81] Community for Creative Non-Violence v Reid, 490 U.S. 730 (1989).

contracting and which would not be reflected in the agreed-upon price for employment or a work. However, where an author is an AI that has no legal rights, there can be no concern about exploitation.

Beyond the legal justification for AI owners being default copyright holders, they are the most appropriate copyright owners for policy reasons. Having owners as right holders encourages investments in developing AI systems, and it encourages owners to license their AI systems. All of this should result in the further creation and dissemination of works.

Ultimately, the specific default owner is less important than ensuring well-defined property rights. That is because copyright is transferable, and so where the user, programmer and owner are different parties, these parties can contract amongst themselves to an optimal outcome. That is particularly likely to occur in advance where the prospect of copyright is an important incentive to a work being created or to a collaboration taking place.

4.5 The Importance of Recognizing AI Authors

If AI-generated works are to be protected, this also raises the question of who, or what, should be designated as an author. By definition, in the case of an AI-generated work, an AI user, programmer, or owner would not qualify as an author according to traditional criteria. Therefore, this either requires non-traditional criteria for human authorship, no authorship requirement or AI authorship.[82] Some of these options could require an amendment to the Copyright Act.

For example, the Copyright Act could be amended to state that in the case of an AI-generated work, the AI user is deemed the author. This has the advantage of ensuring protection and a clear allocation of rights, although it allows someone to claim authorship for merely asking an AI to generate something creative. That is not unfair to the AI, of course, because the AI has no interest in taking credit for the work, but it is unfair to other human artists because it changes the meaning of authorship. It equates legitimate human creativity with someone simply instructing a computer.

AI-generated works could also be authorless. For example, the Copyright Act allows works to be registered anonymously or pseudonymously, although only for works created by a natural person and not for WMFH.[83] Similarly, an applicant could register an AI-generated work with no author listed and an explanation of the basis on which they claim entitlement. This has the advantage of avoiding dilution of human authorship, but not designating an author may prove problematic to entitlement.

Finally, the factual author, the AI, could be listed as the legal author – with some surprising benefits. Listing the AI promotes transparency and appropriate entitlement. It not only accurately reports authorship, because the AI is functionally doing the work of a traditional author, but it also allows the various stakeholders involved with the AI to have a clear record of a work's origins. This allows stakeholders to claim and enforce their rights more appropriately.

Recognizing AI authors also helps to preserve a human-centric vision of authorship. Allowing transparent designation of authorship allows the public to understand how works were created. It also benefits policymakers as they struggle with issues related to AI-generated

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[82] Corporate authorship is another option, already available in the case of works for hire, but not every production of an AI-generated invention will involve a corporation.

[83] 17 USC § 409(2).

works. One of the best ways to track information on the prevalence of AI-generated works is to allow these works to be registered with AI authors.

AI authorship has a final advantage in that, depending on the outcome of *Thaler v Perlmutter*, it may already be permitted under the Copyright Act. There is no case law holding that an AI cannot be an author, and only dicta supporting the Human Authorship Requirement – much of which dates to before the development of AI. Given that AI authorship would promote the purpose of the Copyright Act, a court employing a purposive approach to statutory interpretation should conclude that it is entirely permissible. Indeed, the Supreme Court has a long history of interpreting the terms 'writings' and 'authors' purposively, and not 'in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles'.[84] That is particularly important in the case of the Copyright Act, which was designed to accommodate technological advances.[85]

5. CONCLUDING THOUGHTS

In 1991, Professor Arthur Miller wrote:

> Our discomfort with the notion of computer-'authored' works (even if we cannot articulate a principled reason for the discomfort) is in keeping with a recurring phenomenon in the development of copyright law. In every age, a new technology has appeared around which people have expressed fear and concern, claiming that it defies the boundaries of the existing legal system. With respect to copyright, these claims were made about photographs, motion pictures, sound recordings, radio, television, and other telecommunications. In each case, the copyright system has managed over time to incorporate the new medium of expression into the existing framework. Most recent of the upstart new technology has been assumed by computers. For a while the computers-and-copyright battlefield was centered on the copyrightability of computer programs as literary works. That contest now has been largely fought and resolved in favor of copyrightability. It may be that the next battle will be over copyrightability of computer-generated works.[86]

Technological evolution is often an impetus for reevaluation of copyright law.[87] AI is now generating creative works in a major way, and these works have value to consumers. Today, AI-generated art is making a splash on the internet. Tomorrow, AI-generated music will be

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[84] Goldstein v California, 412 US 546, 561 (1973).

[85] 'When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of its basic purpose.' Twentieth Century Music Corp. v Aiken, 422 US 151, 156 (1975).

[86] A Miller, 'Computers and Authorship: The Copyrightability of Computer-Generated Works' (1991) *WIPO Worldwide Symposium On The Intellectual Property Aspects of Artificial Intelligence*, 245–6 www.wipo.int/edocs/pubdocs/en/wipo_pub_698.pdf.

[87] See BA Greenberg, 'Rethinking Technology Neutrality' (2015) 100 *Minn. L. Rev.* 1495; 'The Evolution of Copyright Law', US Copyright Office, available at copyright.gov/history/copyright-exhibit/evolution/ (accessed 18 Jan. 2023), noting that "[c]opyright has evolved since the first federal copyright law that protected just books, charts, and maps. Over time, the law has expanded to include broad categories encompassing a wide range of works, such as literary works, music and sound recordings, dramatic works, choreography and pantomimes, visual art works, audiovisual works, and architectural works.'

playing on the radio and people will be drawing insights from AI-generated literature. The relentless improvement of AI means that people will increasingly have access to a wealth of useful content.

The unique characteristics of generative AI, including the self-improving nature of AI models and the difficulties associated with attributing their outputs to human creators, challenges the existing framework and necessitates a thorough rethinking of what rules will result in the greatest social value. Encouraging the creation and dissemination of such content is the main purpose of the copyright system – underscoring its utilitarian roots – and allowing copyright protection for AI-generated works will achieve this purpose. Once the desirability of protecting these works is acknowledged, acknowledging AI authorship then becomes nothing more than opting for reality instead of elaborate legal fictions.

21. Utilitarianism and panopticism

Anne Brunon-Ernst

1. CONTEXT AND CONCEPTS

1.1 Panopticism: A Foucaultian Concept

Michel Foucault's engagement with Jeremy Bentham's Panopticon starts in the early 1970s when he is researching for his lecture series on psychiatric power.[1] However, it is only fully fleshed out in 1975, with the publication of *Discipline and Punish*, which publicizes the Panopticon project to a wider audience and coins the concept of panopticism.[2] A circular building from which inmates in cells can be watched by overseers positioned in a central tower is the basic architectural idea of Bentham's asymmetric panoptic power gaze that can be applied to many different users: workers, convicts, paupers, students and even civil servants.

Foucault's interpretation of the Panopticon evolved over time. While his 1978 lecture series on biopolitics provides a reassessment of Bentham's work,[3] his 1975 description of panopticism understood in the wider discussion on disciplines offers five essential features of the concept. First, Foucault stresses the use of a spatial organization that ensures the exact observation of human subjects; second, reliance on an architecture that enables the isolation and confinement of the individuals watched, thus the omnipresence of the few who watch and the knowledge of constant surveillance; third, a perfect control over time that allows the maximum extraction of information and work from those who are under surveillance; fourth, a normalizing form of judgment that compares, differentiates, hierarchizes, homogenizes, excludes; and last, a generalized form of truth production that constantly evaluates and judges those who are being watched, and which ultimately hides the gaze of the watcher, so that those watched begin to internalize the discipline themselves.[4]

1.2 Panopticon versus Panopticism: From Bentham's Legacy to Foucault's Strategic Re-appropriation

Foucault's Panopticism is not Bentham's Panopticon. The first reason for this lies in the fact that Foucault did not take into account the ways in which Bentham's project had evolved with time. There are in fact five different panopticon projects. First, Samuel Bentham, Jeremy's

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1 M Foucault, *Le pouvoir psychiatrique. Cours au collège de France*, *1973–4* (Paris, Gallimard, 2003).

2 M Foucault, *Surveiller et punir: Naissance de la prison* (Paris, Gallimard, 2000).

3 M Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979*, ed. M Senellart, trans. G Burchell (London, Palgrave Macmillan, 2008).

4 M Foucault, *Discipline and Punish* (London, Allen Lane, 1977) 6–7, 170–3 and 183–92. See also B Harcourt, *Exposed: Desire and Disobedience in the Digital Age* (Cambridge, Massachusetts, Harvard University Press, 2015) 85–7.

brother, invented the Panopticon in 1786 in the Russian estate he was overseeing and applied it to factory work. Bentham then resorted to the Panopticon design in 1787–91[5] to solve the problem of prison overcrowding and convict hulks on the river Thames, following the American Independence and the loss of transportation routes to America. Faced with food shortage in Winter 1797/8, Bentham returned again to the Panopticon to provide wide-scale poor relief in a pauper-Panopticon.[6] In Chrestomathia (1816–17),[7] the Panopticon was adapted to a project of schools for the children of the trading middle-classes that Bentham had planned to build in his own garden. Again, at the end of his career, Bentham suggested the panoptic layout for government offices (1832).[8]

These different Panopticons are not just copycat projects. They are adapted to users and aims. Foucault wrote that the Panopticon is a multi-use structure which can house 'a child learning to write, a worker at work, a prisoner correcting himself, a madman living in madness'.[9] He was correct, but he forgot about ministers, who, in the *Constitutional Code* are housed in a crescent-shaped building to maximize control by constituents.[10] The inclusion of the ministers within the reach of panoptic control is key to understanding Bentham's panoptic design, and the ways in which Foucault's panopticism underestimates its accountability and deliberative features. The panoptic scheme moves away from tackling the issues of social control at the margins of society to focus on its heart and head: middle-class children, and members of the government. The first two Panopticons were monitoring populations lying outside the building per se (travellers, poor working-class families and workers), but Bentham could only reach these populations thanks to traditional control methods instead of panoptic ones, because his target population lay beyond the panoptic gaze.[11] In a Panopticon, any member of society could become the panoptic viewer watching over the inmates, but, in the constitutional Panopticon, the inmates are members of government. This makes it possible to think of uses of the Panopticon as an instrument of good governance rather than of abusive control and surveillance.

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[5] J Bentham, *Postscript, Part I. Containing further Particulars and Alterations relative to the Plan of Construction Originally Proposed; principally adapted to the purpose of a Panopticon Penitentiary-House*, in *The Works of Jeremy Bentham*, edited by John Bowring (Edinburgh, W. Tait, 1843), vol 4, 67–121; and J Bentham, *'Postscript, Part II. Principles and Plan of Management',* in *Works*, vol 4, 121–72.

[6] J Bentham, *Outline of a Work entitled Pauper Management Improved*, in *Works*, vol 8, 379–432.

[7] J Bentham, *Chrestomathia*, in *The Collected Works of Jeremy Bentham*, eds MJ Smith and WH Burston (Oxford, Clarendon Press, 1984) and J Bentham, *Chrestomathia*, trans. and ed. JP Cléro (Paris, Cahiers de l'Unebévue, 2004).

[8] A Brunon-Ernst, 'Les Métamorphoses Panoptiques: De Foucault À Bentham' (2007) 4 *Cahiers critiques de philosophie*, 60–71.

[9] M Foucault, 'Truth and Juridical Forms', eds J Faubion and R Hurley, *Power* (New York, New Press, 2000), vol 3, 58. See also similar descriptions in M Foucault, *Psychiatric Power* (London, St Martins Press, 1973) 74–5. Both texts were written in 1973. The later chapter III in *Discipline and Punish* exhibits the same features two years later.

[10] J Bentham, *Constitutional Code*, eds F Rosen, JH Burns, and LJ Hume (Oxford, Clarendon Press, 1983).

[11] A Brunon-Ernst, *Le panoptique des pauvres: Jeremy Bentham et la réforme de l'assistance en Angleterre* (Paris, Presses de la Sorbonne Nouvelle, 2007).

There are also other features which Foucault erroneously identifies as originating from the Panopticon in his concept of panopticism. Three of these are presented here: a separate and isotopic system, circular design, and internalization. Indeed, in describing the Panopticon, Foucault identified permanent visibility and isolation as key features of the project.[12] However, Bentham quickly abandoned isolation as posing mental health risks to inmates, and did make allowance for limited privacy within the cells. Moreover, Foucault believed that the panoptic system relied on ascribing a definite space to each individual in the system. This might be true in the prison and in the pauper panopticon, but it is incorrect in the chrestomatic project of schools, where the economy and efficacy of the teaching method relies on students moving across academic classes according to proficiency.[13] 'Everything that the individual does and says, is graded and recorded',[14] wrote Foucault, and this is true in most cases. However, in government business, Bentham allows for secrecy as a protection of the privacy of individual applications, for example.

When it comes to shape, the Panopticon is generally understood as circular. However, it would make more sense to consider the Panopticon on a gradient of possible design options ranging from semi-circle to square or star. Indeed, from the start of the Panopticon letters, the circular design could be replaced by polygon as easier to build. Bentham himself stressed that circular design was not essential, as one needed to take into account cost and feasibility:[15] the key feature lay in 'position, not form'. He explained: 'centrality of the keeper's lodge […] or any other contrivance which will enable the keepers to see upon occasion without being seen, such is the real characteristic principle.' So the focus on classifying the design as effectively panoptic or not will rest not so much on shape (circle, semi-circle, square, star, radial, and so on) as on the way in which the design is used to enhance certain features, which in themselves are conducive to the ends the institution sets itself.

Lastly, internalization is one of the main contentions Foucault makes about the Panopticon. Academics have also called into question the use of this concept. Indeed, for them, the term 'internalization' is anachronistic in the context of late 18th-century Britain. Indeed, they argue that the Panopticon was instead tapping into the unremitting pressure of traditional forms of social observation on the individual to modify the nature of self and the idea of personhood and ultimately reform them according to the institution's aim.[16]

Panopticism needs to be understood as the reinterpretation of the Panopticon project to suit Foucault's strategic narrative. However, Foucault was neither the first nor the last to use the panoptic motif to suit his own ends.

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[12] M Foucault, *Psychiatric Power*, 103–4.

[13] Ibid., 52–3.

[14] Ibid., 48–52.

[15] I am grateful to Tim Causer for discovery of the square Panopticon project, which strikingly looks like many of the subsequent Panopticon-inspired prison designs of the 19th century. See The Correspondence of Jeremy Bentham (JB to Collins, on 5 April 1803, Letter 1808, 220–3) in response to letter from Collins where Collins says that if he builds prison, will be circular (Collins to JB, on 4 April 1803, Letter 1807, 219-20), and T Causer, '"Position not form": a square Panopticon prison?' on Transcribe Bentham Blog, available at https://blogs.ucl.ac.uk/transcribe-bentham/2016/11/10/position-not-form-a-square-Panopticon-prison/.

[16] D Rosen and A Santesso, *The Watchman in Pieces: Surveillance, Literature and Liberal Personhood* (Yale, Yale University Press, 2013).

2. PANOPTICISM IN SURVEILLANCE AND DIGITAL STUDIES

It is unsurprising that panopticism is used as a disquieting synonym for surveillance. While the literature does not provide a single unified definition of surveillance, the present contribution understands surveillance as a 'technique of social control based on the collection of information'.[17] The scope of this definition has evolved with available technology, shifting from a panoptic model of surveillance that is centralized, normative and moralizing, inspired by Bentham[18], Foucault[19] and Orwell,[20] to a post-panoptic paradigm, where the impact of IT on individuals subjected to surveillance fractures them into their real and virtual selves, as explained by Deleuze,[21] Lyon[22] or Harcourt.[23]

Panopticism needs to be investigated beyond conceptual differences between Bentham and Foucault. The concept has been used to describe our times. Surveillance studies and Harcourt's theories on the digital age make it possible to update the relevance of panopticism in understanding changing eras under a new technological paradigm.

2.1 Surveillance Studies and Panopticism

The panoptic metaphor is used in surveillance studies under different guises: SuperPanopticon,[24] PostPanopticon,[25] Electronic Panopticon,[26] Omnicon,[27] Ban-opticon,[28] Global Panopticon,[29]

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[17] E Orrù, 'The Schengen Information System and Data Retention. On Surveillance, Security and Legitimacy in the European Union', in *Rethinking Surveillance and Control*, eds E Orrù, M Grazia Porcedda and S Weydner-Volkmann (Baden Baden, Nomos, 2017) 115.

[18] J Bentham, *Postscript, Part I. Containing further Particulars and Alterations relative to the Plan of Construction originally proposed; principally adapted to the purpose of a Panopticon Penitentiary-House,* op. cit.

[19] M Foucault, Surveiller et punir.

[20] G Orwell, *1984* (1949).

[21] G Deleuze, *Postscript on the Societies of Control* (MIT Press, 1992) 3–7.

[22] D Lyon, *Theorizing Surveillance. The Panopticon and Beyond* (Cullompton, Willan Publishing, 2006).

[23] B Harcourt, *Exposed*.

[24] M Poster, *The Mode of Information: Poststructuralism and Social Context* (Chicago, Chicago University Press, 1990).

[25] R Boyne, 'Post-Panopticism' (2000) 29/2 *Economy and Society*, 285–307.

[26] D Lyon, 'An Electronic Panopticon? A Sociological Critique of Surveillance Theory' (1993) 41 *The Sociological Review*, 653–78.

[27] N Goombridge, 'Crime Control or Crime Culture TV?' (2003) 1/1 *Surveillance and Society*, 30–45.

[28] D Bigo, 'Surveillance, exception, ban and surveillance', in *Theorizing Surveillance. The Panopticon and Beyond*, ed. D Lyon (Cullompton, Willan Publishing, 2006).

[29] S Gill, 'The Global Panopticon: The Neo-Liberal State, Economic Life, and Democratic Surveillance' (1995) 20/1 *Alternatives*, 1–49.

Panspectron,[30] Myoptic Panopticon,[31] Fractal Panopticon,[32] Industrial Panopticon,[33] Urban Panopticon,[34] PedagoPanopticon,[35] Polypticon,[36] Synopticon,[37] Panoptic discourse,[38] Social panopticism,[39] Cybernetic Panopticon,[40] Neo-Panopticon,[41] and the like. It is possible to identify five panoptical features that are still relevant to describe modern-day surveillance. Indeed, the metaphors point to one group which is isolated to be controlled by a central monitoring gaze which remains key to the panoptic analogy and makes it possible for surveillance to extract unescapable compliance, thus being an all-pervasive mode of governing individuals.[42]

Stances taken towards the Panopticon/panopticism in surveillance studies range from acceptance to rejection. Indeed, as neither 18th-century England or 1970s France is relevant to our digital age,[43] nor is the concept of discipline, Panopticon/panopticism is often rejected on grounds of anachronism.[44] Additionally, the absence of resistance in panoptic surveillance –

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[30] M De Landa, *War in the Age of Intelligent Machines* (New York, Zone, 1991).

[31] S Leman-Langlois, 'The Myopic Panopticon: The Social Consequences of Policing Through the Lens' (2003) 3/1 *Policing and Society*, 43–58.

[32] M De Angelis, M., 'Global Capital, Abstract Labour, and the Fractal Panopticon' (2001) 1 *The Commoner,* 1–19, available at www.commoner.org.uk.

[33] A Butchart, 'The Industrial Panopticon: Mining and the Medical Construction of Migrant African Labour in South Africa, 1900–1950' (1996) 42/2 *Social Science and Medicine*, 185–97.

[34] H Koskela, '"Cam Era" – the Contemporary Urban Panopticon' (2003) 1/3 *Surveillance and Society*, 292–313.

[35] R Sweeny, 'Pedagopanopticon: Beyond Discipline and Punish in the Classroom', *New Forms Festival* (Vancouver (BC), 2004).

[36] M Allen '"See You in the City!" Perth's Citiplace and the Space of Surveillance', in *Metropolis Now: Planning and the Urban in Contemporary Australia*, eds K Gibson and S Watson (Sydney, Pluto, 1994) 137–47.

[37] T Mathiesen, 'The Viewer Society: Michel Foucault's "Panopticon" Revisited' (1997) 1/2 *Theoretical Criminology* 215–34.

[38] V Berdayes, 'Traditional Management Theory as Panoptic Discourse: Language and the Constitution of Somatic Flows' (2002) 8 *Culture and Organization*, 35–49.

[39] L Wacquant, 'The Penalization of Poverty and the Rise of Neo-Liberalism' (2001) 9 *European Journal on Criminal Policy and Research*, 401–12.

[40] G Bousquet, 'Space, Power and Globalization: The Internet Symptom' (1998) 4 *Societies*, 105–13.

[41] S Mann, J Nolan and B Wellman, 'Sousurveillance: Inventing and Using Wearable Computing Devices for Data Collection in Surveillance Environment' (2003) 1/3 *Surveillance and Society*, 331–55.

[42] A Brunon-Ernst, 'La Matrice Panoptique Dans Les Formes Contemporaines De La Surveillance', *Deux Siècles D'utilitarisme*, edited by E Dardenne and M Bozzo-Rey (Rennes, Presses universitaires de Rennes, 2011) 145–56.

[43] M Lianos, 'Social Control after Foucault' (2003) 1/3 *Surveillance and Society*, 413; R Boyne, 'Post-Panopticism', 293.

[44] M Poster, *The Mode of Information: Poststructuralism and Social Context*; C Norris and G Armstrong, *The Maximum Surveillance Society: The Rise of CCTV* (Oxford, Berg, 1999); Z Bauman, 'Social Issues of Law and Order' (2000) 40 *British Journal of Criminology* 205–21; D Lyon, *Surveillance Society: Monitoring everyday life* (Buckingham, Open University Press, 2001).

the observation that Panopticon/panopticism is an unrealistic fantasy of absolute compliance[45] – is often identified as a shortcoming of the model. Lastly, sociologists point to consumer society,[46] where enjoyment imperatives are paramount[47] and rank above any attempt at reforming the individual,[48] to show that the panoptic model is irrelevant. One telling example is that in crime prevention systems track objects rather than individuals, contrary to panopticism, which centred on individual reformation.[49] Even research more responsive to the panoptic metaphor, such as CCTV studies, shows that while CCTV operates from a centrifugal perspective, the overall picture of reality that will be conveyed will be fragmented.[50] Whatever the stand chosen, the wealth of semantic creations points to the strength of the panoptic as a critical concept.

2.2 Panopticism Revised in the Digital Age

For some, the emergence of the digital world has created a new paradigm for which analogue-age metaphors are no longer fitting. In the age of digital surveillance, exposure is the main mode of self. Harcourt traces the shift from the security of biopolitical post-panoptic eras (which targets populations and which is interested in the maximizing/minimizing diptych) to enjoyment which characterizes the digital surveillance under the social networking paradigm. Technology now makes it possible to target people individually at a low cost, since information is freely surrendered by people with the aim of enhancing their pleasure, any panoptic reformative intent being lost in this age.

There is nonetheless something of panopticism which remains in the discussion on contemporary framework of interpretation. At least two of these panoptic features are carried over into the new theories. First, total awareness. Indeed, Harcourt still believes that some classic forms of the juridical exercise of power can be brought into the digital age as, while the symmetries and asymmetries are different, there is a similar desire for 'total awareness'.

Second, spatial metaphors are enduring in new digital age paradigms. Indeed, when writing about the digital world, academics still rely heavily on spatial metaphors to be found in the analogue world. In the past, spatial metaphors were instrumental in describing discrete eras: the age of the spectacle was represented with the arena or that of disciplines with panopticism. But even when he tries to characterize the digital world, Harcourt uses the spatial design of the crystal palace and the steel cage. Architectural space, that is, human-designed space to fit a purpose, is widespread and used as an analogy to describe new social environments, even if they might not necessarily be adequate.

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[45] R Boyne, 'Post-Panopticism', 295; S Mann, J Nolan and B Wellman, 'Sousurveillance: Inventing and Using Wearable Computing Devices for Data Collection in Surveillance Environment', 333.

[46] R Boyne, 'Post-Panopticism', 297.

[47] Z Bauman, 'On Post-modern Use of Sex', in *Love and Eroticism*, ed. M. Featherstone (London, Sage, 1999) 23; P Vaz and F Bruno, 'Types of Self Surveillance' (2003) 1/3 *Surveillance and Society*, 281.

[48] M Lianos, 'Social Control after Foucault', 423.

[49] M Lianos, 'Social Control after Foucault', 426.

[50] C Norris and G Armstrong, *The Maximum Surveillance Society: The Rise of CCTV*, 17.

3. STATE AND CORPORATE SURVEILLANCE

Panoptic characterization can also be found to describe pieces of legislation. Indeed, there is an increasing number of academics who explore directly or indirectly the panoptic metaphor in law. They will adopt different approaches depending on their background and their knowledge of Bentham's Panopticon or Foucault's panopticism. This will lead to the term panoptic/Panopticon/panopticism being used with inconsistent meanings.[51]

3.1 Panopticism and the Law

The section explores two instances of laws regulating state surveillance in a penitentiary environment and in the context of the international fight against terrorism. In both cases, the epithet 'panoptic' was used to describe the provisions, and in doing so dismissed as lacking any benefit. Indeed, arguably, electronic tagging might be considered as a more desirable option for convicts than incarceration, and circumscribing clearly the scope of police powers can be construed as offering additional safeguards through a warrant system and meaningful publicity.

3.1.1 Panopticism and penal law: reformed French Penal Code, 2014

In 2014, electronic tagging was introduced into French penal law.[52] It was portrayed as reeking of panoptic control. The 2014 law's claim to panoptic fame originates in a new legal instrument called penal constraint ('contrainte pénale'). It is a type of probationary sentence meant to replace incarceration. With penal constraint, the subject must abide by a certain number of restrictions and is under continuous supervision, but not remanded in custody.[53] These conditions include electronic tagging.

Isabelle Fouchard, in an article in the French left-wing newspaper *L'Humanité*, wrote a piece on the lessons to be drawn from Foucault's *Discipline and Punish* today. Her argument is that panopticism is very much still present in the way the prison is organized. She gives the example of the 2014 penal reform and the introduction of electronic tagging as an instance of surveillance inside and outside the prison.

3.1.2 Panopticism and terrorism: USA FREEDOM Act 2015

In 2015, the US government passed the USA FREEDOM Act[54] in order to close some of the loopholes and address the breaches of civil liberties identified by the 2013 Snowden WikiLeaks Scandal. Indeed, the NSA and the FBI were using section 215 of the USA PATRIOT Act 2001, passed after the 9/11 attacks, and the 'business records' provision of the 1978 Foreign Intelligence Surveillance Act (FISA) in order to carry out dragnet and warrantless collection

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[51] A Brunon-Ernst, ed., *Beyond Foucault: New Perspectives on Bentham's Panopticon* (Aldershot, Ashgate, 2012).

[52] Loi No. 2014-896 du 15 août 2014 relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales [Law No. 2014-896 of 15 August 2014, on the Individualization of Sentencing and Reinforcing the Efficacy of Penal Sanctions], LEGIFRANCE.

[53] Loi No. 2014-896, articles 19–23.

[54] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 or the USA FREEDOM Act of 2015.

of US phone call data and business records.[55] In order to obtain these records, the government had to apply for a Section 215 order from a FISA Court. The requests for the order and the court's rulings were classified. Aggregate numbers were then sent to Congress annually.

The USA FREEDOM Act amends the FISA Act to establish a new process to be followed when the FBI submits an application to a FISA court for an order requiring the production of business records or other tangible records for an investigation to obtain foreign intelligence information not concerning a US person or to protect against international terrorism or clandestine intelligence activities. The USA FREEDOM Act bans bulk collection of data, as any request for records must now be based on 'specific collection terms'.

The USA FREEDOM Act allows State surveillance of telephone call records for the purposes of fighting terrorist organizations but regulates it thanks to checks and balances. Nonetheless, it has been criticized as part and parcel of 'America's Panopticon'.[56]

3.2 Covid-19 and Panopticism

It is impossible at the present time to have enough perspective on how surveillance will change in the decades post-Covid, from telehealth to remote working and learning, all of it generating an unprecedented stream of data.[57] However, it might be possible tentatively to identify a certain number of directions which surveillance is taking. Examples on the dystopian side are rife, such as patrol robots and drones,[58] CCTV cameras[59] and smart phone applications. Naomi Klein forecasts 'a future in which our every move, our every word, our every relationship is trackable, traceable and data-mineable by unprecedented collaborations between government and tech giants'.[60] Below we consider the apps offered on a voluntary – or not – basis to trace virus contacts, as they are also given 'panoptic' epithets in the media.

3.2.1 Digital panoptic tracing

There were broadly two models of tracing apps in the world: (1) the Australian CovidSafe type of app, where the government collected and stored a large amount of data, before notifying individuals of their status; and (2) the app developed by Apple and Google, which offered a decentralized system of data flow, that is, without a centrally controlled database holding private information on individuals. The world was thus faced with two options: state surveil-

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[55] This could be combined with section 216 of the USA PATRIOT Act which granted access to records of online activity.

[56] K Fitzpatrick, 'America's Panopticon', *The Nation* (6 December 2018).

[57] Naomi Klein writes about 'pandemic shock doctrine' or the 'Screen New Deal' in 'How big tech plans to profit from the pandemic', in *The Intercept,* republished in *The Guardian* on 13 May 2020.

[58] In France, the use of patrol drones has been banned by France's highest administrative court (Conseil d'Etat) on grounds that privacy-friendly regulations are needed to address concerns about facial recognition. See H Fouquet and G Sebag, 'French Covid-19 Drones Grounded after Privacy Complaint' on Bloomberg, on 18 May 2020.

[59] For a detailed study of the effect of CCTV cameras, see N Falkenhayner, *Media, Surveillance and Affect* (London, Routledge 2019).

[60] N Klein, 'How big tech plans to profit from the pandemic', *The Intercept*, republished in the Guardian on 13 May 2020.

lance or corporate tracking. Indeed, in the Australian case, larger amounts of data than necessary were held for longer periods than needed in a central national database, thus vulnerable to illegal or improper access and to mission creep, whereby the government could change the purpose for which the data was held.[61] The Australian government contracted with Amazon for the storage of the CovidSafe data.[62] This points towards the 'amalgam' between state and business in the field of surveillance.[63] On the other hand, Apple and Google offered an interface (or API) that facilitated automated contact tracing, thanks to use of Bluetooth technology, and that was advertised as less vulnerable to interception than GPS.[64] Decentralized systems made it possible to comply with the European General Data Protection Regulation (hereafter GDPR)[65] requirements as they were more in line with data minimization principles (more on that in the following section)[66] and made it more onerous to reidentify the data subject.[67] Scientists and researchers praised the Apple and Google joint venture and called governments to embrace that app model. Some were more cautious.[68]

In both cases, commentators have been quick to panoptic nicknames: Coronopticon,[69] Pandemic Panopticon,[70] Panopticon in Your Pocket,[71] to quote a few panoptic semantic creations. The first response to these creations would be to highlight the difference between the operational workings of the app and the Panopticon. While the aim of the apps is to change the behaviour of the person that has been notified of a high-risk contact, the automated, fragmented and decentralized tracking system cannot be compared to panopticism and its centralized, all-encompassing and data-hungry system of surveillance. The second response is to recognize the ways in which describing these apps as 'panoptic' is critical of the surveillance system they imply. Both state and corporate surveillance have shown past instances of misuse of private data, leading to dramatic consequences. In a digital age where the use of online communication and social networking is embedded in our daily lives, reminding people of the risks and trade-offs of doing so by using the Panopticon metaphor might not be historically accurate, but could be critical to raise awareness.

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61 K Kemp, 'COVIDSafe: Four Weeks In', Webinar organized by HMI project at ANU, and the Australian Academy of Science (26 May 2020).

62 See https:// au .finance .yahoo .com/ news/ govts -coronavirus -app -sends -data -to -amazon -012946916.html.

63 B Harcourt, *Exposed: Desire and Disobedience in the Digital Age*.

64 Joint Statement on Contact Tracing (19 April 2020).

65 OJ [2016] L 119/1.

66 S Rossello and P Dewitte, 'Anonymization by decentralization? The case of COVID-19 contact tracing apps' (European Law Blog, 25 May 2020), available at https://europeanlawblog.eu/2020/05/25/anonymization-by-decentralization-the-case-of-covid-19-contact-tracing-apps/#more-6280.

67 See European Court of Justice (ECJ) judgment on the matter in Breyer: Recital 26 of the GDPR indeed states that to determine whether a person is identifiable 'account should be taken of all the means reasonably likely to be used'.

68 M Faizal Abdul Rahman, 'Covid 19 and the acceleration of state surveillance', *The Interpreter* (14 May 2020). Published by the Lowy Institute at www.lowyinstitute.org/the-interpreter/covid-19-and-rise-state-surveillance.

69 The Economist (26 March 2020): coronavirus app to monitor virus and citizens.

70 Aljazeera (19 April 2020): Israelis using the pandemic to surveil populations.

71 M Bartos, 'Panopticon in your pocket' (27th April 2020) *Inside Story*.

Notwithstanding the criticism implied in these new panoptic phrases, evidence shows that people seem to have shifted their attitudes to surveillance when it relates to health. Data show that popular support for such forms of surveillance globally is high.[72] What interests me, therefore, is the shift in other types of historic surveillance from over the skin surveillance to under the skin surveillance,[73] and seeing how negative perceptions of surveillance might change.

3.2.2 Post-panoptic bien(sur)veillance?

The latest type of surveillance to be born of the Covid lockdown under the pen of Cynthia Fleury is called 'bien(sur)veillance'[74] and attracts higher levels of global acceptance. The benevolent aim of electronic surveillance is a legacy of 19th-century paternalism. This is a very successful rebranding of the fears of privacy invasiveness operated by high-tech corporations into 'the dubious promise that these technologies are the only possible way to [disease-free] lives, the indispensable keys to keeping ourselves and our loved ones safe'.[75]

To the suggestion that privacy is traded for utility, Harari answers that there are ways of building safeguards into the system (as we have seen: decentralized systems, anonymity, data minimization, short-time data storage, consent download, and so on)[76] in the same way that the low-tech Panopticon was designed to allow accountability built into its system of surveillance.

3.3 State-Regulated Corporate Surveillance: GDPR Contra E-Panopticon

The third type of surveillance relates to government regulating mainly private corporations' harvesting of private data. This type of instrument might be thought to be exempt of any panoptic criticism. This is not necessarily the case, as some commentators trace the genealogy of such legislation to Bentham and Foucault's Panopticon.[77]

3.3.1 Corporate data collection without consent

Companies have used personal data (genetic, biological, physiological, bank details, IP addresses) to create profiles that can then be used for aggressive marketing or more sinister purposes. However, the ECHR protects data about a natural subject which cannot be collected without their consent.[78] The EU needed to strengthen its legal provisions to make effective

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[72] See The Conversation (15 May 2020) at https://theconversation.com/70-of-people-surveyed-said-theyd-download-a-coronavirus-app-only-44-did-why-the-gap-138427.

[73] YN Harari, 'The Surveillance in the time of Covid-19', in *The Take by Aljazeera* (5 May 2020).

[74] C Fleury, 'Journal D'une Confinée, Par Cynthia Fleury: "Nous Entrons Dans Une Ère De Bien(Sur)Veillance"', *Telerama* (9 avril 2020).

[75] N Klein, 'How big tech plans to profit from the pandemic'.

[76] Harari, 'The Surveillance in the time of Covid-19'.

[77] 'Decoding the GDPR' in *Brandt School Bulletin*.

[78] Consent is the core legal basis for processing any personal data, defined as 'any freely given specific and informed indication of […] wishes' in the Data Protection Directive (OJ [1995] L 281/31, Article 2). See E Kosta, *Consent in EU Data Protection Law* (Martinus Nijhoff Publishers, 2013) 110, and M Kuschewsky, *"EU" in Data Protection and Privacy: Jurisdictional Comparisons* (Thomson Reuters, 2012) 129–48. Unfortunately, the consent condition has not always been implemented so as to guarantee compliance with fundamental rights. Indeed, in *Copland v* The *United Kingdom* (App no. 62617/00 (ECtHR, 3 April 2007)), the European Court of

these rights. It passed the GDPR, which introduced two levels of data protection: by design and by default.

3.3.2 Data protection by design

Data protection by design is technical and organisational measures embedded in the treatment of data at the level of system, service, product or process throughout its lifecycle to ensure that data is effectively afforded the protections under ECHR. This can take to form of pseudonymization, encryption and data minimization. In themselves, these three measures counter previous practices and could be construed as anti-panoptic in design. At the time he was creating the Panopticon, Bentham advocated tattooing people to fight crime that could take place under the cover of anonymity;[79] and in his projects on poor law reform, he embraced data minimization only on account of the high cost of data collection. This is not to say that, faced with the same circumstances of aggressive data harvesting corporate culture, he would not have resorted to the same instruments as those put forward in the GDPR.

3.3.3 Data protection by default

Data protection by default is processing only the data necessary to achieve a company's specific purpose, thus choosing the most privacy-friendly settings. The default settings make it possible to restrict the transparency of individual internet browsing. Here again, panopticism's strength lies in the quasi-full disclosure of inmate's actions. The internet provides access to the actions and thoughts of any given user. While such a provision can be deemed un-panoptic, increasing the effective privacy of an individual, it would be anachronistic to use these categories in a digital age with its unique set of challenges. The GDPR reallocates areas of transparency (language used when communicating with users) and secrecy (areas that remain private) to avoid misuse of corporate power. This stands in contrast to Panopticism which controls in order to reform the individual. No such reforming aim presides over the GDPR provisions.

4. CRITICAL AND FICTIONAL PANOPTICISM

Panopticism has spread beyond surveillance studies and small archipelagos of penal law to branch out into the world of critical theory and fiction. When it comes to panoptic fiction, the

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Human Rights emphazised the need for consent to collect and store an employee's personal information relating to telephone calls, email correspondence and internet use; and in the joined cases *Digital Rights Ireland (Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landsregierung and Others* [2014] OJ C175/6), the Court of Justice of the European Union (CJEU) stated that Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in the connection with publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC was invalid as it was not compliant with the CFREU on grounds of failing to establish the proportionality of measures concerning the conditions of data storage and the obligations of Internet Service Providers (ISP) and security agencies.

[79] See among others, J Bentham's manuscript source titled 'Indirect Legislation', UC 87, 31.

assumption is that panopticism influenced artists. It is also a concept that has been fleshed out as a very fertile critical tool, but is not without its methodological shortcomings.

4.1 Critical Panopticism

This section serves to identify some discrete instances where panopticism can be used as a critical tool in literary studies, in the same way as it was used as a paradigm in surveillance studies. Here, academics are interested in the interpretative value of concepts of Panopticon/panopticism/panoptic in understanding fictions. First, John Bender argues counterintuitively that it is not so much a matter of panopticism influencing the novel as, conversely, the novel being a constructive force in the rise of the penitentiary.[80] In the same line of reasoning, D.A. Miller investigates panopticism not only as a running metaphor in novels, but as a disciplining regime informing the whole purpose of the novel itself. According to him, the novel is part of a policing regime that regulates the subject. It carries normative injunctions regarding appropriate and inappropriate behaviour in society and thus aims to modify the reader's behaviour.[81]

Approaches taken by Bender and Miller, and similar uses of critical panopticism, are called into question by Dorrit Cohn.[82] She points out that real worlds described or targeted in the Panopticon projects or in the concept of panopticism are not to be confused with the fictional worlds described by artists. Cohn also believes that it is inappropriate to use the panoptic trope to analyse narrative techniques. Whether she is correct or not is of no bearing on the present discussion, as what is of import is to identify how fertile the panoptic metaphor has been, even in areas where it was least expected, such as critical theory.

4.2 Panoptic Fictions

Beyond the academic debates and closer to the experience of the general public, panopticism has spread to the novel, giving rise to a new sub-genre: the panoptic fiction.[83] Panoptic fiction is understood as presenting a panoptic view of the world, based on the theoretical foundations laid in Foucault's *Discipline and Punish.* The concept panoptic/panoptical/Panopticon/panopticism is used both in literary critique and in fiction that draws on the panoptic scenario, either explicitly or implicitly referring to it. Examples of panoptic fiction are rife: George Orwell, *1984*, 1949; Angela Carter, *Night at the Circus,* 1984; Tim Willocks, *Green River Rising,* 1994; Patrick McGrath, *Vigilance,* 1989; Jeni Fagan, *The Panopticon*, 2013, *The Circle*, 2017, and so on. The sub-genre is not without its challenges: since metaphor can be implicit or explicit in a work of art, it may be difficult to identify the works that belong to it.[84]

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[80] J Bender, *Imagining the Penitentiary: Fiction and the Architecture of Mind in Eighteenth-century England* (Chicago, University of Chicago Press, 1987).

[81] DA Miller, *The Novel and the Police* (Oakland, University of California Press, 1989).

[82] D Cohn, 'Optics and Power in the Novel' (1995) 26/1 *New Literary History*, 3–20.

[83] For a seminal study of panoptic fiction, see Claire Wrobel, *Panoptic Fiction since 1984: Theory, Surveillance and the Anglo-American Novel* (Paris, Classiques Garnier, 2022).

[84] Fran Cottell and Marianne Mueller even trace the first panoptic fiction to a pre-panoptic era: Fénelon's Telemachus, see F Cottell and M Mueller, 'From Pain to Pleasure: Panopticon Dreams and Panopticon Petal', *Bentham and the Arts*, edited by Malcolm Quinn (London, UCL Press, 2020) 244–69.

This is the reason why Wrobel's seminal research on panoptic fictions stays clear of categorizing them as a new literary genre.[85] Instead she analyses the Panopticon as a literary laboratory, even though it is an aborted project.[86] She shows how literature, much more than Bentham's writings, makes it possible to explore the complexity of human agency when confronted with a structure of control.[87] And this essential feature that emerges from the cracks of Bentham's (and Foucault's in many respects) projects is the erroneous belief that the surveillance system thus created is resistance-proof. Literature engulfs itself in the interstices of panoptic architecture, exploring in its narratives the flaws of the Panopticon. These interstices can be found in the architecture itself, but also in the surveillance system, or in the writing style, whose language overflows and challenges the ambitions of panoptic control.[88] Resistance is not only a unexpected manner of appropriating the architecture in fiction, but it informs the characters' identities.

References to panopticism seem to crop up in fictions set in a prison environment. Indeed, fiction is a form of discourse which reflects reality,[89] foretells and anticipates it,[90] and offers a particular response to the challenges the modern penitentiary poses by highlighting its abuse and inefficiency, thus participating in the debate on the reform of the contemporary penitentiary. However, literary criticism and fiction reinterpret the original Benthamite Panopticon and Foucauldian panopticism for their own purposes. Thus, fiction does not provide a consistent critical discourse on the prison system.[91] Indeed, panoptic fictions generally fail the test of the five levels of surveillance which are the groundwork of accountability in the Panopticon.[92] They also represent surveillance as a trap,[93] in a prison isolated from the rest of the community

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[85] C Wrobel, *Panoptic Fiction since 1984*, 6.

[86] C Wrobel, *Panoptic Fiction since 1984*, 102.

[87] C Wrobel, *Panoptic Fiction since 1984*, 149.

[88] C Wrobel, *Panoptic Fiction since 1984*, 195.

[89] M Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston (Mass), Beacon Press, 1995).

[90] 'Vehicles, not reflections of social change' (Bender, *Imagining the Penitentiary*: *Fiction and the Architecture of Mind in Eighteenth-Century England*); 'novelists have often […] been generators of […] surveillance history' (D Rosen and A Santesso, *The Watchman in Pieces: Surveillance, Literature and Liberal Personhood*).

[91] M Fludernick, 'Panopticisms: From Fantasy to Metaphor to Reality' (2017) 31/1 *Textual Practice*, 1–26.

[92] Janet Semple shows that it is not just the central gaze and its reversal that is at the heart of the panoptic endeavour: (1) inmates overseen by staff; (2) inspector oversees staff; (3) staff oversee inspector; (4) inmates control each other; (5) the building is open to the public. The gaze operates from the centre to the ring, and back, but also from points on the ring between them, thus allowing for any combination of sightlines and control. See J Semple*, Bentham's Prison: A Study of the Panopticon Penitentiary* (New York, Clarendon Press, 1993).

[93] For more in-depth studies on surveillance and the cultural field, see B Wasihun, ed., 'Narrating Surveillance – Überwachen erzählen' (2019) 28 *Literatur, Kultur, Theorie*; E Van der Meulen and R Heynen, *Expanding the Gaze: Gender and the Politics of Surveillance* (Toronto, UToronto Press, 2016); F Zappe and AS Gross, eds, *Surveillance, Society, Culture* (Berlin, Peter Lang, 2020); S Flynn and A McKay, eds, *Spaces of Surveillance: States and Selves* (Basingstoke, Palgrave Macmillan, 2017); T Levine, U Frohne and P Weibel, *CTRL_SPACE: Rhetorics of Surveillance form Bentham to Big Brother* (Cambridge (Mass.), MIT Press, 2002); J McGrath

where the unmonitored and unchecked abuse of overseers is rife. Artists make a strategic use of Panopticon/panopticism features to enhance an artistic effect or to make a political point. Panopticism thus presented is necessarily dystopic and aims to be critical of the failure of contemporary penitentiary systems and of society which promotes a crime control industry.[94] More than an essay, the fiction lends reality to the concept of panopticism, thus making it more eloquent.[95]

5. CONCLUSION

Notwithstanding major publications affirming the death of panopticism, these studies reassert the importance of the panoptic paradigm.[96] In the field of surveillance and critical studies, law and fiction, there is still room for panopticism as a methodological and substantive tool. However, it cannot be taken at face value but used critically as it can only present a fragmentary understanding of reality.

The panoptic metaphor doe nonetheless fulfil a very important function. It taps into the collective psyche and activates primal fears that individuals can have of surveillance and loss of liberties and self. While it might not be as fitting a descriptive tool as it used to be, it remains effective in reminding people of the routine activity of surveillance and its risks.

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and B Sweeney, eds, 'Surveillance, Performance, and New Media Art' (2010) 7/2 spec. issue *Surveillance & Society*.

[94] For more general consideration of surveillance and the prison, see N Christie, *Crime Control as Industry* (London, Routledge, 2000).

[95] A Brunon-Ernst and C Wrobel, 'Dystopic Prisons in Panoptic Fiction', CLAH Research Seminars, Australian National University (24 July 2019).

[96] See Gary Marx's comment on Lyon's *Theorizing Surveillance. The Panopticon and Beyond*: 'This volume paradoxically serves both to undermine and strengthen the idea of panopticism as a theoretical construct.'

22. Utilitarianism and religion

Jean-Pierre Cléro

Utilitarianism is so common in Anglo-Saxon countries that nobody would dream of not taking it into account in considering political, legal, economic, ethical and moral issues, even without conforming to that doctrine. The problem becomes more delicate with religious matters. Some utilitarians give some place to religion, others are agnostics, and still others are atheists.[1] Sometimes, a utilitarian author changes attitudes regarding religion on fundamental issues, as was the case for the very founder of utilitarianism, who did not deny himself some palinodes. In French-speaking countries the problem is different, since utilitarianism, though a possible choice, is a minority option when it is acknowledged and is much less so when it is not[2] – which may justify the fact that it is possible, without being too ridiculous, to classify some research in humanities as anti-utilitarian. Things are changing and, quite strangely, religion, which seemed to be anti-utilitarian by nature, may not necessarily be so; the sardonic outbursts that one can find in the writings of 19th-century Catholic dignitaries, who feared that practical positions may be 'infected by utilitarianism', are a thing of the past. It is important to understand why utilitarianism, when read and interpreted correctly, is not a fundamentally ungodly attitude. This is due to the very history of the movement, and to Bentham's change of attitude.

1. BENTHAM'S EVOLUTION

Bentham started from a point of Voltaire- or Hume-like irreligion. Such an attitude is quite clear in *Délits religieux*, which he wrote in an often grammatically erroneous French in the 1780s, but which often allows for very precise work on concepts. As in the works of Lumières, Enlightenment, Aufklärung philosophers, it is still in the name of truth and of what can be known about the beyond death and the fears that absurdly result from it that religion is being questioned (§§ 58, 59). However, two important themes can already be found in that first work. The political topic is put forward in two ways. There is good reason for Bentham entitling his text *Délits religieux*.[3] Religion does not punish the same criminal offences as the State, it does not see crimes in the same places and it does not classify them in the same way.[4] Religions

[1] J Crimmins thinks that atheism is Bentham's position.

[2] For utilitarianism is much more frequent in our assessments than one could think.

[3] J Bentham, 'Délits religieux' (published online in 2010) 6 *Revue d'études benthamiennes*, available at http://etudes-benthamiennes.revues.org/72.

[4] J Bentham, *Introduction to the Principles of Morals and Legislation*, ed. JH Burns and HLA Hart (London, Athlone Press, 1970) 202: 'It has commonly been the way to put offences against religion foremost.' However, that sort of deference is ambivalent. But 'for expressing reverence, there are other methods enough that are less equivocal. And in point of method and perspicuity, it is evident, that with regard to offences against religion, neither the nature the mischief which it is their tendency to produce, nor the reason there may be for punishing them, can be understood, but from

can imagine and convey the idea that crimes can be redeemed while States do what they can to punish faults and transgressions so that no offender may be tempted to reoffend and potential offenders may be deterred from committing the same crimes. They therefore counter what the States are there for and they confront State sovereignty. However, it is not because an act is religiously motivated that the social damage it causes is diminished.[5] Moreover, the second theme, which was already present in Hobbes' philosophy and was extended in Bentham's, was that religions can have power over imagination by using the fear of the beyond that they pretend to know better than the others. That is exactly the mechanism of fictions: the power that cannot be directly obtained may be obtained indirectly, by going above political sovereignty. There is some cleverness in the fact that one may feign a second-rank humility, seem to put up with such a debasement, and even justify it, while aiming nonetheless at supremacy.

The criticism of Anglicanism and the attached catechism in Bentham's *Church-of-Englandism and its Catechism examined*[6] focused on other aspects of Anglican politics and, through it, on all the politics of the religions of the Book. They distort the book on which they are founded, by radically restructuring its parts, by breaking it into small pieces, by changing verb tenses from past to present, by taking stories out of the context that gives them their meaning. From stories which tell a story, the religious becomes a power discourse, entering language to give duties and orders. Though they have escaped foot washing, which would have been too humiliating for the celebrant, believers have not escaped the sublimation of the Eucharist, which Christ never considered as a sort of sacred duty of the Christian but rather as a simple memory. However, Bentham made a mistake when he said that the Eucharist was a modern invention; the Διδαχη <didaché>, found much after Bentham's death in 1883,[7] demonstrated the ancientness of that sacrament which was set up as early as the first century after the death of Christ. The most political axis was in the denunciation of a collusion between a religion and the British State, which helped each other out when, for example, one demanded, for the benefit of the other, that several categories of civil servants and university students subscribe to the 39 articles that ensured the supremacy of the Anglican Church over all the other churches so that everybody, from a very young age, hated the Anglican clergy,[8] and ethics was driven out of English universities towards Scotland.[9] Hypocrisy lied in feigning a Christlike foundation to a permanent breach, by the State, of the value of secularism which allows everyone, whatever

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the consideration of the several mischiefs which result from the several other sorts of offences. In a political view, it is only between those others who are mischievous, that offences against religion are so too.'

5 Ibid., 154, note.

6 J Bentham, *Church-of-Englandism and its Catechism Examined* (London, E. Wilson, 1818).

7 Mgr Bryennos published it in Constantinople.

8 In *Délits religieux* (§ 180), Bentham wrote those terrible words: 'en Angleterre, la signature des Articles de foi ne fait pas tout à fait tant de mal à la La(ïc)ité qu'au Clergé'; and 'si le souvenir – que les signataires forcés ont – de cette tache – dont on a souillé leur jeunesse – leur fait une sensation désagréable, une sensation semblable est l'effet de tout objet et de toute personne qui contribue à la renouveler'. See also *'Swear not at all',* J Bentham*, Containing an Exposure of the Needlessness and Mischievousness as well as Antichristianity of the Ceremony of an Oath* (London, R Hunter, 1817).

9 J Bentham, *A Table of the Springs of Action*, in *Deontology together with A Table of the Springs of Action and Article on Utilitarianism* (Oxford, Clarendon Press, 1983) 55.

their religious commitments, to have their place. That issue nonetheless remained very much Lockean[10] and linked to Enlightenment positions.

It was in a much more Hobbesian manner that, in *Analysis of the Influence of Natural Religion on the Temporal Happiness of Mankind*,[11] Bentham, under the pseudonym of Philippe Beauchamp, levelled, among many topics that had already been evoked in his former works, the criticisms that *De Cive*[12] and *Leviathan*[13] had already made against oaths which, sworn in the name of God, quite dangerously redouble simple compliance with the law – which should be enough – thereby implicitly substituting their authority and making the reasons why one must obey them quite equivocal.

The step that, for us, shows the radical change in Bentham's approach of religious matters was taken in 1823 in *Not Paul, but Jesus*,[14] his last magisterial work on Christianity (he had planned a follow-up which was never written), which he signed under the apocryphal name of Gamaliel Smith. Utilitarianism no longer questioned the possibility of the Resurrection, or of the other miracles, for that matter. The only problem that Bentham was now deliberately interested in was that of the utility of asserted dogma, or at least that of the compatibility of those dogma with utility. Such utility was understood in the eudaimonian and hedonistic sense – that is, the greatest happiness of the greatest number. As early as *Délits religieux*,[15] admittedly, the principle was that weakening religion was not necessarily wrong if it did not contribute to that happiness. Religion was considered as one block, however. In *Not Paul, but Jesus*, religion is thought as being crossed by currents, some of which go towards utility and others against. Paul, who was the first author to give a doctrine – a legal, truly universal one – to Christianity, which, without such a decisive act would have vanished like the memory of a fact among other fact memories, is accused of distorting Christianity from the very first by giving it a turn it did not have in Christ, that of asceticism. There is no worse enemy of utilitarianism than asceticism, for happiness, according to Bentham is fundamentally terrestrial, found and ensured on Earth by trying to alleviate and reduce the pains that cannot but exist, including when looking for happiness itself.[16] Nothing in Christ's words may justify that physical and intellectual pleasure is put on trial. It took Paul's phantasms – and he did not lead by example, as his love of money, his way of hoarding it for himself, his ambition and his will to dominate others show – and their communication to generations of Christians substituting for Christ's words to transform the Christian Church into a sort of real and potential enemy of utilitarian-

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[10] The way Locke thought about tolerance in the *Second Treatise of Government* and in his famous (four) *Letters concerning Toleration* inspired, at least, one form of secularism. See J Locke, *The Second Treatise of Civil Government; and A Letter Concerning Toleration*, ed. JW Gough (Oxford, B Blackwell, 1948).

[11] J Bentham, *Analysis of the Influence of Natural Religion on the Temporal Happiness of Mankind* (New York, Promotheus Books, 2003).

[12] T Hobbes, *De cive*, English version entitled in the first edition *Philosophical rudiments concerning government and society*, ed. H. Warrender (Oxford, Clarendon Press, 1983).

[13] T Hobbes, *Leviathan, or, The matter, forme, & power of a common-wealth ecclesiastical and civil* (New Haven, Conn., London, Yale University Press, 2010).

[14] J Bentham, *Not Paul, but Jesus* (London, Hunt, 1823).

[15] J Bentham, 'Délits religieux', § 3.

[16] Bentham wrote it in all his books on religion; see J Bentham, *Introduction to the Principles of Morals and Legislation*, 202; J Bentham, 'Délits religieux', § 1.

ism and human happiness. The way he set the problem was not the same as in the first works, as, for example, *An Introduction to the Principles of Morals and Legislation* (published in 1789),[17] in which Bentham did not see any reason to consider asceticism as an obstacle to utilitarianism, provided whoever engaged in it did not try to impose it on others – which Bentham first considered as rare and not likely. One can take pleasure in what could be disagreeable to another and vice versa. The law itself takes into account that everyone is the master of their own happiness. That truism could remain. The thesis that no longer seemed acceptable, on the contrary, was that asceticism is nothing more than perverted utilitarianism, which has not become aware of itself as utilitarianism and is mixed with precepts which, because of their lack of conformity with those of utility, withhold it, harm the individual or are pernicious for the rest of the community.[18] The advantage of such a bias is that it believes it can protect its position by holding that it is so fundamental that it is almost neutral, and that there is no bouncing back of the opposite positions on the utilitarian ones. In a way that was cleverer, more political and more realistic too, Bentham progressively took his enemies seriously, treated them as real adversaries and expected them to counter utilitarianism with another discourse and not a partially utilitarian one to the entirety of which only the utilitarian would have the key. There is, with adversaries, some conciliation which is falsely respectable in that it denies them the status of adversaries, as if it were not possible to be an adversary of utilitarianism. That is often the stance of proponents of secularism: They do not understand that the behaviours they upset bounce back against them, holding them accountable. From a status as the main philosophy which displaced all others, in the last years of the 18th century, utilitarianism became in the first decades of the 19th century just one philosophy among others, which had opponents and had to answer them in ways other than by telling them that they had not yet reached the appropriate level of utilitarianism. Similarly, in the years 1810–20, asceticism was presented as a possible aspect of Christianity, contrary to the utility perspective. The issue that was raised was therefore whether Christians turning their back on utilitarianism was fatal, whether they would all rush into asceticism – and the answer was of course negative,[19] for Bentham's endeavour was precisely to oppose Paul's words to those of Christ's, who admittedly died in the most terrible conditions, but did not want that 'terrible' dimension and did not recommend suffering for its own sake. The Cross may have been no more than a disastrous accident.

The real meaning of the assertion of Christ's homosexuality in *Délits religieux* – which was not devoid of the ulterior motive of embarrassing Christian Churches, all of which rejected homosexuality at the beginning of the 19th century – may be that religion does not consist in restraining all desires, in all circumstances. It would be quite contradictory on Bentham's part to write a book seeking to exempt homosexuality from any crime and to be ironical about the homosexuality of Christ, who he said was in love with John, his 'beloved' disciple. That is not only what was at stake, however.

There was nothing in it to convince Kierkegaard, who at no time considered loving God without suffering in this world.[20] He would willingly have conceded, as he did to Feuerbach,

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[17] J Bentham, *Introduction to the Principles of Morals and Legislation*.

[18] Ibid., 120–1.

[19] Calculation was explicitly made in *Chrestomathia* to exclude theology and religion from topics that are to be taught.

[20] S Kierkegaard, *Journal*, vol IV, 307: 'Être en parenté avec Dieu, c'est souffrir' (To be related to God is suffering) and *Journal*, vol II, 274.

that most Christians really consider the happiness of loving God and being loved by Him in the utilitarian mode. Bentham quoted a certain number of theologians who admitted the principle of utility and who were among his friends: Browne, Paley, Priestley, Law.[21] They were but a small sample of the theists who supported ideas of the same vein. One needs only to think of the countless orators of the Boyle conferences, through to the theologian Bayes. The ambivalence about the meaning of pleasure and pain may well have been at its highest. There were other issues on which utilitarianism was more connected to the religious.

2. THE ISSUE OF EDUCATION

What should children be taught, since no religious idea is innate and even those which seem the most spontaneous and immediate have nevertheless been installed in minds? Admittedly, if the very ideas of irreligion, heterodoxy, heresy, schism, blasphemy and sacrilege that men use to attack one another are not taught, they may not be harvested either.[22] The stakes were higher, though. R.M. Hare differentiated in ethical matters between what he called prima facie feelings and ideas and the more critical, conceptual and reflexive elements.[23] However, the difference between those two registers does not imply at all that the necessary reflection which notes concepts, explains them and understands how they are articulated to our spontaneous ways of assessing situations should be substituted just like that. Reflexive education alone should not be counted upon to produce behaviours and judgements which to us seem to be the best connected to reality.

Here, the elaboration of that prima facie foundation is made more with the content of the Christian faith than Kantian formalism. Thus, the famous golden rule, whether in its affirmative – 'do unto others as you would have them do unto you' – or negative form – 'do not do unto others what you do not want done unto you' – has nothing in common with the Kantian law, which, to assess our acts, subjects their maxim to a universal extension. Christ would not ask everyone to live in poverty and from the charity of people one might encounter. He may ask that individually of someone, but no society could live according to those precepts without destroying itself from the start. Regulating another's feelings does not imply the game of going up from maxims to laws, unless one wants to conceptually teach that first intuitive level. On the contrary (Kant would have willingly agreed), in order for the conceptual game to work – and it may be necessary to make it operate in many situations – a set of feelings and ideas which belong more to religion than to morals and ethics must first have been established, which one should not explain right away, but which would be explained through the conceptual game. It is not impossible that a religious education may have to be provided before an ethical one if one wants the latter to become prevalent.

That remark has two important consequences. The first is that although utilitarianism always stood out from other practical attitudes thanks to calculation, blaming sentimentalist, sympathy, and common-sense morals for forgetting the crucial moment which transforms any

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[21] J Bentham, *A Table of the Springs of Action*, 52.

[22] J Bentham, *Chrestomathia*, ed. MJ Smith and W.H. Burston (Oxford, Clarendon Press, 1993) 51.

[23] RM Hare, 'Moral conflicts', in *Moral Thinking. Its Levels, Method and Point* (Oxford, Clarendon Press, Oxford University Press, 1981) 25–43.

situation into a sort of diplomatic game, no calculation may in itself claim to have an ultimate practical value. An ethical situation can never be resolved through a synthesis of settings which would not include an examination of the latter's detail and constitution. Utilitarianism never calculates but with already 'valued' parameters which do not expect from the calculation to which they are applied to be justified by that very calculation. One cannot see how one could accept racist, sexist and unequal elements in a calculation. The religious sets itself quite precisely on that point of watchfulness.

There is a second important consequence. Hare's discussion of abortion on that matter is interesting from that point of view. Admittedly, utilitarians would hardly become supporters of a cause that would prevent women from freely aborting. However, Judith Jarvis Thomson's point of view, supported by Peter Singer who published it in *Applied Ethics*,[24] is insufficiently detailed on the issue. And, from the moment a life is established, even though one could only talk about it potentially, by projecting it well beyond the present and quite outside any possible knowledge, the question of the happiness of that being is raised and considering it is, in most circumstances, in favour of the continuation and protection of the life of that being. Religion gets to and places itself in the blindest and darkest spots of a situation by paying them attention which does not select in advance the most favourable elements of the calculation for the result that one tries to obtain. Once again, the calculation that is presented as the most decisive progress of any utilitarian ethics, because of its apparent detachment from any religious and ethical conviction, cannot operate at all without some prima facie certainties. One must implement them firmly enough, but in an uncritical mode, in order not to risk that the critical level be established as the supreme authority of decision in any situation; in order to avoid any fanatic dogmatism as well, for, 'although it is a good thing to grow up with intuitions, there are some intuitions with which it is bad to grow up'.[25] The game between the practical that is felt and cannot be explained in its ultimate elements, and the practical that is critical, is exactly what must be established and invented in each generation, maybe even for each particular case.

The articulation of the religious with the rules, laws and norms that one wants to decree in any situation results in an original conception of the religious and politics.

Since the classical era, two main systems have fought about the conception of State secularism: that of Hobbes, who intended the assertion of the State's sovereignty to be radical and absolute, rejecting the traditional distinction of the spiritual and the temporal; and that of Locke, who, among different religious positions, looked for a balance, an agreement between the protagonists that would have defended them by channelling energies towards objectives that were socially useful. On the two sides, which may be closer than one might think, one is entangled in a conception of the contract which implies that citizens who disagree at least agree on the fact that their own disagreement – on a law, on a measure that is taken, and so on – must not weigh on the matters of the State which must resolve the real social objectives. Any contract that maintains conflicts must be doubled by another until it is possible to do as if everybody wanted what some precisely did not want. Perfection in that domain is the theory of the double contract in Rousseau's work which, beyond insoluble problems at a first

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[24] P Singer, *Applied Ethics* (Oxford, New York, Oxford University Press, 1986).

[25] RM Hare, *Moral Thinking*, 10.2, 172. Similarly, in the same book, Hare claimed he wanted to raise any child he would be entrusted with according to that secular principle (which might not be that secular) the equivalent of which is in the consideration that they must be, as is asked during the marriage service, 'christianly and virtuously brought up' (11.8, 205).

level, establishes a principle of universal agreement on some majority rule, as in a system of derivatives where one ends up reducing the heterogeneousness of the initial curve. In reality, it is possible to conceive a law that will not win unanimous support but only a relative majority, without having to fantasize an unanimous agreement on that majority, which is accepted as a majority, now, without any guarantee that it will remain so forever.

> A law may be defined [as] an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are, or are supposed to be, subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.[26]

Here one can see how important Bentham's definition of the law is to resolve the issues of secularism and tolerance. With such a definition of the law, there is no need to ask the believer to sacrifice her belief; she is not asked to separate, among the values in which she believes, the 'symbolic' part from the 'acting' one – which she would have to radically renounce. She understands the political issues with her faith, and, without renouncing it, she participates, law after law, in the very diverse game of the majorities and minorities that it triggers. A law cannot be separated from the citizen participations and withdrawals which are its very essence: 'however good in itself, [it] may become bad in any degree by unpopularity'.[27]

3. IN WHAT SENSE MAY THE THEORY OF FICTIONS EXPRESS THE RELIGIOUS?

The theory of fictions is truly the mark of one of Bentham's books. It was never really resumed after him by utilitarians. It could be an original contribution to the philosophy of religion, provided however that it lets itself be modified by the new objects it thinks of. We will therefore not talk about application, precisely because of that boomerang effect which results in the theory of fictions not being left untouched by its attempt at shaping religion.

What is underlined right away by Bentham is that religion is eminently a fiction.[28] Obviously, there are all the thought experiments which situate the reader on the other side of death in the kingdom of heaven. There are people who will tell you, and write that, 'par dessus le fonds de souffrance et de jouissance dont vous avez expérience et qui se distribue dans la vie où vous êtes, il y en a un autre tout différent qui doit se distribuer dans une vie à venir qui suivra la Présente'.[29] That is less an ontological truth than the suggestion of a practical mode

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[26] J Bentham, *Of Laws in General*, ed. Hart (University of London, The Athlone Press, 1970) Chap. I, 1st §, 1; J Bentham, *Of the Limits of the Penal Branch of Jurisprudence* (Oxford, Clarendon Press, 2010) 24. The squared '[as]; only appears in *Of Law in General*.

[27] J Bentham, *Writings on Political Economy*, vol I, ed. M. Quinn (Oxford, Clarendon Press, 2016).

[28] J Bentham, *Introduction to the Principles of Morals and Legislation*, 202.

[29] J Bentham, *Délits religieux*, § 13 (trans In addition to the pain and pleasure that you experience, and which is distributed in the life that you live, there is another, quite different, one, which is to be distributed in a future life which will follow this one).

of life: Live as if there were another side to life. My objective here is not to develop a theory of fictions in the diversity of its aspects, but rather simply insofar as I think that its rationality is important for the religious when the latter wants to get its own rationality. The essential point is that, to consider that a term or a proposition is fictitious, another term or proposition must be considered as real and must act as a foundation for the first. However, that relation of the real to the fictitious must not be held to be one-way. It can be reversed, and what was considered as fictitious can become real and vice versa. One should not think that one is saying the same thing. Changing, in that manner, one's assessment of what is real and what is fictitious is changing from a direct problem to a reverse problem, and a reverse problem cannot be solved like a direct problem. If one thinks that that rationality of the theory of fictions is appropriate for the religious, it is because very often, in an opposition between the temporal and the spiritual, the economic and the spiritual, money and the religious, an inversion is possible and the term that is considered as real is upturned as being fictitious. One of the most exorbitant examples is that Bentham may refer to the religions as fictions, which does not prevent him from considering God, not as a fictitious entity but as a real entity.[30] This point is as overlooked by those who want to count Bentham among the atheists as by those who have an overly sensualist reading of the real entities. Far from opposing money to the religious, the economic to the religious, the temporal to the spiritual, as if they were two completely separated entities, the same thing must be acknowledged in the two opposite terms but read differently. The Parable of the Laborers in the Vineyard (Matthew X, 1–16) has a double meaning. One can wonder about that type of justice which is operating when a work that is ten times less important is paid the same. Is not the landowner, rather than giving to everyone what is owed them, which is linked to the number of worked hours, paying something else: for example, the needs that must be satisfied to live? One can see that in order to understand the parable, one needs to reverse the terms of the issue and wonder of what goods such a way of acting can be the logic. To remain faithful to that openness, one must adopt a completely different approach. There has been a change from a direct problem to an indirect one, but it is more delicate to understand that there is not the same relations and the same remainders in one sense and in the other. One can make mistakes in the way one uses fictions as one can make mistakes when one solves reverse problems. It is true that it is possible to find excerpts in the Bible that say that it is not possible to serve two masters, God and Mammon (Matthew VI, 24). However, there are so many others which have us face conceptions of the economy which, though far from ours, are always remarkably interesting, even though they are not likely to become our own, if they ever were those of the Jews! There is an economic interpretation of the religious as there is a religious interpretation of the economic. The worst reading is that which holds them as two separate registers in two worlds which will not have anything to do with each other. The religious and the economic, the religious and money, and so on, are different modes of what can be perceived as the same, or having at least common features.

Those types of fictions which have just been described have a role to play, not only in the domain of law and politics, but also in the field of the religious, and it is too easy to conceive

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[30] J Bentham, *De l'Ontologie* (Paris, Le Seuil, 1997) 138: '*Author* and *Creator*: these alone, and not the word *cause*, can with propriety be employed in speaking of God. These, as well of *God*, are names of real entities: *author*, a name applicable to man, or in a word to any being considered as susceptible of design: *creator*, a term exclusively appropriated to the designation of God, considered with reference to his works.'

that the exploration, thanks to fictions, of modes of being that we cannot know directly, as what 'exists' beyond our death, is favoured. The aim is not to allow us to know that beyond or to draw aside, even a little, the veil that hides one of its objects. It is rather, thanks to such an incursion, to underline a point that could be important for an ethical or moral question that is raised in our world. The sort of fiction that is most frequently found is that which Bentham theorized in *Pannomial Fragments*,[31] by showing that economic phenomena of which it is possible to build series – he generally takes the example of the constitution of added value[32] – may be the object of an affective reading which, for example, while relying on the same series, gives them quite another meaning. Bentham puts us on the right path to deciphering a certain number of parables. He thus establishes that it is more painful to lose a sum of money than it is pleasant to win it. Behind the S that is lost or won, and which may be seen as equivalent, compared to the initial S, affectivity reads the relation or the series as follows: the loss of ΔS, in relation to [S – ΔS] (since ΔS is lost) is obviously felt as more vivid than ΔS, in relation to [S + ΔS] (when one wins ΔS). Biblical stories are often subtler, however, while belonging to the same approach: How to explain that the ΔS that has been lost – and which has created a pain that is greater than the pleasure that could have been felt if an equivalent had been given – causes a greater pleasure when it is recovered than if a comparable object had been given? There is a need for a calculation that would take into account the fact that an object that has been lost and retrieved is not the same object as an object with an equivalent economic value and is not to be counted in the same way on an affective level. Parables are full of enigmas of that sort: the theme of the lost sheep is echoed in that of the lost coin or that of the prodigal son, the arithmetic of which is identical and as difficult to formalize, while it is easy to spontaneously sympathize with the represented affects. Such a way of fictionalizing does not set realities against one another. It adapts them as being ordered based on different series and looks at what relations they have, what crossings they make. Religion is at ease in those adaptations, relations and crossings. On the contrary, it loses any meaning in attempts that hold it as substantial, next to other substances, the economy, money, and so on, which are not more substantial. Though many people think religion aimed at separating the temporal from the spiritual, others, on the contrary, have admitted that it should not be the case, that the temporal allowed the spiritual to move forward and progress and that there could not be any spiritual that would not be incarnated into the temporal. Thus, against those who think that a Christian should not meddle with money issues, one could argue that a Christian must at least constantly tackle them and that there is a Christian way of doing it, that economic affairs can be read in a religious way, just as there is an economic reading of the religious.[33]

Political considerations intersect, from this point of view, with religious considerations. From the added value line, one can watch the functioning of the line of pleasure gains and of the line of pleasure losses. From there, all distributions are possible. A government can worry particularly about the line of displeasure, for, pain being more vivid and profound than pleasure, and pleasure being everyone's business, State is more in its role when it cares about

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[31] J Bentham, 'Pannomial Fragments', in J Bowring (ed.), *Works of Jeremy Bentham*, vol III (Edinburgh, W. Tait, 1843).

[32] With S, a ΔS can be made; which transforms S into S', which equals [S + ΔS]. That operation may be repeated as many times as needed. Thus the following series: ΔS/S, ΔS'/S', ΔS''/S'', etc.

[33] Exactly in the same way as what has to do with art has to do with science and vice versa; see J Bentham, *Chrestomathia*, 60.

misery than when it cares about everyone's happiness. For reasons that refer to the very ontology of pleasures and pains, 'the care of providing for his enjoyments ought to be left almost entirely to each individual; the principal function of government being to protect him from sufferings'.[34] However, there are extremely subtle policies that only rely upon the differences between the series of pleasures and the series of displeasures and that need a medium line, not as the substantial added value line, but as a sort of imaginary line which depends on these differences. A political line can be only built by differences.

There are at least two pitfalls to avoid: what we call the theory of fictions – to comply with a way of speaking which has been used since Ogden[35] – allows you to bypass them. The first is not using the opposition of the literal and the figurative, as if the religious were necessarily the figurative of the literal, which would unquestionably be constituted of the economic, the political. The religious is just as real as what is usually considered and consecrated as real.[36] The literal and the figurative are relative notions and it is wrong to consider one as being the absolute of the other. It is too often tempting to see the figurative where the literal should be seen. The second is the use that is made by Hegelians of the notion of mediation, as if concepts could be passed into one another, when the aim is completely different since what is at stake is the reading of religious phenomena and notions from an economic, political and social perspective, and the reading of economic, political and social notions from a religious point of view. One of the advantages of the theory of fictions, at least in some of its uses, is that it makes it possible to keep the consistency of the terms, by reading them through the lens of the others, without forcing them to be identified to the others or diluted into the others. When he shows that the winning of money is always felt to be less pleasant than the losing of the same sum of money is felt to be unpleasant, Bentham does not ask that affects become sums of money, nor that relations of sums of money become affects, but that they let themselves be read by the others. Oppositions do not melt: in a balancing movement, different points of view are adopted.

Lastly, there is a point that brings utilitarianism and Christianity closer. One should not interpret Christianity as an ontology or a metaphysics – it contains too much of them, and they are incompatible. Christianity is first and foremost a practice. Utilitarianism, which is more a theory of practice than any elaborated knowledge of things, is a practice too.

If one wanted to read Saint Paul's texts correctly, and do more than ungenerously note logical errors, one should consider them as having to do with practical knowledge. Admittedly, Resurrection should not be formulated as an ontological fact, but rather, insofar as its idea is not absurd, considered as a risk which results in my not living thinking that that Resurrection has a meaning in the same way as I would thinking that it has none. Moreover, if what must be chosen is a rule that commits the community, the respective weight of the different motives supporting the adoption of one rule rather than any of the others, must be considered. The

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[34] *The Works of Jeremy Bentham*, ed. Bowring (Edinburgh, W. Tait, 1843) vol I, 301.

[35] CK Ogden, *Bentham's Theory of Fictions* (New York, Brace and Co, London, Kegan Paul, Rench, Trubner & Co, 1932).

[36] That inversion led Bentham so far that he admired that Berkeley could reverse the dogma that the soul and the religious should be classified as fictitious entities while the body, because of its material nature, should be put into the category of real entities. The inversion of the real and the fictitious led to the quite unexpected result of considering matter as a fictitious entity (J Bentham, A *Table of the Springs of Action*, 8).

knowledge of the action on things is not the same, even though it requires it, as the knowledge of things themselves. Bentham did not attack Resurrection in the same way as Hume would have done it, by underlining against its miracle that all chances are against it. Rather, he questioned the abuse of evidence that is found in Saint Paul's writings when he wants to demonstrate that we will all resurrect.

Faith is not considered as degraded knowledge. It is what could be called practical knowledge, which therefore implies a voluntary choice, which may give its reasons, without transforming into knowledge of what it is about. What is at stake is betting on eternal life in the contradictions of life which may present as many obstacles to it. But the fact that the probability of that choice is not non-existent is enough to begin to justify it. If faith is knowledge, it is not of the things which are chosen but of the choices themselves, of their probability and of what is expected of them.[37] It does not have to be presented as a pseudo-notion which would claim to be solving a problem. On all those essentially pragmatic points, there is no disagreement in principle between Christianity and utilitarianism, except if the choices made by the former are deliberately anti-hedonistic or anti-eudemonistic. That is truly the in-depth reason for the long anti-Paul plea.

One can study more deeply this agreement, which, being called – as I have done – 'pragmatic' does not give itself as such, but goes through the game of pleasure and pain, which is valued both by Christianity and utilitarianism. The essence of the religious, like that of utilitarianism, is action. However, it is the way action is felt that is at the principle in both cases. Maybe Bentham was wrong not to distinguish sufficiently between the two meanings of pain. Maybe there is a sort of pain that only causes suffering and must be fought, eradicated. Perhaps on that point there is a doubt in Christian asceticism and perhaps sometimes suffering has been valued as such – what Bentham calls afflictive asceticism in *Délits religieux*, § 53 – with a few limits nonetheless; but there is another pain which lies in the passiveness of our actions towards themselves. That pain is not much mentioned in Bentham's work. About the other pain, on the contrary, that which only causes suffering, and of which one wants to get rid, Bentham noted, like Christian authors, who are not prone to minimize sufferings, that there is a link between pain and reality. Whereas pleasure is always somewhat evanescent, pain, on the contrary, is a sign of reality. From that point of view, Christianity is on the same level as utilitarianism: suffering should not be minimized, as if it were a failure of happiness, or as if it could be assimilated to a shadow in a globally happy painting.

Active though a utilitarian may be, it is difficult to hold her to be Promethean. When one looks at the *Table* V, the *Table of Art and Science*, which is the equivalent of D'Alembert's encyclopaedic Table, *Le système figuré des connaissances humaines*, one can see that the eudemonic is presented as an equivalent of ontology, or even as preeminent, for it is always ready to take its place. Happiness – not the market, or the fanatic will of making added value – is the key to all knowledge, all methods and all techniques. There is nothing that can be aimed at above human happiness. It is the unsurpassable horizon of everything that we know and do. That means that sentimental and Epimethean values prevail. However, that point ends

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[37] Locke firmly insisted on it in his chapter on probability: 'Moral truth, *which is speaking Things according to the persuasion of our Minds, though the Proposition we speak agree not to the reality of Things*' (J Locke, *An Essay Concerning Human Understanding* (1689) Book IV, Chap. V, § 11, 578). He opposed that moral truth, which is valid in religion, to the metaphysical truth, which is a truth that conforms to things in their reality.

on a particular paradox: whereas the *French Encyclopédie* was founded on a 'mythological'[38] division of faculties – memory, reason, imagination – all the arts and sciences, at least in their principle, Diderot and D'Alembert put religion twice at the forefront, as a sacred and ecclesiastical history and as a science of God (natural theology, revealed theology, science of good and evil spirits); on the contrary, the *Table* of *Chrestomathic Encyclopedia* does not give it any place, not even one that would be difficult to recognize under any neologism. Apparently more open in principle to the existence of the religious, Bentham's *Table* seems to have purely and simply eliminated it. In the dichotomous tree of arts and sciences, there is no branch for religion, whereas the dichotomous method is allowed to organize the religious in *Délits religieux*. How can such a paradox be explained? That absence is all the more surprising since the springs of action, divided into 14 tables, leave some room in the IXth Table for the pleasures and pains of the altar.

That paradox is readily explained in reality when one understands the point of view of the *Chrestomathic Table*. Having happiness as their source and ultimate horizon, sciences and arts must all be renamed and reorientated: their contents depend on that new direction. D'Alembert's perspective remains dogmatic and classifies contents which are already there, without changing them, whereas *Chrestomathia* derives its contents from the tree of the acts which make happiness. Therefore, religious fears or phantasmagorias – which prevent action – are nowhere to be found in the *Table* if natural philosophy (physics, chemistry, biology) on the one hand, and the science of testimonies (and their formation and transmission) on the other, manage to dissolve them, in what Bentham calls their 'preservative' function.[39] Because of the way it wants our unhappiness, religion could not be part of the *Table*. However, in the list of all the springs of action, bad motives, neutral ones, have their place just as good ones. Let us note that those fears and superstitions could have been found on the other side of the *Table*, beyond the horizon, out of range, if Bentham had not placed the horizon of happiness so high and had accepted some inversion of acts on the other side of that horizon. It is not likely that, in that way of thinking, religion would only have found a place on the other side of the presented *Table*, but the *Table* is not continued on the side of the anti-eudemonic. Not in *Chrestomathia*. It is, in a way, *Not Paul, but Jesus* which, going to the other side of the eudaimonic horizon, meticulously examines, under the figure of Paul, the Antichrist, anti-eudaimonic values, or anti-values based on which it is possible to live a way of life that Bentham refused. It is that type of attitude about which *Délits religieux* wondered whether they could be sanctioned as a crime, since it is possible, by frightening one, to deprive one of one's very pleasures, and that the evil that is done in that way is more frequent than the evil occasioned by duels.[40]

John Stuart Mill was right: 'We not uncommonly hear the doctrine of utility inveighed against as a godless doctrine.'[41] But he added at once:

> If it [is] necessary to say anything at all against such a mere assumption, we may say that […] If it [is] a true belief that God desires, above all things, the happiness of his creatures, and that this was

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38 Bentham called that division 'mythology'; see J Bentham, *Chrestomathia*, 169.

39 Ibid., 29–30.

40 J Bentham, *Délits religieux*, § 80.

41 JS Mill, 'Utilitarianism', in: *Essays on Ethics, Religion and Society*, *Collected Works of John Stuart Mill*, vol X (Toronto, University of Toronto Press, London, Routledge and Kegan Paul, 1969) 222.

> his purpose in their creation, utility is not only not a godless doctrine, but more profoundly religious than any other.[42]

Utilitarianism is not necessarily a synonym for atheism and, though it is not directly religious, nothing prevents its compatibility with the religious provided it does not only aim at making its disciples live badly.

Just as mathematics is a set of modifications and rectifications of ordinary language, the religious may be understood in the same way. The transformations in that case are not the same, but language does not give more reasons to be irreligious than to be hostile to mathematics or physics. The religious is the bundle of language uses which contribute to the constitution of language itself, and whoever would not want to acknowledge that bundle of language uses –provided they manage to do it – would deprive themselves and language of one of its essential dimensions. Though it is true that, when disciplines are left to grow out of the eudemonistic roots of utilitarianism, there is no room left for the religious as a consistent entity, the situation is not as desperate as Bentham let his friends think,[43] and modern times have opened a space of possibility for utilitarianism and Christianity to agree.

Undoubtedly economic reasons forced the bourgeoisie to count on a comeback of the religious, admittedly on other conditions at the beginning of the 19th century than was the case previously, but as a necessity.[44] And political reasons result in utilitarians not asking believers to become or to imagine they are utilitarians, but to offer a doctrine that is not aggressive towards their positions. One should not fall into the trap of asking believers to 'evolve', either. On the contrary, and even more successfully than the classical liberal position – in line with Locke – their positions as believers may be recognized as such in their citizenship. That is at least what the definition of the law in *Of the Limits of the Penal Branch of Jurisprudence* allows.

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[42] Ibid.

[43] One must be careful – to establish Bentham's supposed atheism – not to grant too much importance to letters and neglect what is really important, that is, his works. Bentham clearly said what he thought in his works. He did not say everything, that is true; but it is quite dangerous to rely on correspondence and private discussions to counter what is said in the works. Works only are right.

[44] G Besse showed it in his article 'Philosophie, apologétique, utilitarisme' (1970) *Dix-huitième siècle 1970* 144.

23. Utilitarianism and migration

Isabella Luisa Mariani

1. INTRODUCTION TO UTILITARIANISM AND MIGRATION

Migration is a highly politicized global issue. In 2019 there were roughly 272 million international migrants, which equates to around 3.5 percent of the global population.[1] While the majority of migrants relocate for work or family, many are fleeing dire circumstances of war, persecution, civil unrest, or poverty. Climate change alone is predicted to force 200 million people—roughly 1 in every 45 people in the world—to migrate by 2050. Moreover, the act of migration itself can be treacherous and even deadly. According to the International Organization for Migration (IOM), between 2014 and 2018 more than 30,900 women, men, and children lost their lives while trying to reach other countries; the Mediterranean Sea alone claimed the lives of at least 17,919 people.[2] The moral imperatives surrounding migration must, therefore, be taken seriously.

This chapter sets out to examine what taking a purely consequentialist approach to migration ethics would entail. Utilitarianism, arguably the most influential consequentialist approach to morality, is a monistic moral theory in which that which leads to the greatest happiness for the greatest number of people is what is morally required. A central feature of utilitarianism is the equal moral weight of all individuals in making the utility calculus, and thus it is a relevant lens through which to view migration. Some of the authors explored in this chapter explicitly or implicitly adopt deontological rights-based arguments in their work. However, both these authors and public discourse around migration more generally make claims about the consequences of migration, usually framing their arguments around economic or cultural effects on the political communities sending or receiving migrants. Insofar as the effects of migration are considered, they are relevant for a consequentialist, and utilitarian, approach to migration ethics.

This chapter therefore argues that what a utilitarian approach to migration will entail depends first on how we understand utility and second, on who is included in the utility calculus. In seeking these answers, section 2 explores three dominant conceptions of utility—namely, classical conceptions of utility as pleasure or happiness, economic conceptions of utility, and negative utility—and how they may lead to different moral imperatives surrounding migration. Section 3 examines the idea that utilitarianism's moral imperatives related to migration will depend on who is included in the utility calculus: whether it is only those inside the political community or the global population. Sections 4 and 5 return to examining the consequences of migration, focusing on economic and cultural effects as they are the most dominant concerns in modern discourse around migration. Section 4 considers the moral implications of an economic conception of utility on migration, examining globalization and

[1] 'World Migration Report 2020' (Geneva, IOM, 2019) 19.
[2] 'World Migration Report 2020' (Geneva, IOM, 2019) 32.

migration, economic effects of migration on the receiving country, effects on the migrants themselves, and effects on the sending country. Lastly, section 5 considers the effects of migration on the culture of the receiving country, examining the relationship between culture and race, the effects of demographic changes to the receiving country, and how immigration is perceived to affect solidarity.

2. WHAT IS UTILITY?

Utilitarianism is a monistic system of normative ethics based in the greatest happiness principle. However, utilitarianism does not provide a precise definition of utility intrinsic to the theory itself. Therefore, what a utilitarian moral framework will require regarding migration will depend on how utility is understood. We focus here first on classic conceptions of utility as happiness, second on economic conceptions of utility, and last on negative utility and its implications for migration.

Hedonistic utilitarianism, famously outlined by Jeremy Bentham, understands utility as a mental state of pleasure. The utility calculus on this approach entails the summation of pleasures or pains that result from an action and the moral imperative lying with the action that leads to the greatest net balance of happiness over unhappiness.[3] For Bentham, there was no moral differentiation between pleasures of the body and those of the mind, even arguing that pleasures from maleficence count towards the moral imperatives of the utility calculus. John Stuart Mill's revisionist utilitarianism, on the other hand, distinguishes between higher and lower pleasures, arguing that higher pleasures hold more weight in the utility calculus than their more base counterparts.[4] For Mill, the diversity of ideas and exposure to pleasures is vital to achieving the greatest possible happiness, as pleasure from ignorance is a mere base pleasure and less intrinsically valuable.

Exposure to these new pleasures could arise with higher levels of migration. High levels of migration may lead to a diversity of ideas and experiences, and a mixing of cultures that may conceivably lead to more hedonistic pleasure, as the political community is exposed to new sources of pleasure such as new foods and music. The exposure to new pleasures that arises with more diversity also leads to greater understanding and knowledge, which not only brings the political community closer to ideal utility maximization, but also allows it to be more adept to choose the higher pleasures, as such a capacity only arises with knowledge and exposure. Hence it seems that migration can conceivably lead to an increase in utility on both a Benthamite and a Millian conception.

The second conceptualization of utility that we will consider is the economic formulation, which has arguably become the dominant understanding of utility over the past century. As famously articulated by W. Stanley Jevons as he set out to introduce the methods and language of mathematics into morality, utilitarians can avoid the problem of determining the unit of pleasure or pain if there is a method to compare their quantities directly.[5] Hence, economics follows directly from the calculus of pleasure and pain: to maximize happiness by purchasing

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[3] J Bentham, *The Principles of Morals and Legislation* (Buffalo, NY, Prometheus Books, 1988).

[4] JS Mill, *Utilitarianism*, ed. G Sher, 2nd ed. (Indianapolis, Hackett Pub, 2001).

[5] WS Jevons, *The Theory of Political Economy*, third ed. (London, MacMillan and Co., 1888).

pleasure at the lowest cost of pain. Vital to the economic conception of utility is contract, as it is through such voluntary exchange that parties can mutually increase utility.[6] As section 4 will further explore, the increase in ability to contract and the economic implications of free movement can be used to defend a system of more global migration, if not open borders.

Lastly, let us consider the negative conception of utility. As Karl Popper argues, through the use of reason it is easier to reach agreement on existing evils and how to combat them than it is to reach agreement on the ideal good or how to achieve it. The institutionalization of utilitarianism can thus prove to be difficult in the political community. It follows that the moral imperative of utilitarianism ought to be to minimize suffering, rather than to maximize happiness.[7] This moral imperative to minimize suffering may require states to admit necessitous migrants. Joseph Carens, among others, has defended the moral requirement to admit refugees on these grounds, arguing that the urgency of the needs of asylum seekers and refugees must surpass the typical utilitarian assumption of the equal moral weight of all parties involved.[8] Along broader utilitarian lines, Matthew Gibney has argued that states have a moral obligation to admit refugees where the cost to the state is low.[9] However, the vast majority of displaced persons, roughly 86 percent, seek asylum in neighboring countries where the relative cost to the state may be higher.[10] For example, in 2020 Turkey reported the highest number of displaced peoples, at just under 4 million, most of whom were Syrian refugees (92 percent); the United States reported only 1.3 million.[11] Such distribution of refugee responsibility based on proximity, Gibney argues, leads to enormous disparities in state burdens and biases in favor of refugees with the contracts, resources, and capacity to undergo dangerous journeys to richer and farther states.[12] As Betts and Collier argue, however, the duty to rescue (which can be understood as a moral requirement to minimize suffering) may entail merely a right of migrants to move to states close to their home country, rather than a right to migrate globally.[13]

3. WHO IS INCLUDED IN THE UTILITY CALCULUS?

There is nothing internal to utilitarianism as such that dictates whether the utility calculus must be done at the level of the political community or globally. For classical utilitarians such

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[6] F Edgeworth, *Mathematical Physics: An Essay on the Application of Mathematics to the Moral Sciences* (London, C. Kegan Paul & Co., 1881) 18–19.

[7] KR Popper, *The Open Society and Its Enemies*, 5th ed. (Princeton, NJ, Princeton University Press, 1971).

[8] JH Carens, 'Refugees and the Limits of Obligation' (1992) 6/1 *Public Affairs Quarterly* 31–44.

[9] MJ Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge, New York, Cambridge University Press, 2004).

[10] UNHCR, 'Global Trends: Forced Displacement in 2020' (2021) Global Trends 2020, available at www.unhcr.org/en-us/statistics/unhcrstats/60b638e37/global-trends-forced-displacement-2020.html.

[11] Ibid., 8.

[12] MJ Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 240.

[13] A Betts and P Collier, *Refuge: Rethinking Refugee Policy in a Changing World* (New York, Oxford University Press, 2017).

as Jeremy Bentham and Henry Sidgwick, while utility as pleasure is endemic to the human condition, the weighing of pleasures to translate utility maximization into law occurs at the level of the political community.[14] If only those within the political community are included in the calculus, a further question emerges of whether only citizens are to be included, or all those present within the national borders, including non-citizens. David Miller argues for giving priority to co-nationals in determining the preferences of the broader political community, grounding his argument on appeals to democratic sovereignty and the right to collective self-determination.[15] On the other hand, as Carens has argued, the fundamental feature of utilitarianism is the equal moral weight of all *people*'s utility, and this entails that the utility calculus must be done at the global level, and include citizens, non-citizens, and aliens alike.[16]

Relatedly, ought the calculation of utility consider average utility or total utility? As J.J.C. Smart puts it, is a universe of two million happy sentient beings, all equally happy, morally superior to a universe with only one million happy beings?[17] If we consider total utility, migration may lead to more overall utility in the receiving country, and less in the sending country. Using average utility, on the other hand, and if we consider only those already within the receiving country, immigration could conceivably lead to a lowering of average utility. However, using a universal calculation of average utility may lead to an opposing moral imperative to allow for more migration if global average utility is increased with more movement of peoples.

One final consideration is whether those within the political community who are not citizens should be included in the calculation. Most of this chapter will discuss prospective migrants. Let us briefly examine what utilitarianism might say about those who have already migrated. Should non-citizens be included in the utility calculus? In particular, should irregular migrants be included?

The IOM defines irregular migration as "Movement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the State of origin, transit or destination."[18] In determining what utilitarianism will require for irregular migration, it is imperative to consider the cost of borders themselves. In attempting to enter without documentation, migrants face dangerous circumstances and even death. The deaths of more than 60,000 men, women, and children were recorded on migration routes worldwide

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[14] J Bentham, *The Principles of Morals and Legislation*; H Sidgwick, *The Elements of Politics* (Cambridge, Cambridge University Press, 2012).

[15] D Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Cambridge, Massachusetts, Harvard University Press, 2016); D Miller, *On Nationality* (Oxford, Oxford University Press, 1999).

[16] JH Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49/2 *The Review of Politics* 251–73.

[17] JJC Smart, 'An Outline of a System of Utilitarian Ethics', in *Utilitarianism: For and Against* (Cambridge, Cambridge University Press, 1973) 27–8.

[18] IOM, 'Key Migration Terms' (2021) International Organization for Migration, available at www.iom.int/key-migration-terms.

from 1996 to 2017.[19] At the borders themselves, many have studied the significant mental health implications of detaining irregular migrants.[20]

The enforcement of migration law also entails significant costs of utility to non-citizens. Jeremy Harding analogizes the effects of forced removal of irregular migrants in Europe to a low-level military conflict.[21] Similarly, Gillian Brock argues that removal of undocumented migrants from the place in which they have established a home *prima facie* results in a violation of human rights, especially for children brought across borders by their parents.[22] On the other hand, Miller argues that while the state must protect the human rights of all those present, whether legally or not, it also has the right to remove people without residence rights from the territory so long as the methods do not themselves violate human rights by virtue of their brutality.[23]

Even if they are not forcibly removed, the lower relative utility of undocumented migrants within the political community is undeniable. Sarah Song argues that undocumented migrants have lower relative utility compared to citizens due to living with insecurity of status and lack of legal protections, lower access to benefits such as medical care, and facing discrimination in their interactions with citizens.[24] Regarding undocumented migrants in the workforce, studies show that they are especially vulnerable to exploitation as they fear job loss, incarceration, and deportation.[25] In addition, these studies document urgent health issues among migrant workers that include concerns of occupational safety, injury prevention, work-related diseases, barriers to accessing health services, and the associated health risks for their families and communities.

There are also associated economic costs to the receiving country in removing undocumented migrants and enforcing borders. As Brock outlines, the cost of removing temporary protective status and deporting Hondurans, Haitians, and El Salvadoreans from the United States would include shrinking GDP by $45.2 billion, deportation costs of $3.1 billion, and US employers absorbing turnover costs of about $1 billion.[26] According to the American Immigration Council, the United States government has spent an estimated $333 billion on agencies that carry out immigration enforcement since the creation of the Department of Homeland Security in 2003.[27] Legislative debates over undocumented migration are promi-

[19] A Singleton, F Laczko, and J Black, 'Measuring Unsafe Migration: The Challenge of Collecting Accurate Data on Migrant Fatalities' (September 2017) VIII/2 *Migration Policy Practice* 4–9.

[20] K Robjant, R Hassan and C Katona, 'Mental Health Implications of Detaining Asylum Seekers: Systematic Review' (April 2009) 194/4 *The British Journal of Psychiatry* 306–12; T Filges, E Montgomery, M Kastrup and AM Klint Jørgensen, 'The Impact of Detention on the Health of Asylum Seekers: A Systematic Review' (2015) 11/1 *Campbell Systematic Reviews* 1–104.

[21] J Harding, *Border Vigils: Keeping Migrants Out of the Rich World* (London, Verso, 2012).

[22] G Brock, *Justice for People on the Move: Migration in Challenging Times* (Cambridge, New York, Cambridge University Press, 2020) 95–6.

[23] D Miller, *Strangers in Our Midst: The Political Philosophy of Immigration*, 117.

[24] S Song, *Immigration and Democracy* (New York, Oxford University Press, 2019) 182–3.

[25] J Benach, C Muntaner, C Delclos, M Menéndez, and C Ronquillo, 'Migration and "Low-Skilled" Workers in Destination Countries' (7 June 2011).

[26] G Brock, *Justice for People on the Move: Migration in Challenging Times*, 93–4.

[27] American Immigration Council, 'The Cost of Immigration Enforcement and Border Security' (20 January 2021) American Immigration Council, available at www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security.

nent particularly in the United States. President Joseph Biden introduced the US Citizenship Act of 2021 that would, among others, provide paths to citizenship for millions of undocumented people, including the creation of a new Lawful Provisional Immigrant (LPI) status; expand opportunities for family sponsorship for Lawful Permanent Residents; and increase the per-country limit for prospective immigrants to the United States.[28] It would therefore have a conceivably impactful effect on the lives of many living without the benefits of lawful residency. The bill, however, is facing robust opposition and has not yet passed as of the time of writing this chapter.[29] In sum, what utilitarianism dictates in terms of migration will depend on whether we consider average or total utility, and whether we include in the utility calculus the global population, all those within the borders of the political community, or only citizens.

4. MIGRATION AND UTILITY: ECONOMIC EFFECTS

This section will examine the economic effects of labor migration, focusing on temporary labor migration. Temporary labor migration makes up the majority of documented migration globally. For example, 2.7 million migrants entered the EU from non-EU countries in 2019, while only 706,400 were granted citizenship that year.[30] In the United States, more than 4 million I-94 work visas were granted in 2019, and only 1 million permanent resident statuses.[31] This section considers the effects of globalization of the economy on migration, and the economic effects of labor migration on the receiving country, on the labor migrants themselves, and on the sending country.

4.1 Globalization and Migration

Globalization of production has undoubtedly contributed to the increase in certain forms of migration. As Czaika and de Haas argue, the global political trend towards more *laissez-faire* economic policies beginning in the 1980s, in conjunction with the gradual lifting of international barriers for trade and capital flows, has facilitated international migration.[32] Furthermore, as states become economically interdependent and people become more mobile, economic and social relationships across national borders too have increased in what is referred to as "trans-

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[28] LT Sánchez, 'H.R.1177 – U.S. Citizenship Act' (18 February 2021) 117th Congress (2021–2), available at www.congress.gov/bill/117th-congress/house-bill/1177/text.

[29] Z Kanno-Youngs and L Broadwater, 'Democrats Scramble to Keep Immigration Overhaul Alive in Reconciliation Bill' (13 October 2021) *The New York Times*, available at www.nytimes.com/2021/10/13/us/politics/democrats-immigration-biden.html.

[30] Eurostat, 'Migration and Migrant Population Statistics' (March 2021), available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics.

[31] Homeland Security, 'Yearbook of Immigration Statistics 2019' (30 March 2021) available at www.dhs.gov/immigration-statistics/yearbook/2019.

[32] M Czaika and H de Haas, 'The Globalization of Migration: Has the World Become More Migratory?' (2014) 48/2 *International Migration Review* 283–323.

nationalism."[33] One effect of such globalization is the rise of dual citizenship, the rate of which has increased by more than 30 percent globally in in the past 50 years.[34]

A notable consequence of the globalization of production and foreign direct investment has been an increase in internal migration of developing nations. Commercial agriculture, for example, has displaced subsistence farmers, causing mass migration into cities and created a large supply of rural wage laborers.[35]

The rise of export-oriented manufacturing in Southeast Asia and the Caribbean Basin has led to an urban reserve of wage laborers as people flock to industrial zones looking for employment. Such disruptions of traditional, unwaged labor have also led to an exodus of young women to industrial zones as factory representatives recruit young women directly from their villages and rural schools, eventually causing an economic and social culture that requires no further active recruitment.[36]

However, the globalization of the economy and its effects on migration is not always perceived as negative. Economists have argued that if migration rates were to rise to satisfy global market demands for labor and production, global GDP could increase by trillions of dollars. Michael Clemens argues that the gains from eliminating barriers to migration amount to large fractions of global GDP, one or two orders of magnitude greater than the gain from dropping all remaining restrictions on international flows of goods and capital. Restricting migration is therefore the economic equivalent of leaving "trillion-dollar bills on the sidewalk."[37]

4.2 Economic Effects on the Receiving Country

Economists broadly agree that both "skilled" and "unskilled" migrants stimulate economic growth in receiving countries. As Goldin et al. outline, economic effects of immigration include low-skilled workers taking jobs considered undesirable by those already living in the receiving country, releasing skilled workers into the labor force, as well as highly skilled migrants helping to grow sectors of the economy such as health care, education, and information technology.[38] Temporary migrants can therefore fill spaces in the labor force, offering skills that workers already in the receiving country may not have.[39] Canada is an important case study for economic migration. In 2019 Canada issued more than 404,000 temporary work permits, and 58 percent of permanent residents (out of a total of 341,180) were admitted under

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[33] S Castles, H de Haas and MJ Miller, *The Age of Migration: International Population Movements in the Modern World*, 5th ed. (Basingstoke, Palgrave Macmillan, 2014).

[34] HM Alarian and SW Goodman, 'Dual Citizenship Allowance and Migration Flow: An Origin Story' (1 January 2017) 50/1 *Comparative Political Studies* 133–67.

[35] Sassen, "America's Immigration "Problem"', 820.

[36] S Sassen, 'America's Immigration "Problem"' (Fall 1989) 6/4*World Policy Journal* 821.

[37] MA Clemens, 'Economics and Emigration: Trillion-Dollar Bills on the Sidewalk?' (19 August 2011) 25/3 *Journal of Economic Perspectives* 83–106.

[38] I Goldin, G Cameron and M Balarajan, *Exceptional People: How Migration Shaped Our World and Will Define Our Future* (Princeton, Princeton University Press, 2011).

[39] M Lister, 'Justice and Temporary Labor Migration' (2014) 29 *Georgetown Immigration Law Review* 104.

the economic category.[40] The country has also launched the Rural and Northern Immigration Pilot, a five-year federal immigration policy initiative to increase economic immigration to smaller communities in order to meet rural labor market demands.[41]

Beyond effects on the domestic labor force, labor migration is necessary for ensuring continued patterns of accumulation and surplus extraction.[42] Broadly speaking, migrant labor is endemic to capitalist economies. As James Hampshire argues, migrant labor a structural requirement of advanced capitalism; if states want to promote trade and international investment, they must accept more migration.[43] For example, in Germany and the UK, if immigration had been frozen in 1990, real GDP in 2014 would have been around €155 billion and £175 billion lower respectively.[44]

One concern when it comes to the economic effects of migration is its effect on wages in the receiving country. There is competing evidence as to whether immigration lowers the wages of workers already in the country. The worry is particularly salient in sectors such as agriculture, construction, and service industries, especially restaurants. Some economists argue that an increase in the labor supply of those industries depresses wages for all workers in those sectors. However, it is unclear if this is in fact caused by immigration. An increase in workers in other "skilled" industries such as medicine or technology has not led to a decrease in those wages. That said, let us examine the evidence for this concern further.

In isolating the factors to study the precise effect waves of immigration have on wages of workers already in the receiving country's labor market, one important case study emerges. What is referred to as the Mariel Boatlift occurred in 1980 when Fidel Castro declared that Cubans who wanted to emigrate to the United States could depart from the harbor port of Mariel. Approximately 125,000 Cubans emigrated, with roughly 50 percent settling in Miami, Florida. As Kimberly Clausing outlines, the influx of these *Marielitos* resulted in an overall increase in the labor force of Miami of around 7 percent and an increase of the low-skilled workforce of around 20 percent.[45] However, in a 1990 study David Card found that this increase in the workforce had "virtually no effect on the wages or unemployment rates of

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[40] MEL Mendicino, '2020 Annual Report to Parliament on Immigration' (2020) Immigration, Refugees and Citizenship Canada, available at www .canada .ca/ en/ immigration -refugees -citizenship/ corporate/ publications -manuals/ annual -report -parliament -immigration -2020 .html #fn27.

[41] Immigration, Refugees and Citizenship Canada, 'Rural and Northern Immigration Pilot: About the Pilot' (18 September 2020), available at www .canada .ca/ en/ immigration -refugees -citizenship/services/immigrate-canada/rural-northern-immigration-pilot.html.

[42] G Menz, *The Political Economy of Managed Migration: Nonstate Actors, Europeanization, and the Politics of Designing Migration Policies* (Oxford, Oxford University Press, 2008).

[43] J Hampshire, *The Politics of Immigration: Contradictions of the Liberal State* (Cambridge, Polity Press, 2013) 12–13.

[44] I Goldin, A Pitt, B Nabarro and K Boyle, 'Migration and the Economy: Economic Realities, Social Impacts and Political Choices' (September 2018) Citi GPS: Global Perspectives & Solutions, available at www.oxfordmartin.ox.ac.uk/publications/migration-and-the-economy -economic-realities-social-impacts-and-political-choices/.

[45] KA Clausing, *Open: The Progressive Case for Free Trade, Immigration, and Global Capital* (Cambridge, Massachusetts, Harvard University Press, 2019) 194–5.

less-skilled workers, even among Cubans who had immigrated earlier."[46] George Borjas challenged this finding in a 2017 study, arguing that the evidence in fact indicates that the "race-adjusted low-skill wage in Miami fell significantly relative to the wage in other labor markets shortly after 1980 before fully recovering by 1990."[47] Borjas's findings too, however, have been contested by Michael Clemens and Jennifer Hunt, who claim that Borjas's findings are due to a compositional change in the Miami census data, which in 1980 included a higher fraction of the African American population, thus accounting for the discrepancy between Card and Borjas's findings.[48]

Given the debates surrounding this case, the effects of immigration on wages of workers already in the receiving country is hardly clear-cut. Even if the depression of wages for low-skilled workers is in fact a direct result of immigration, its broad effects may not be entirely negative. As Brock outlines, it may incentivize those in the receiving country to invest in self-education to acquire further skills to be positioned for higher paying jobs. Thus, the overall effect of lower wages for certain positions may lead to increased earning power for others. Moreover, lower wages may cause firms to expand in a particular area, creating more job opportunities. The prices of consumer goods may fall as a result of such expansion of production. Lastly, immigrants can contribute to rising wages if they open up new markets and opportunities by creating new businesses.[49]

4.3 Economic Effects on Temporary Labor Migrants

Let us now turn to the economic effects on temporary labor migrants themselves. One important benefit is increased economic opportunities for the most vulnerable populations. What Michael Clemens, Claudio Montenegro, and Lant Pritchett term the "place premium" describes the wage gain to foreign workers upon entering the United States. In their 2008 micro-data study of more than two million individual formal-sector wage-earners in 43 countries, they found that in a conservative estimation, the welfare gain to a "moderately skilled" worker in the median country of the sample moving to the US is $10,000 annually, approximately double income per capita in the global south.[50]

However, besides this opportunity for economic gain, there are also associated costs for temporary labor migrants. First, temporary labor migrants often are separated from their families and communities of support for long periods of time.[51] Such isolation can conceiv-

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[46] D Card, 'The Impact of the Mariel Boatlift on the Miami Labor Market' (1990) 43/2 *Industrial and Labor Relations Review* 245–57.

[47] GJ Borjas, 'Still More on Mariel: The Role of Race' (2017) *National Bureau of Economic Research*, Working Paper no. 23504, available at www.nber.org/papers/w23504.

[48] MA Clemens and J Hunt, 'The Labor Market Effects of Refugee Waves: Reconciling Conflicting Results' (2017) *National Bureau of Economic Research*, Working Papers no. 23433, available at www.nber.org/papers/w23433.

[49] G Brock, *Global Justice: A Cosmopolitan Account* (Oxford, New York, Oxford University Press, 2009) 196.

[50] MA Clemens, CE Montenegro and L Pritchett, 'The Place Premium: Wage Differences for Identical Workers across the US Border' (2009) *Harvard Kennedy School Faculty Research Working Paper Series*, RWP09-004.

[51] G Brock, *Justice for People on the Move: Migration in Challenging Times*.

ably lower one's utility. Economically, they are vulnerable to exploitation in the workforce as they effectively have lower bargaining power than citizens or permanent residents in the receiving country. Such economic exploitation has been widely examined by economists, sociologists, and theorists alike. Patti Lenard and Christine Straehle argue that temporary labor migration programs are problematic from a normative standpoint, citing the vulnerability of such workers in asserting their rights, frequent contract violations by their employers, unjust conditions of the contracts themselves, and stipulations that bar most migrants from being able to transfer their status from "temporary" to "permanent."[52]

The risk of exploitation is particularly acute for female migrant domestic workers. A 2014 report from Human Rights Watch explores the circumstances of such workers in the United Arab Emirates. The report exemplifies a wide range of human rights abuses they face, including having their passports confiscated by their employers, physical abuse and confinement, failing to be paid their full wages, long hours without breaks or days off, and denial of adequate food, living conditions, or medical treatment. Some workers even reported circumstances of forced labor or trafficking.[53]

There have been important policy responses to the exploitative circumstances of temporary labor migration programs. The International Labour Organization, for example, has implemented the "General Principles and Operational Guidelines for Fair Recruitment," which stimulates, *inter alia*, that recruitment of labor migrants must protect internationally recognized human rights, including collective bargaining, and that forced labor, child labor, and discrimination must be eliminated.[54] While such policies are well intended, they often lack enforcement capabilities and end up as symbolic declarations rather than tractable policies. In fact, economists have argued that there is an inverse relationship between the number of migrants admitted and the rights of those migrants employed in low-skilled jobs in high-income countries; meaning that more migrants tend to be associated with fewer rights for migrants.[55] Notably, some have argued if the exploitation experienced is modest, the utility calculus of temporary labor migration overall is positive for most workers who are afforded such economic opportunities.[56]

In sum, while temporary laborers are afforded economic opportunities upon migrating, they often face exploitative conditions that may result in a lowering of their overall welfare, and importantly lack the status or effective capacity to advocate on their own behalf to change such circumstances.

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[52] PT Lenard and C Straehle, 'Temporary Labour Migration: Exploitation, Tool of Development, or Both?' (1 November 2010) 29/4 *Policy and Society* 283–94.

[53] R Begum, '"I Already Bought You": Abuse and Exploitation of Female Migrant Domestic Workers in the United Arab Emirates' (22 October 2014) Human Rights Watch, available at www.hrw.org/report/2014/10/22/i-already-bought-you/abuse-and-exploitation-female-migrant-domestic-workers.

[54] 'General Principles and Operational Guidelines for Fair Recruitment' (Geneva, ILO, 2019) available at www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_536755.pdf.

[55] M Ruhs and P Martin, 'Numbers vs. Rights: Trade-Offs and Guest Worker Programs' (2008) 42/1 *The International Migration Review* 249–65.

[56] R Mayer, 'Guestworkers and Exploitation' (1 April 2005) 67 *Review of Politics*.

4.4 Economic Effects on the Sending Country

Is the restriction of certain forms of labor migration justifiable on utilitarian grounds? From a purely consequentialist standpoint, this will require a calculation between the economic utility increase for the skilled migrants themselves and the utility loss to the sending country. This section considers two prominent economic effects of labor migration: first, what is referred to as "brain drain," and second, remittances sent back from laborers abroad to their home countries.

Brain drain is the much-debated phenomenon in which talented and often expensively trained professionals emigrate from their developing nations to more developed ones. And, importantly, as Gillian Brock and Michael Blake accurately note, the phenomenon seems to be a result of a global history of colonialism and violence, as the countries in which it occurs most frequently are those that have been "most brutalized by Western powers."[57] The sector of greatest concern of most migration scholars regarding this phenomenon is the medical sector, and is particularly salient in sub-Saharan Africa. For example, between one third and one half of South African medical school graduates emigrate to the developed world.[58] This emigration pattern, Brock and Blake argue, amounts to a substantial loss for countries that already struggle with inadequate human resources, and results in a significant loss to health-care delivery capacity.[59] What's more, the rising amount of migration from less-developed to more-developed countries with the increase in skill level of those migrants suggests that brain drain as a phenomenon is in fact increasing in absolute terms.[60]

The negative effects of brain drain, however, have been highly contested. A 2007 study by Michael Clemens challenges the conventional wisdom surrounding the phenomenon, showing that low staffing levels of medical professionals in Africa and poor public health conditions are in fact the result of factors wholly unrelated to international movements of medical professionals.[61] Second, as Kimberly Clausing argues, the fact that emigration is a possibility may raise the perceived benefits of education in the sending country, thus contributing to human capital and productivity growth for the origin state.[62]

Whether or not there is a causal relationship between migration, low staffing rates, and poor health outcomes in developing nations, there have been significant policy responses born of concern for the negative effects of brain drain on sending nations. England's "Code of Practice for the International Recruitment of Health and Social Care Personnel in England," for example, aims to prevent active international recruitment to the UK from countries with a UHC service coverage index of less than 50, and a density of doctors, nurses, and midwives

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[57] G Brock and M Blake, *Debating Brain Drain: May Governments Restrict Emigration?* (Oxford, New York, Oxford University Press, 2015) 3.

[58] G Brock, 'Health in Developing Countries and Our Global Responsibilities' In *The Philosophy of Public Health*, ed. A Dawson, (Farnham, Burlington, Ashgate, 2009) 75.

[59] G Brock and M Blake, *Debating Brain Drain: May Governments Restrict Emigration?* 38.

[60] J Gibson and D McKenzie, 'Eight Questions about Brain Drain' (Summer 2011) 25/3 *Journal of Economic Perspectives* 107–28.

[61] MA Clemens, 'Do Visas Kill? Health Effects of African Health Professional Emigration' (2007) *Center for Global Development*, Working Paper no. 114.

[62] KA Clausing, *Open: The Progressive Case for Free Trade, Immigration, and Global Capital*, 206.

that is below the global median.[63] The WHO has set a Global Code of Practice on the international recruitment of healthcare professionals in a similar effort.[64] The effects of these policies on staffing and health outcomes in the global south are yet to be determined, but will be vital to the discussion of the consequences of emigration.

One common response to concerns over emigration is that migrants send funds directly back to those in their country of origin. Such remittances, it is argued, can offset the costs of brain drain as direct funds are inserted back into the sending country's GDP. India, for example, in 2015 received an estimated $69 billion dollars in remittances from multiple countries, an amount that is equivalent to more than 3 percent of India's GDP, while Mexico received about 2 percent of its GDP in remittances from the United States that same year.[65] However, while remittances may have a positive effect on transient poverty, they do not themselves reduce structural poverty. Moreover, as Gillian Brock argues, remittances themselves can have negative effects on those receiving them. She highlights concerns over dependency on the inflow of such funds, which in turn encourages further emigration, especially for working-age adults. Furthermore, vital economic reforms to structural causes of poverty can be ignored due to the influx of foreign capital in the form of remittances. Lastly, Brock outlines, remittances themselves do not remain steady from those sending them, so they are not reliable sources of income for those in the origin country. Remittances are at their strongest between three and five years after departure but decline over time.[66] Thus, remittances themselves do not appear to offset the negative effects of emigration.

In sum, whether limits to labor migration can be justified on utilitarian grounds depends largely on the practical effects of brain drain as a phenomenon, which, as we have seen, are still up for debate.

5. MIGRATION AND UTILITY: CULTURAL EFFECTS

We now turn to the consequences of migration on the receiving country beyond the economic. Predominant in debates around migration are the effects it has on the demographics of the receiving country, related concerns about the preservation of culture, and whether such changes affect the solidarity of the receiving country. This section explores, first, the effects of migration on culture and the relationship between this idea and race; second, the practical effects of demographic changes in the receiving country; last, the role of solidarity and its connection to migration.

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[63] 'Code of Practice for the International Recruitment of Health and Social Care Personnel in England' (11 November 2021) Department of Health & Social Care, available at www.gov.uk/government/publications/code-of-practice-for-the-international-recruitment-of-health-and-social-care-personnel/ code-of-practice-for-the-international-recruitment-of-health-and-social-care-personnel-in-england.

[64] 'WHO Global Code of Practice on the International Recruitment of Health Personnel' (8 May 2020) 73rd World Health Organization Assembly, World Health Organization, available at https://apps.who.int/gb/e/e_wha73.html.

[65] KA Clausing, *Open: The Progressive Case for Free Trade, Immigration, and Global Capital*, 206.

[66] G Brock, *Global Justice: A Cosmopolitan Account*, 207.

5.1 Culture and Race

Common in both scholarly arguments and public discourse around migration are the cultural effects migration has on the receiving country. David Miller builds his defense of the right to exclude certain migrants on the foundation of a national culture. The right of the political community to preserve its national culture includes the right to control, for example, levels of public expenditure on housing, schools, and hospitals, as well as the rate of immigration and the personal characteristics of the immigrants that will affect these measures.[67] Henry Sidgwick, however, has argued that while the state has the right to restrict immigration to maximize utility of its people, if "mischievous consequences" to the community such as threats to internal cohesion and lowering the standard of living for the poorest classes can be avoided, the "free admission of aliens will generally be advantageous to the country admitting them."[68] Thus, unless the state will be directly threatened by the admittance of certain immigrants, the state should recognize the benefits to overall utility of openly admitting immigrants into the political community

Such arguments rest, of course, on how one defines culture. As Jeremy Waldron posits, culture as such is not a static feature of a territorially bound political community, but an ever-evolving, multifaceted feature of common existence.[69] What gives us meaning is not a single, coherent culture operating in a vacuum, but the dynamic evolution of our culture from its interactions with others. If we understand culture in this way, the very notion of the preservation of culture is rendered meaningless, and with it, cultural preservation as grounds for limiting migration.

One important consideration regarding cultural effects of migration is the issue of race, and the history of exclusion of groups based on their racial identity. Scholars have approached this issue differently. Michael Walzer defends the right of the political community to decide the composition of its members, even if that entails exclusion on the basis of race, if race is perceived to be intrinsic to national identity and culture. He famously argues that the "White Australia" policy of the turn of the twentieth century can be defended on his theory of complex equality and collective self-determination of the political community.[70] It is worth noting that Walzer is assuming a homogeneous white population in his defense of such policies of racial exclusion in deciding membership. However, no modern state is wholly homogeneous, and even less so in an ever more globalized world. Are those, then, in the racial majority justified in excluding entry for those who share qualities with the racial minority already living in the state? To use Walzer's example, what about those living in Australia who are not white? The United States' Chinese Exclusion Act of 1882 is another example of a racial majority limiting the migration of a racial group that was already part of the makeup of the population. Are such policies justified on utilitarian grounds if they maximize the overall happiness of the majority of the population?

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[67] D Miller, *Strangers in Our Midst: The Political Philosophy of Immigration*, 62.

[68] H Sidgwick, *The Elements of Politics*, 296–7.

[69] J Waldron, 'Minority Cultures and the Cosmopolitan Alternative' (1 June 1992) 25/3 *University of Michigan Journal of Law Reform* 751–93.

[70] M Walzer, *Spheres of Justice: A Defense of Pluralism And Equality* (New York, Basic Books, 1984) 46–8.

Scholars have disagreed with Walzer's position, arguing that such policies of racial exclusion are morally unjustified, even if they maximize the happiness of the political community. Miller holds this position, calling such exclusions "insulting" to the migrants, and stating that exclusions based on race and sex are immoral, since such features of identity do not have meaningful effects on the society migrants may want to join.[71] But, as Song aptly notes, what if race and gender *are* considered intrinsic or at least relevant to the culture of the receiving nation?[72] And are racial exclusions based in a racialized culture justified on utilitarian grounds—the question remains—if the happiness of the majority of those in the political community, and presumably those of the racial majority, is increased by such policies?

Concern over the preservation of national culture is manifested in the rise of nationalist political parties across Europe. Austria's Freedom Party, one of the most successful populist far-right parties in Europe, advocates a platform of anti-migration based in identity politics, in particular in anti-Islamic sentiments.[73] Similarly, the Swiss People's Party (SVP) is explicitly anti-Muslim, and holds a platform of anti-migration, advocating in 2020 for the end of free movement of people within the European Union.[74] Moreover, these parties are prominent; Austria's Freedom Party holds roughly 26 percent of national electorate votes[75] while the Swiss People's Party is the strongest faction in the Nationalrat, the National Council, and in 2019 won 53 parliamentary seats, the most of any party.[76] The prominence of these parties demonstrates the power of arguments that centralize the cultural effects of immigration, and the tractable effects such rhetoric has on public perception and, with it, electoral outcomes.

As we consider the effects of migration on the identity and racial makeup of the receiving country, we come to the role of family. Family-sponsored migration is one of the most common forms of authorized migration globally. Shared ethnic ties and kinship are inherent parts of what constitute family ties that are the basis for family-sponsored migration. While many scholars argue that kinship and relationships of care have intrinsic value, most have not done so on utilitarian grounds.[77] However, such arguments do involve examining the consequences of migration on those already in the receiving country. Those opposed to family-sponsored migration often cite its effects on the racial makeup and culture of the political community as demographics change. The next section examines these claims further.

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[71] D Miller, 'Immigration: The Case for Limits' in *Contemporary Debates in Applied Ethics*, eds AI Cohen and CH Wellman (Malden, MA, Blackwell Pub, 2005) 193–206.

[72] S Song, 'Political Theories of Migration' (2018) 21 *Annual Review of Political Science* 393.

[73] F Hafez, R Heinisch and E Miklin, 'The New Right: Austria's Freedom Party and Changing Perceptions of Islam' (24 July 2019) Brookings Institute, available at www.brookings.edu/research/the-new-right-austrias-freedom-party-and-changing-perceptions-of-islam/.

[74] Factsheet: Swiss People's Party (Schweizerische Volkspartei, SVP)' (22 December 2020) Georgetown University: The Bridge Initiative, available at https://bridge.georgetown.edu/research/factsheet-swiss-peoples-party-schweizerische-volkspartei-svp/.

[75] 'Europe and Right-Wing Nationalism: A Country-by-Country Guide' (13 November 2019) BBC News, sec. Europe, available at www.bbc.com/news/world-europe-36130006.

[76] 'Switzerland Election: Green Parties Make Landmark Gains' (21 October 2019) BBC News, sec. Europe, available at www.bbc.com/news/world-europe-50116400.

[77] See M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, 227–42; S Song, *Immigration and Democracy*, 143–8; M Lister, 'Immigration, Association, and the Family' (2010) 29/6 *Law and Philosophy* 717–45.

5.2 Effects of Demographic Changes

George Borjas's correct, if not obvious, assertion that migrants are not simply labor pegs in an economic system of production but full people who inevitably affect the social, political, and cultural fabric of their receiving country[78] is relevant for a consequentialist approach to migration. Demographic changes that result from migration can certainly affect the culture of the receiving country, as the makeup of the population shifts and diversity likely increases. As such, some scholars have argued that demographic changes pose challenges to national culture and the stability of the welfare state.[79]

However, as Gillian Brock outlines, these changes may in fact be beneficial to the receiving country where population imbalances pose an economic and social strain. For example, if a large portion of a nation is above working age, this can strain social security programs and pose a burden to economic stability.[80] Consider the case of Japan. According to Pew Research Center, the nation's population of around 12 million is predicted to contract by nearly 30 percent by 2065, when 38 percent of the population will be aged 65 or older.[81] As such, Japanese citizens are concerned with the emigration of working-age adults. Demographic changes from immigration can therefore offset such issues that are a potentially detrimental strain to social security, leading to an overall utility increase for both migrants and those already in the receiving country.

Furthermore, demographic changes can alter culture in a way that enhances the population's exposure and knowledge in a way that satisfies a Millian conception of utility, as outlined in section 2. In other words, as demographics change and diversity increases, the political community is exposed to new pleasures and preferences and new sources of utility. Kimberly Clausing suggests as much, claiming that the preferences of immigrants may contribute to an influx of new goods into the receiving country that may in fact influence the "tastes" of those in the receiving country.[82] For example, we may be satisfied with only eating baked potatoes until we are exposed to new flavors and dishes, and our preferences change to include new tastes and more complex sources of nutrition. Thus, in order to truly maximize our utility in a Millian conception, we must be exposed to a diversity of sources of pleasure, as only with knowledge and exposure can we find the highest quality sources of utility.

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[78] GJ Borjas, *We Wanted Workers: Unraveling the Immigration Narrative* (New York, W.W. Norton & Company, 2016); titling his work after the quote from Swiss novelist Max Frisch, 'We wanted workers […] but we got people instead'.

[79] PT Lenard, 'Why Temporary Labour Migration Is Not a Satisfactory Alternative to Permanent Migration' (1 April 2012) 8/1–2 *Journal of International Political Theory* 172–83.

[80] G Brock, *Global Justice: A Cosmopolitan Account*, 196.

[81] B Stokes and K Delvin, 'Despite Rising Economic Confidence, Japanese See Best Days Behind Them and Say Children Face a Bleak Future' (12 November 2018) Pew Research Center, available at www.pewresearch.org/global/2018/11/12/perceptions-of-immigrants-immigration-and-emigration/.

[82] KA Clausing, *Open: The Progressive Case for Free Trade, Immigration, and Global Capital*, 204.

5.3 Solidarity

A common concern over migration is that high levels of migration will lead to a severing of the population into misbegotten parts, causing political polarization and threatening the solidarity of the political community. While solidarity is not a concept intrinsic to utilitarianism as such, it seems that theorists of solidarity are implicitly engaging in utilitarian considerations when they discuss the impact of diversity caused by immigration on feelings of solidarity and trust among those in the political community.

What, then, is solidarity? As conceived by Will Kymlicka and Keith Banting, solidarity is a set of attitudes and motivations characterized by mutual acceptance, cooperation, and mutual support in times of need.[83] The question then is whether high levels of immigration threaten solidarity as societies become more diverse. Arlie Hochschild, in an impressive qualitative study of polarization in the United States, highlights the sentiment of "line cutters," in which those already in the receiving country perceive immigrants and refugees as "cutting ahead" in the line leading to the "American Dream" of progress, only achievable through hard work and dedication.[84] Her work demonstrates the feeling of suspicion and betrayal that can be felt by certain citizens when they perceive that other groups, whether foreign or simply of a different gender or racial identity, are receiving benefits and assistance that they themselves are not. Thus, they come to feel like "strangers in their own land," which in turn spawns feelings of resentment, frustration, and anger towards those "othered" groups, leading to political polarization, mistrust of the state and its representative capacities, and threatening the solidarity of the political community. If such negative effects result from migration, can migration be restricted on utilitarian grounds?

Interestingly, while some claim that solidarity is a prerequisite for a unified and inclusive political community, others argue that the causal relationship is in fact reversed; solidarity, and with it tolerance of immigrants, is in fact a result of an inclusive welfare state. For example, Ove Korsgaard suggests that part of the solidarity of the Danish people is due to the universality of its welfare state, such that the Danish identity is one and the same with the "Danish welfare project."[85] Likewise, Markus Crepaz and Regan Damron studied sentiments around welfare in the global north, and found that in universal systems of welfare provision in which almost all contribute to and benefit from such programs, the debates center on fairness and inclusion, rather than stigmatizing those who receive such benefits and desires to exclude those who may depend on them.[86] These programs include, but are not limited to, public health care, unemployment benefits, housing subsidies, and public education. Furthermore, sentiments around immigration do not seem to be affected by the percentage of foreign-born population. For example, in the year 2000 the foreign-born population reached 1.8 percent in

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[83] KG Banting and W Kymlicka (eds), *The Strains of Commitment: The Political Sources of Solidarity in Diverse Societies* (Oxford, Oxford University Press, 2017) 3.

[84] AR Hochschild, *Strangers in Their Own Land: Anger and Mourning on the American Right* (New York, New Press, 2016) 136–40.

[85] OK Korsgaard, 'The Danish Way: How to Establish the Nation in the Hearts of the People' in *National Identity and the Varieties of Capitalism: The Danish Experience*, eds JL Campbell, JA Hall and OK Pedersen, (Montréal, Quebec, Canada, McGill-Queen's University Press, 2006) 158.

[86] MML Crepaz and R Damron, 'Constructing Tolerance: How the Welfare State Shapes Attitudes About Immigrants' (1 March 2009) 42/3 *Comparative Political Studies* 437–63.

Finland and 5.4 percent in Sweden; however, the former showed higher sentiments of "welfare chauvinism," the perception by natives that foreigners undermine the protective umbrella of social welfare by abusing and misusing social services for which they are not eligible, despite having a significantly lower percentage of foreign-born population.[87] Thus, it is in fact the universality of social welfare programs that determines public sentiment around immigration, not the level of immigration itself. It therefore seems that solidarity can in fact be constructed, or at least augmented, at the structural level by universalizing social welfare programs.

What this means for our purposes is that sentiments around immigration may in fact be susceptible to changes at the structural level. It follows that it is at least conceivable that the utility as happiness of the political community, even if it at first is lowered with the influx of immigrants, can be increased if social programs of welfare provision are made universal. The threat to solidarity, and the "othering" of migrants, may be mitigated by structural changes at the state level.

6. CONCLUSION

This chapter has explored what moral imperatives a utilitarian framework will dictate for migration, framing the discussion around how utility is defined and who is included in the utility calculus. Whether utilitarianism will require more migration, or even a global system of open borders, will depend first on whether the utility of only those within the political community is considered, or whether the utilitarian notion of equal moral weight of all persons necessarily entails a global calculation of utility. We also considered economic and cultural conceptions of utility as the dominant forms, showing that scholars have debated the effects of migration globally on both conceptions of utility. To determine what utilitarianism as a consequentialist moral framework requires for migration law and policy will largely depend on further examination of the effects of migration on the receiving countries, the sending countries, and the migrants themselves, and on both economic and cultural terms.

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[87] Ibid., 449–50.

24. Legal utilitarianism in environmental law: a critique of the critique

Clément Lacombe

When the French act 'relating to the reconquest of biodiversity, nature and landscapes'[1] was published, it was accused of being a 'utilitarian and anthropocentric conception of nature'.[2] At issue was the definition of 'services' in Article 2 of the law, '"services" (implying services to the economy) rendered by nature, which fall under a purely utilitarian and anthropocentric conception of nature'.[3] Thus, rightly or wrongly,[4] environmental law is anthropocentric[5] and utilitarian.[6] However, there are few authors today who claim to be part of the utilitarian movement in law – and this is all the more true in environmental law. This work begins with criticisms of this movement. However, an analysis of these criticisms seems interesting, first in order to understand the basis on which they are founded, and second in order to discuss the compatibility of legal utilitarianism and environmental law.

First of all, in order to understand the current basis of criticism of utilitarianism, it is necessary to point out that it is difficult to determine whether those who are referred to as utilitarians today really are, two centuries after the main current (with Jeremy Bentham, John Austin and Mill father and son as leading figures). However, criticism of utilitarianism became particularly important in the second half of the twentieth century – and this criticism came from all parts of the political spectrum. On the left, John Rawls in his *Theory of Justice*, while

[1] Loi no 2016-1087, 8 August 2016, pour la reconquête de la biodiversité, de la nature et des paysages.

[2] S Charbonneau, 'La loi sur la biodiversité reflète une vision utilitariste de la nature', 31 August 2016, Reporterre. Le média écologique, https://reporterre.net/La-loi-sur-la-biodiversite-reflete-une-vision-utilitariste-de-la-nature (accessed 05/01/2024).

[3] S Charbonneau, 'La loi sur la biodiversité reflète une vision utilitariste de la nature', 31 August 2016, Reporterre. Le média écologique, https://reporterre.net/La-loi-sur-la-biodiversite-reflete-une-vision-utilitariste-de-la-nature (accessed 05/01/2024).

[4] 'Rightly or wrongly' because certain authors, precisely, claim a utilitarian approach, centred on humans, against 'deep ecology'. For a recent example, see L de Redon, *Cessez le feu! Traité de paix avec la nature* (Clohars Carnoët, La Singulière, 2023).

[5] For some, law, the creation of man, can only be anthropocentric, particularly in environmental law. On this subject, see eg J Rivero, 'Préface', in F Caballero, *Essai sur la notion juridique de nuisance* (Paris, LGDJ, 1981) viii: 'The word itself testifies to this: there is no environment except as a function of the environment, and the environment is man. Deterioration of the air, water and landscape is only a nuisance because it affects humans.'

[6] X Izdiak, 'Éthique environnementale et droits: réflexions autour d'une évolution de la perception du droit', Notre affaire à tous, https://notreaffaireatous.org/ethique-environnementale-et-droits-reflexions-autour-dune-evolution-de-la-perception-du-droit/ (accessed 05/01/2024).

admitting the value of consequentialism,[7] denounced the primacy of efficiency over justice[8] and asserted that each person possessed an inviolability that could not be transgressed, even in the name of social well-being.[9] On the right, Friedrich Hayek denounced utilitarianism as constructivism.[10] For him, utilitarianism, like all constructivisms, lacks quantitative and timely information[11] to be effectively consequentialist. He therefore prefers the spontaneous order of the market to any utilitarian regulation.[12] Thus – and this will be the focus of the present work – the criticism seems to be directed not against classical utilitarian ethics, but against an 'economic' utilitarianism: the economic analysis of law in general, and the Law and Economics movement specifically. While the leading figure in this movement, Richard Posner, differentiates the economic analysis of law from utilitarianism,[13] his main opponents do not, notably his colleague at the University of Chicago Law School, Martha Nussbaum.

In Nussbaum's book *Poetic Justice: The Literary Imagination and Public Life*,[14] she draws on Charles Dickens' novel *Hard Times: For These Times*,[15] in which the main character, Thomas Gradgrind, repeats to anyone who will listen: 'Now, what I want is, Facts. Teach these boys and girls nothing but Facts. Facts alone are wanted in life.'[16] From the very first pages of her book, Nussbaum notes that cost–benefit analysis is omnipresent, so much so that it seems to be taken for granted in any public policy.[17] Unlike many other authors, she distinguishes between two types of utilitarianism: ethical utilitarianism – that of Bentham and Sigdwick – on the one hand, and economic utilitarianism and cost–benefit analysis on the other – the latter being her explicit opponent.[18] The rest of the book tries to show why the second type of utilitarianism fails to take account of social injustices, and why this is legally

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[7] J Rawls, *A Theory of Justice* (Cambridge, The Belknap Press of Harvard University Press, 1971) 26.

[8] J Rawls, *A Theory of Justice* (Cambridge, The Belknap Press of Harvard University Press, 1971) 3.

[9] J Rawls, *A Theory of Justice* (Cambridge, The Belknap Press of Harvard University Press, 1971) 4.

[10] FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, 3 Vol in one (London, Routledge, 1982) Vol 1, 5–6.

[11] FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, 3 Vol in one (London, Routledge, 1982) Vol 2, 20.

[12] FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, 3 Vol in one (London, Routledge, 1982) Vol 2, 107–9.

[13] RA Posner, 'Utilitarianism, Economics and Legal Theory' (1979) 8 *Journal of Legal Studies* 103–14. His main criticism is that such a doctrine, according to him, leads the individual to be sacrificed on the altar of social need. See also RA Posner, *Economic Analysis of Law* (Boston, Toronto, Little, Brown and Company, 1979) 116). See also DI Waked, 'Jeremy Bentham and the Genesis of Law and Economics: An Alternative Narrative', in this book.

[14] M Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston, Beacon Press, 1995).

[15] C Dickens, *Hard Times: For These Times* (London, Bradbury and Evans, 1854) 3.

[16] C Dickens, *Hard Times: For These Times* (London, Bradbury and Evans, 1854) 3.

[17] M Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston, Beacon Press, 1995) 8.

[18] M Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston, Beacon Press, 1995) 3.

prejudicial. A repeated theme is that the teaching of law should not be purely utilitarian, so that future lawyers do not have a vision of law reduced solely to 'social engineering'.[19] This book is particularly interesting in that it overlaps in many respects with the French vision of legal utilitarianism.

The French case is rather interesting, as it appears that criticism of utilitarianism in general, and legal utilitarianism in particular, is more virulent here than elsewhere. The journal MAUSS (whose acronym simply stands for *Mouvement Anti-Utilitariste en Sciences Sociales*) is fairly symptomatic of a certain mistrust of French authors. In law more specifically, utilitarianism does not get a good press, and Michel Villey said on the subject that 'the invasion of utilitarianism [seemed to him] an illustration of the lack of philosophy from which French jurists, and our times in general, suffer'.[20] These criticisms have been repeated by others in philosophy of law textbooks.[21] Michel Villey was also echoing, perhaps unknowingly, Charles Dickens' novel and his criticism of Thomas Gradgrind: '[what] good is law if it confines itself to recognising and sanctioning the fact!'[22] Like Charles Dickens and Martha Nussbaum, he denounced the fact that 'justice is not a given on the basis of which an arsenal of technical means can be calculated. The art of law seeks an end, not a goal.'[23] In addition to this criticism of the primacy of the useful over the just, we also find in France a criticism of law reduced to 'social engineering', utilitarianism being seen as 'the charter of technocrats devoted to the cult of efficiency and the abandonment of vain ideals'.[24] This criticism includes the idea that our law is being changed, that its substance is changing. For example, Jacques Chevallier points out that '[t]he rationality of the law is no longer presumed: the norm is now screened for effectiveness, which becomes the guarantee of its legitimacy'.[25] This same idea was recently taken up by Alain Supiot,[26] who added – based on an ideal of social justice, like Martha Nussbaum – that the omnipresence of recourse to utility calculations had the consequence of 'disqualifying by the same token the idea of a categorical imperative attached to human dignity'.[27] Here

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[19] In the words of Roscoe Pound, who saw lawyers as legal engineers. See R Pound, *Social Control Through Law* (New Haven, Yale University Press, 1942).

[20] M Villey, 'Préface historique' (1981) 26 *Archives de philosophie du droit* 2.

[21] Following on from Michel Viley's criticism, according to S Neuville, *Philosophie du droit*, 2nd ed (Paris, LGDJ, 2021) 284, utilitarianism would be 'a form of philosophy which consists above all of not doing philosophy […] It is a method of learning which consists of training students so that they become good legal technicians capable of memorizing quantities of texts in order to find the best solution.'

[22] M Villey, 'Préface historique' (1981) 26 *Archives de philosophie du droit* 4. This distrust of facts is found among many legal authors, so much so that some have written that 'the French legal mind has a horror of facts' (L Cohen-Tanugi, *Le droit sans l'État* (Paris, PUF, 2007) 50).

[23] M Villey, 'Préface historique' (1981) 26 *Archives de philosophie du droit* 10.

[24] R Sève, 'La métaphysique et l'utilitarisme' (1981) 26 *Archives de philosophie du droit* 155.

[25] J Chevallier, 'Vers un droit postmoderne?', in J Clam, GJ Martin (eds), *Les transformations de la régulation juridique* (Paris, LGDJ, 1998) 29.

[26] A Supiot, *La force d'une idée suivi de L'idée de justice sociale d'Alfred Fouillée* (Paris, Les liens qui libèrent, 2019) 46.

[27] See also A Supiot, *La force d'une idée suivi de L'idée de justice sociale d'Alfred Fouillée* (Paris, Les liens qui libèrent, 2019) 46: 'according to a method consisting of making the legality of a rule depend on the expected usefulness of its application.'

again, legal utilitarianism is criticised for its alleged lack of ethics and the omnipresence of economics in the teaching, design and application of law.[28]

This leaves us with the even more specific question of how to understand utilitarianism in environmental law. The origins of contemporary environmental law largely lie in 1972, when two of its founding texts were written. The first is the Stockholm Declaration,[29] which states that '[t]he natural resources of the earth […] must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate' (principle 2). The Declaration went on to state that 'The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind'. This gave rise to the idea that we now call 'sustainable development', which should reconcile environmental protection and economic development, 'to ensure that benefits from such employment are shared by all mankind'. This text can be linked to legal utilitarianism, as it enjoins States to adopt a consequentialist approach based on the search for an optimum: 'the greatest happiness of the greatest number', made possible by the joint concern for environmental protection and economic development. It also reflects Henry Sidgwick's concern for future generations, to which we shall return later. This was also the year when the polluter-pays principle became widespread, with one of the OECD's recommendations defining it as follows: '[t]he principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment.'[30] Here again, environmental protection and economic development were considered to go hand in hand, so much so that the same recommendation stated that '[i]n many circumstances, in order to ensure that the environment is in an acceptable state, the reduction of pollution beyond a certain level will not be practical or even necessary in view of the costs involved'.[31] It is this understanding of the 'polluter pays' principle – and this search for the optimum that sometimes favours economy over the environment – that continues to be the target of fierce criticism. Indeed, the reconciliation achieved by sustainable development supposedly favours economic development over environmental protection. These criticisms are all the more vehement now that environmental damage has become intolerable, to the extent that the quest for optimal pollution seems cynical at best.

Sustainable development and the adjective 'utilitarian' are thus used by their detractors to criticise the balancing of different interests, instead of the only interest that should, in their view, be taken into account: the environmental interest. To better understand these criticisms, it is necessary to understand that the supposed legal utilitarianism in environmental law is based on economic theory (section 1), the legal translation of which nevertheless contributes to the protection of the environment (section 2). However, this vision of legal utilitarianism, based solely on economics, is reductive, as utilitarian ethics are also present in environmental law (section 3).

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[28] L Floury, 'À propos d'une fausse pomme de discorde: les juristes français et l'analyse économique du droit', in *Un universitaire entre droit et économie. Mélanges offerts à Serge Schweitzer* (Aix-en-Provence, PUAM, 2019) 131.

[29] United Nations Conference on the Human Environment, 1972, Stockholm.

[30] OCDE/GD(92)81, The polluter-pays principle, Annex.

[31] OCDE/GD(92)81, The polluter-pays principle, Annex.

1. LEGAL UTILITARIANISM BASED ON ECONOMIC THEORY

In the context of legal utilitarianism in environmental law, the study of the polluter-pays principle is particularly enlightening. This principle is said to have its origins in the theory of the internalisation of externalities,[32] found in Henry Sidgwick[33] and Alfred Marshall[34] but above all, in environmental matters, in Arthur Cecil Pigou.[35] This economic theory, backed up by the polluter-pays principle, can be found directly in the 1992 Rio Declaration on Environment and Development, article 16 of which states: 'National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.'

To fully understand this economic theory, we need to understand that an externality (positive or negative) is created 'whenever the act of consumption or production by one agent has an impact on the utility of another agent, without this impact being reflected in a variation in the price or quantity produced'.[36] For example, an industrial activity creates jobs as a positive externality for the new employees and pollution as a negative externality for the neighbourhood. Finally, the theory of externalities can only be understood in an efficient market in which agents are rational, and bearing in mind that 'an externality is not, however, an objective fact, but rather the result of an interpretation of the world'.[37] At this stage, it would be tempting to say that the theory of externalities is utilitarian because it is based on a utility calculation. However, contrary to the utilitarian ethic, the utility calculation used here is the individual, selfish calculation of the economic agents involved, and not of the population as a whole. The only logic in the theory of externalities is that of economics alone.

As for the internalisation of these externalities, it is the fact that an economic agent anticipates the cost of these externalities. Otherwise, 'the company that minimises its costs omits the cost that its action represents for others (consumers or local residents, for example)'.[38] In the case of environmental damage, this internalisation can take the form of an accounting provision, or even the informal anticipation of possible litigation. This is where the utilitarian logic comes in. It was precisely from an environmental perspective that Arthur Cecil Pigou theorised what are now known as Pigouvian taxes. At the time he wrote his theory, the understanding of environmental protection was not the same. Rather than protecting flora and fauna,

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[32] S Schmitt, 'Propos introductifs' in V Fumaroli, S Schmitt (eds), *La fiscalité environnementale. Entre attentes, doutes et pragmatism* (Aix-en-Provence, PUAM, 2018) 11.

[33] H Sigdwick, *The Principles of Political Economy*, 3rd ed (London, Macmillan and Co, 1901) 406.

[34] A Marshall, *Principles of Economics*, 8th ed (London, Macmillan and Co, 1920) 221.

[35] AC Pigou, *The Economics of Welfare*, 4th ed (London, Macmillan and Co, 1932) 182.

[36] R Lanneau, *Pour une analyse économique du droit des interventions de l'Etat dans l'économie* (Paris, Société de législation comparée, 2021) 35.

[37] R Lanneau, *Pour une analyse économique du droit des interventions de l'Etat dans l'économie* (Paris, Société de législation comparée, 2021) 36.

[38] M Bacache-Beauvallet, 'Marché et droit: la logique économique du droit de l'environnement' (2008) 127 *Pouvoirs* 35–47, 36.

the idea was to avoid the odour, noise and air quality pollution caused by industry.[39] Pigou's idea is that certain costs, particularly environmental costs, are not taken into account by certain industrial activities, and are therefore not reflected in the price they offer. The idea is to try to internalise these costs so that society as a whole does not have to bear them. Pigou proposed two solutions: taxing polluting activities to internalise negative environmental externalities, or regulating to force industries to set up in uninhabited areas (it should be remembered that at the time there was no understanding of the global phenomenon of the environment).[40] In this sense, Pigouvian taxes can be likened to legal utilitarianism – even if it is not the only doctrine to endorse this approach.[41] However, when we talk about internalising positive externalities we are no longer just talking about Pigouvian taxes, but also about the economist Ronald Coase's article 'The Problem of Social Cost'.[42]

'The Problem of Social Cost' 'is probably the most quoted article in American legal literature',[43] and to fully understand the paradigm shift he imposed, it seems necessary to recount an anecdote surrounding the drafting of Coase's famous article.[44] Twenty or so economists, including George Stigler and Milton Friedman, attended an evening organised for Ronald Coase to explain his theory. At the beginning of the evening, the vote was unanimous as to the superiority of Pigou's theory over Coase's, but at the end of the evening the vote was unanimously in favour of Coase. For Coase, Pigou's theory inevitably damaged someone's interests. If the state decided to tax or regulate, industry was harmed. Conversely, if the State abstained, the neighbours of these industrial activities were harmed. For Coase, there was a median solution, which consisted of a negotiation between the parties: the industrialists could compensate for the costs of pollution, and the neighbours could compensate for the costs of reducing said pollution. To understand the solution proposed by Coase: if industrial activity causes pollution, it affects the property of the neighbours. Conversely, if neighbours prevent industrial activity, they encumber the industrialist's freedom of enterprise – a freedom conceived in the context of a bundle of property rights. 'Until Coase, no one had ever asked

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[39] This logic can be found in law on the old continent as far back as the 18th century, with numerous regulations governing these births. The same logic can also be found in Europe, where a large proportion of 'polluters' prefer to pay administrative fines rather than reduce or postpone their activity. See A Dobigny-Reverso, 'Les origines de la fiscalité environnementale au XIXe siècle: sur les traces du principe pollueur payeur' in V Fumaroli, S Schmitt (eds), *La fiscalité environnementale. Entre attentes, doutes et pragmatism* (Aix-en-Provence, PUAM, 2018) 23.

[40] It should be noted that if the State does not intervene to internalise these externalities, this can be interpreted, on the contrary, as a means – for the State – to favour polluting companies. See R Lanneau, 'Promoting Renewable Energies and State Aids, a Reform is Required' in K Mathis, BR Huber (eds), *Energy Law and Economics* (Berlin, Springer, 2018).

[41] The most convincing example is that of Hayek, who, despite being in favour of a minimum form of state, recognises the value of state intervention when private interests affect social well-being, even using the environment as an example. See FA Hayek, *The Road to Serfdom* (London, George Routledge & Sons, 1944) 39–40.

[42] R Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1–44.

[43] R Janda, 'Etat des réflexions sur l'analyse économique du droit, à travers deux ouvrages américains récents' (1992) 37 *Archives de philosophie du droit* 173-178, 174.

[44] The following example is taken from P Larouche, E Mackaay, A Parent, S Rousseau, *Analyse économique du droit*, 3rd ed (Paris, Dalloz, 2021) 231–2.

this simple but fundamental question: what if the parties could reach an agreement?'[45] This theory was very quickly taken up by the legal world: the 1970 decision in *Dorset Yacht Co Ltd v Home Office*[46] directly cites the theory for the application of the principle of liability.[47] Coase did, however, set limits on his theory. The Coase Theorem can only be applied in a legal system where the bundle of property rights is clearly established, and where transaction costs are negligible. Moreover, the parties must be willing to negotiate. This is why the legal translation of this economic theory provides, in addition to the proposed contractual liability, a subsidiary extra-contractual liability – the latter being favoured as transaction costs increase.[48] Under this theory, the role of the state is no longer to tax or regulate, but to play a subsidiary role through the judiciary[49] – if, and only if, the parties fail to reach an agreement.

It is this Coase Theorem that is strongly criticised by environmentalists,[50] because of 'the balancing of the right to breathe clean air against a "right to pollute"'.[51] For Coase, '[t]he aim of such regulation should not be to eliminate smoke pollution but rather to secure the optimum amount of smoke pollution, this being the amount which will maximise the value of production'.[52] In fact, the liability in question is economic theory, devoid of ethics, because in economics 'liability only aims to determine who should pay, without it being possible to say whether a person is really "responsible"'.[53] Liability law is thus mutating into a 'right to pollute' in both its contractual and extra-contractual fields. In contractual liability, for example, Richard Posner's theory of the efficient breach of contract[54] that it is sometimes 'more advantageous to compensate one's co-contractor […] than to perform the contract.'[55]

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[45] S Schweitzer, L Floury, *Droit et économie: un essai d'histoire analytique* (Aix-en-Provence, PUAM, 2015) 181.

[46] *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2, [1970] AC 1004.

[47] R Lanneau, *Les fondements épistémologiques du mouvement* Law and Economics (PhD, Nanterre University, 2009) 231–2.

[48] G Maître, *La responsabilité civile à l'épreuve de l'analyse économique du droit* (Paris, LGDJ, 2005) 49–51.

[49] S Schweitzer, L Floury, *Droit et économie: un essai d'histoire analytique* (Aix-en-Provence, PUAM, 2015) 182: 'In fact, civil liability in tort is the form of jurisdictional arbitration used by one of the parties to obtain compensation for its loss in the absence of prior agreement on the market due to the high transaction costs.'

[50] See eg J Untermaier, 'Le droit de l'environnement. Réflexions pour un premier bilan', in *L'année de l'environnement*, Vol. 1 (Paris, Presses universitaires de France, 1981) 114: 'the internalisation of externalities […] is a kind of charlatanism.'

[51] P Jourdain, *Les perspectives d'amélioration offertes par la loi du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages* (Bayonne, Institut Francophone pour la Justice et la Démocratie, 2020) 280.

[52] R Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1–44, 42.

[53] R Lanneau, *Les fondements épistémologiques du mouvement* Law and Economics (PhD, Nanterre University, 2009) 394.

[54] RA Posner, 'Let Us Never Blame a Contract Breaker' (2008–9) 107 *Michigan Law Review* 1349–66. It should also be noted that for Posner, utility calculation originated with Jeremy Benham. See RA Posner, 'Blackstone and Bentham' (1976) 19 *Journal of Law and Economics* 569–606, 600.

[55] A Supiot, *La gouvernance par les nombres* (Paris, Pluriel, 2020) 280.

With regard to extra-contractual liability, the reasoning of Judge Learned Hand[56] gave rise to the 'Hand Formula'. According to this formula, liability for damage is only accepted if the cost of preventing the damage is 'less than the amount of the probable damage'.[57] This balancing of environmental and prevention costs can also be found in OECD communications. Once again, these different theories stem from the economic analysis of law, and are imbued with methodological individualism, resulting in a calculation of utility for the individual and not for society as a whole. Here again, a distinction can be made between ethical utilitarianism (Sigdwick and Pigou) and economic utilitarianism (Hand and Posner).[58]

Finally, following on from Coase's approach in terms of property rights, proprietary theses explained that well-defined property rights allow better protection of the environment. The best-known of these is undoubtedly Garret Hardin's famous article 'The Tragedy of the Commons',[59] in which he argues that the internalisation of externalities, through the privatisation of resources, makes for more rational management – in contrast to what was practised before 'The Enclosure Movement'.[60] There are many positive examples of defined property rights in this proprietary movement, contributing to the fight against desertification[61] and the protection of African elephants,[62] for example. It should be noted, however, that these proprietary theories are strongly criticised by the new commons movement, particularly in the wake of Elinor Ostrom.[63]

The criticisms levelled at them suggest that there are two types of utilitarianism in environmental law: one that is more ethical, based on taxes and regulation, and another that is more economic, based on well-defined property rights and liability, both contractual and extra-contractual. In practice, however, the dividing lines become blurred, and the demarcation between the two approaches is not so clear-cut, particularly in the context of legal arrangements known as 'markets in pollution rights'. Moreover, in a consequentialist approach, it is only the consequence that matters, in this case environmental protection, which seems to be ensured by the mechanisms arising from these economic theories.

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[56] See *United States v Carroll Towing Co.,* 159 F.2d 169 (2d. Cir. 1947). It should be noted, however, that this Hand Formula was attached *a posteriori* to the Coase Theorem, the first having preceded the second.

[57] M Fabre-Magnan, *Droit des obligations. 2 – Responsabilité civile et quasi contrats*, 5th ed (Paris, PUF, 2021) 59.

[58] This analysis needs to be put into perspective because, in his article 'The Problem of Social Cost', Coase, while seeking to reconcile the individual utilities of individuals, was at the same time looking for an optimum between pollution avoidance and economic activity.

[59] G Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

[60] Before the 15th century, there was a great deal of land in England that was abandoned and/or left to anyone. From the 15th century onwards, the so-called 'Enclosure Movement' saw the appearance of fences on this land, and thus the emergence of private property, the purpose of which was to make farming more efficient.

[61] N Wade, 'Sahelian Drouht: No Victory for Western Aid' (1974) 185 *Science* 234–7.

[62] W Block, 'Environmental Problems, Private Property Rights Solutions', in W Block (ed), *Economics and the Environment: A Reconciliation* (Vancouver, The Fraser Institute, 1990) 364.

[63] See E Ostrom, *Governing the Commons: The Evolution of Collective Action* (New York, Cambridge University Press, 1990).

2. WIDESPREAD AND EFFECTIVE LEGAL UTILITARIANISM: THE EXAMPLE OF 'MARKETS IN POLLUTION RIGHTS'

As we saw above, the 'polluter-pays' principle underpins sustainable development,[64] which has been criticised as a utilitarian approach to environmental law. In the context of this principle, economic doctrine considered that '[t]he common and free use of natural resources explains why they are neglected by the activity of economic agents, the environment being conducive to the emergence of externalities',[65] so that State intervention seemed necessary to internalise these externalities. The role of the State, then, is to enable the internalisation of these externalities in order to achieve the optimum – the economic–environmental optimum, in our case. The question then arises: 'under what conditions is it more efficient to charge the costs of internalising a negative externality to one person rather than another?'[66] One of the favoured solutions in environmental law is that of markets in pollution rights, legal arrangements that combine private property[67] and state intervention.

While some believe that 'the creation of these environmental markets was obviously inspired by the work of economic doctrine, particularly that of Coase',[68] this statement needs to be qualified. Instead, markets in pollution rights have their origins in John Dales' *Pollution, Property & Prices: An Essay in Policy-making and Economics*.[69] For Dales, negative externalities stem from a poor definition of property rights, and it is from a property-owning approach that he sees his solution to environmental challenges. Like Coase, his aim was to ensure that environmental protection was not achieved solely through state regulation and/or taxation (and thus broke with Pigou's ideas). However, he proposed a middle way, combining regulation and the exchange of property rights.[70] In Coase's theory, a structural problem was the possible,

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[64] In fact this principle, without being named, can be traced back to the very beginnings of environmental law in the 19th century. See JF Brenner, 'Nuisance Law and the Industrial Revolution' (1974) 3 *Journal of Legal Studies* 403. See also A Dobigny-Reverso, 'Les origines de la fiscalité environnementale au XIX° siècle : sur les traces du principe pollueur payeur' in V Fumaroli, S Schmitt (eds), *La fiscalité environnementale. Entre attentes, doutes et pragmatism* (Aix-en-Provence, PUAM, 2018).

[65] E Durand, 'Le marché au service de la démocratie: l'exemple de la protection de l'environnement', in E Carpano, G Marti (eds), *Démocratie et marché dans l'Union européenne* (Bruxelles, Larcier, 2021) 291.

[66] S Caudal, M Poumarède, 'Principe pollueur-payeur. Approches droit public/droit privé', in M Mekki, E Naim-Gesbert (eds), *Droit public et droit privé de l'environnement: unité dans la diversité?* (Paris, LGDJ, 2016) 74.

[67] For a broader study of the various legal systems using private property in environmental law, see M Falque, M Massenet (eds), *Droits de propriété et environnement* (Paris, Dalloz, 1997).

[68] A Tomadini, 'La marchandisation de l'environnement: instrument de prévention, vecteur d'intégration', in *Le droit de l'environnement: 30 ans d'intégration. Bilan et perspectives* (Paris, Institut Francophone pour la Justice et la Démocratie, 2020) 87. On Coase's presumed "paternity", see also L Neyret, 'Construire la responsabilité écologique', in *Prendre la responsabilité au sérieux* (Paris, Presses universitaires de France, 2015) 126.

[69] J Dales, *Pollution, Property & Prices: An Essay in Policy-making and Economics* (Toronto, University of Toronto Press, 1968).

[70] N Berta, 'A Note on John Dales and the Early History of Emissions Trading: Mixing Standards and Markets for Rights' (2021) *Cahiers d'économie politique* 61.

and frequent, asymmetry of information between the parties. Another criticism can be levelled at the taxation method, as it 'proceeds by trial and error, the amount of the tax being revised from period to period until the desired result is obtained'.[71] To overcome these difficulties, Dales proposes the creation of a regulatory agency (an emanation of the State), which would set up a market in pollution rights[72] – the price emerging from this market being considered the optimum pollution price. Finally, with regard to the framework emanating from economic doctrine, it should be pointed out that markets in pollution rights are not fundamentally different from Pigouvian taxes,[73] being a method of regulation like any other, put in place by the State with the aim of reconciling economic and environmental concerns. In this respect, they differ from Coase's approach, in that the resulting exchange of property rights does not arise from spontaneous market forces, but from state regulation.

There are many legal translations of this economic theory. The best-known example is carbon pricing – from an economic perspective, the idea is to find the 'ideal' price for this type of pollution. According to the World Bank Group, the majority of governments have opted for market in pollution rights rather than taxation.[74] The market in pollution rights, in terms of carbon pricing, is the European Union's scheme for greenhouse gas emission allowance trading,[75] the stated aim of which is to reduce greenhouse gas emissions 'more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible'.[76] This search for the optimum in the legal text is thus a legal transposition of Dales' economic theory.

Moreover, markets in pollution rights, in general, are promoted by the European Union 'because they provide a flexible and cost-effective means for reaching given policy objectives',[77] the stated aim being to 'transform environmental liabilities into marketable assets, thus changing incentive structures and behaviour by assigning property rights and creating markets'.[78] There are many different ways of internalising externalities within the framework of market in pollution rights. They all seek, more or less, the economic and environmental optimum advocated by 'sustainable development'. They are also a way for the State to inter-

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[71] V Boisvert, A Caron, E Rodary, 'Privatiser pour conserver? Petits arrangements de la nouvelle économie des ressources avec la réalité' (2004) 177 *Revue Tiers Monde* 61–83.

[72] J Dales, *Pollution, Property & Prices: An Essay in Policy-making and Economics* (Toronto, University of Toronto Press, 1968) 93.

[73] A Karsenty, J Weber, 'Les marchés de droits pour la gestion de l'environnement Introduction générale,' (2004) 177 *Revue Tiers Monde* 7.

[74] World Bank Group, State and Trends of Carbon Pricing, Washington DC, 2015, www .worldbank .org/ content/ dam/ Worldbank/ document/ Climate/ State -and -Trend -Report -2015 .pdf (accessed 06/01/2024).

[75] Directive 2003/87/EC, 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

[76] Directive 2003/87/EC, 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, recital 5.

[77] COM (2007) 140 final, Green Paper on market-based instruments for environment and related policy purposes 2.

[78] COM (2007) 140 final, Green Paper on market-based instruments for environment and related policy purposes 14.

nalise both negative and positive externalities[79] – for the latter, the idea is to give a monetary value to the positive effects of economic activities, so that these activities are not disadvantaged in relation to less positive activities. As in the case of the carbon market, these are artificial markets – constructed by governments and imposed on economic operators – on which what are traded are not rights to pollute, but evidence that actions to protect the environment have been taken. In France, the best-known example is that of energy saving certificates.[80] Under the energy saving certificate market, a certain number of economic operators are legally obliged to obtain a certain number of certificates at the end of a given period. To do this, they can either carry out energy efficiency actions themselves and obtain certificates, or buy certificates obtained by other operators who have carried out these actions. The legal device has been transposed identically to the market for phytopharmaceutical product savings certificates.[81] However, while the legal system seems to be becoming more widespread in environmental law,[82] one difficulty remains: its application to the ecological functions of biodiversity. Unlike the fight against greenhouse gases, the protection of the ecological functions of biodiversity is so complex that it makes the development of legal measures with this objective just as complex – particularly in the context of the development of a market whose objective is the protection of biodiversity.[83]

Finally, even if markets in pollution rights are effective in the context of sustainable development, they are also criticised. Already, from a purely economic point of view, their effectiveness can be put into perspective, the total share of emissions regulated by the law being quite small[84] and the emerging prices of these devices being quite low.[85] This is the reason why, from an ethical point of view, '[t]he trade-off between production and therefore pollution, on the one hand, and reduction in environmental damage on the other, prevents us from considering that optimal pollution is zero',[86] and locks in state intervention within the framework of a utility calculation. The criticism of the doctrine, but also of civil society, is

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[79] R Lanneau, *Pour une analyse économique du droit des interventions de l'Etat dans l'économie* (Paris, Société de législation comparée, 2021) 140.

[80] T Chenille, A Fourmon, 'Bilan rétrospectif sur le dispositif des certificats d'économie d'énergie. Un dispositif financier d'efficacité énergétique bientôt vingtenaire, à l'aube de la 6e période et de la prochaine publication d'un décret sur les contrats de vente à terme' (2024) *Energi e-Environnement-Infrastructures*.

[81] Articles L. 254-10 to L. 254-10-9 of the French Rural and Maritime Fisheries Code.

[82] F-G Trébulle, 'Les titres environnementaux' (2011) 36 *Revue juridique de l'environnement* 203–26.

[83] F-G Trébulle, 'Marché et protection de la biodiversité: les unités de compensation écologique' *in* M-P Camproux Duffrène, J Sohnle (eds), *Marché et environnement* (Bruxelles, Bruylant, 2014) 256.

[84] J Viñuales, 'La distribution de la charge de protéger l'environnement : expressions juridiques de la solidarité', in A Supiot, *Face à l'irresponsabilité : la dynamique de la solidarité* (Paris, Collège de France, 2018) 19.

[85] J Viñuales, 'La distribution de la charge de protéger l'environnement : expressions juridiques de la solidarité', in A Supiot, *Face à l'irresponsabilité : la dynamique de la solidarité* (Paris, Collège de France, 2018) 19.

[86] D. Brécard, 'L'analyse économique de la fiscalité environnementale' in V Fumaroli, S Schmitt (eds), *La fiscalité environnementale. Entre attentes, doutes et pragmatism* (Aix-en-Provence, PUAM, 2018) 75.

thus turned towards sustainable development – and the supposed legal utilitarianism from which it would result. However, legal utilitarianism is not devoid of an ethical dimension, particularly in environmental law.

3. LEGAL UTILITARIANISM, NOT DEVOID OF ETHICS

The last section of this chapter will endeavour to demonstrate that despite criticism, ethics remains relevant in a utilitarian approach to environmental law. To take up the distinctions made by the detractors of legal utilitarianism, notably Martha Nussbaum, there exist in environmental law – as in law in general – two forms of utilitarianism: a classical and ethical utilitarianism on the one hand, and a contemporary and economic utilitarianism on the other.

The main defender of the economic analysis of law, Richard Posner, considers that Law and Economics *is* moral.[87] Even if this claim can be debated,[88] it is appropriate to elaborate on the objects of analysis of this doctrine: the legal applications of economic theories. In this context, we can return to the example of externalities, which have a preponderant place – as seen previously – in environmental law. If markets in pollution rights and Pigouvian taxes are put in place with the objective of internalising externalities, it must be remembered that the externality is not 'an objective fact, it rather results from an interpretation of the world'.[89] These instruments seek to make economic operators pay for the social costs they generate as a result of their activity – pollution, for example. However, '[w]hat constitutes a social benefit or a social cost is not "dictated" by economic analysis'.[90] The legal application of these economic theories is then, in itself, neutral. The definition of the social benefit to be favoured – such as energy savings or the reduction of plant protection products – or the social cost to be disadvantaged – such as greenhouse gas emissions – may in turn be ethical or not. However, a large number of environmental philosophers and ecologists indicate that 'environmental ethics and utilitarianism are incompatible'.[91] But there is not only one environmental ethics, and if legal utilitarianism seems incompatible with certain environmental ethics, it fits imperfectly with others, and even sometimes fits perfectly with still others.

Concerning environmental ethics incompatible with legal utilitarianism, we must cite deep ecology, popularised by Arne Næss.[92] This environmental ethics aims to overturn the anthro-

[87] RA Posner, 'Law and Economics *Is* Moral' (1990) 24 *Valparaiso University Law Review* 163–73. It should be noted, however, that in this article he reiterates the differentiation between his doctrine and that of legal utilitarianism. The example of Posner is again used in this analysis, because some of his critics consider him to be a utilitarian.

[88] Moreover, in his article, Posner goes to great lengths to show that other approaches are no more moral, rather than demonstrating that the Law and Economics current is moral. See RA Posner, 'Law and Economics Is Moral' (1990) 24 *Valparaiso University Law Review* 163–73.

[89] R Lanneau, *Pour une analyse économique du droit des interventions de l'Etat dans l'économie* (Paris, Société de législation comparée, 2021) 36.

[90] R Lanneau, *Pour une analyse économique du droit des interventions de l'Etat dans l'économie* (Paris, Société de législation comparée, 2021).

[91] D Birnbacher, 'Éthique utilitariste et éthique environnementale – une mésalliance?' (1998) 96 *Revue philosophique de Louvain* 427–48, 427.

[92] A Naess, 'The Shallow and the Deep Long Range Ecology Movement: A Summary', https://iseethics.wordpress.com/wp-content/uploads/2013/02/naess-arne-the-shallow-and-the-deep-long-range-ecology-movement.pdf (accessed 03/07/2024).

pocentric paradigm, by advocating for nature with intrinsic value and not utility for humans. For this ethics, Man must not reduce natural resources, because they have a value that cannot be quantified. Refusing the calculation of utility in the context of environmental protection, this ethic is intrinsically anti-utilitarian. Moreover, as environmental law is difficult to imagine outside of standards decreed by Man for Man,[93] legal utilitarianism also seems incompatible with this ethic refusing any human intervention – note, however, that certain authors evoke the *Buen vivir* of the Ecuadorian and Bolivian constitutions as a legal translation of this ethics of deep ecology.[94]

Concerning imperfectly compatible environmental ethics, we cannot ignore animal ethics – in environmental law as in utilitarianism. In environmental law, Bentham's animal ethics[95] is one of the only examples of legal utilitarianism discussed positively – if not *the* only. Indeed, the principle 'the greatest happiness of the greatest number' applies, according to Bentham, to 'the whole sentient creation'. According to this principle, animal exploitation must balance the degree of usefulness of the exploitation with the degree of sensitivity of the animal. We cannot fail to think of the wording of article L. 515-14 of the French civil code ('animals are living beings endowed with sensitivity'), and this principle permeates all contemporary animal law, from the supervision of farmed animals, to that of animals for entertainment purposes, to that of animal exploitation for scientific purposes.[96] If utilitarianism has an undeniable influence on contemporary animal law, the observation is different on the side of contemporary animal ethics, which refuse, for example, to classify species according to their utility (anti-speciesism), or quite simply refuse any form of exploitation of animals (abolitionism). It should be noted, however, that Peter Singer, a contemporary utilitarian, advocates that the principle of equality be extended to all species – granting the same discredit to speciesism as to sexism and racism.[97]

Concerning environmental ethics perfectly compatible with legal utilitarianism, we must finally cite the most cited work in environmental law literature: Hans Jonas's 'imperative of responsibility',[98] regarding responsibility towards future generations.[99] Unlike Rawls who bases responsibility towards future generations on the principle of fair savings,[100] Hans Jonas

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[93] J Rivero, 'Préface', in F Caballero, *Essai sur la notion juridique de nuisance* (Paris, LGDJ, 1981) viii.

[94] G Sozzo, 'Deep Ecology', in F Collart Dutilleul, V Pironon, A Van Lang, *Dictionnaire juridique des transitions écologiques* (Bayonne, Institut Universitaire Varenne, 2018) 291.

[95] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Oxford, Clarendon Press, 1996) 282–3 n b. This ethic is also found in JS Mill, *Utilitarianism*, 1863, www.earlymoderntexts.com/assets/pdfs/mill1863.pdf, Ch. 2. See also R Bismuth, 'Animal Law through a Utilitarian Lens', in this volume.

[96] On these legal regimes, see C Morales Frénoy, *Le droit animal* (Paris, L'Harmattan, 2017) 139–300.

[97] P Singer, *Animal Liberation* (New York, HarperCollins, 1975) 311.

[98] H Jonas, *Le principe responsabilité* (Paris, Flammarion, Champs 2000) (original ed *Das Prinzip Verantwotung. Versuch einer Ethik für die Technologische Zivilisation*, 1979).

[99] Jonas's thought could be expressed by the idea of 'la responsabilité de l'homme envers l'homme'. See H Jonas, *Le principe responsabilité* (Paris, Flammarion, Champs 2000) 193.

[100] H Jonas, *Le principe responsabilité* (Paris, Flammarion, Champs 2000) 324–33.

rests his theory on the ontological duty of man to preserve himself[101] – and thus preserve his environment. His approach is based on asymmetry, and rejects 'any form of give-and-take logic'.[102] This approach is particularly interesting in law, because it is difficult to think of a liability system imposed not on a past or present situation, but on a future one. This difficulty is due to what Émilie Gaillard calls the 'paradigm of reciprocity',[103] 'the idea that only reciprocal obligations are justified and accepted by each person concerned (contractualism), the presupposition according to which distant generations cannot in any way affect us (instantaneism)'.[104] In short, our law of liability, particularly in environmental matters, is intrinsically incompatible with the 'imperative of responsibility' towards future generations. *A priori*, Jonassian ethics thus appears incompatible with legal utilitarianism in environmental law[105] – particularly that applying Coase's theories. It would also be incompatible, for certain critics, with utilitarianism in general – the latter would have 'a lot of difficulty defining "the greatest good for the greatest number" when future generations must be taken into consideration'.[106]

However, responsibility towards future generations is at the centre of what is called 'economics of welfare', a utilitarian theory perfectly transcribed into environmental law. Two of the main authors of economics of welfare are Pigou[107] and Sidgwick. It is this current that was the first to show an interest in the internalisation of negative externalities,[108] thereby indicating the need for state intervention in the market to compensate for its failures. Concerning environmental law, in 1883 Sidgwick explained the benefits of fishing quotas. These quotas made it possible, according to him, to counterbalance the increase in current supply with the potential future decline.[109] More generally, markets in pollution rights and Pigouvian taxes are examples of legal measures favouring future generations over present generations, because they increase the costs of present generations so as not to increase drastically (due to the scarcity of resources) the costs borne by future generations. This responsibility for future

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[101] H Jonas, *Le principe responsabilité* (Paris, Flammarion, Champs 2000) 163. For a legal definition of 'future generations', see E Gaillard, *Générations futures et droit privé* (Paris, LGDJ, 2011).

[102] H Jonas, *Le principe responsabilité* (Paris, Flammarion, Champs 2000) 163.

[103] E Gaillard, *Générations futures et droit privé* (Paris, LGDJ, 2011).

[104] F Ost, 'Mondialiser nos responsabilités : transmettre un milieu habitable', in A Supiot (ed), *Mondialisation ou globalisation? Les leçons de Simone Weil* (Paris, Collège de France, 2019) 17. We also find this concern in political theory in the writings of Raymond Aron: 'It is probable that, if we asked people what they think, they would choose to sacrifice less for future generations and, therefore, therefore, would like forced savings and industrialization to be pushed less far and less quickly. It is probable but not demonstrable.' See R Aron, *Introduction à la philosophie politique* (Paris, Le Livre de Poche, 1997) 194.

[105] However, we find, even in Posner, questions about the place of future generations in the calculation of utility. See eg RA Posner, *The Economics of Justice* (Chicago, Chicago University Press, 1981) 52–4).

[106] C Larrère, 'Les éthiques environnementales et la question du pluralisme' in S Guérard de Latour, M Dilhac (eds), *Étant donné le pluralisme* (Paris, Éditions de la Sorbonne, 2013) 55.

[107] D Collard, 'Pigou and Future Generations: A Cambridge Tradition' (1996) 20 *Cambridge Journal of Economics* 585–97.

[108] P Bazard, *Les fondements de l'économie du bien-être et la révision de l'utilitarisme. L'héritage de Henry Sidgwick* (PhD, Université Paris I Panthéon Sorbonne, 1997) 14.

[109] H Sidgwick, *The Principles of Political Economy* (London, Macmillan, 1883) 409–10.

generations – almost Jonas-like – is found in the main legal texts linked to sustainable development, from the first principle of the Stockholm declaration of 1972[110] to the Brundtland report,[111] demonstrating the compatibility of legal utilitarianism and this environmental ethic.

4. CONCLUSION

Legal utilitarianism in environmental law is essentially assimilated to the legal application of a certain number of economic theories. If this assimilation to utilitarianism is contested by some of those concerned (such as Posner), the result, in environmental law, is a distrust of utilitarian approaches, which is in fact a distrust of market mechanisms.[112] However, markets in pollution rights and Pigouvian taxes, whether they are instruments of legal utilitarianism or assimilated to it (because they carry out a calculation of utility in a consequentialist approach), are instruments used worldwide in law of the environment. Although the degree of efficiency can be improved, the fact remains that such mechanisms effectively contribute to environmental protection. Finally, one of the main criticisms addressed to legal utilitarianism would be its alleged lack of ethics. If legal utilitarianism seems incompatible with certain environmental ethics (such as deep ecology), it is at the origin of many others, such as certain animal ethics, or the consideration of future generations.

If legal utilitarianism in environmental law can be debated – and must be, like any legal doctrine in democratic lands – it seems necessary to take the time to understand the criticisms addressed to it. It also seems necessary to recall that legal utilitarianism is not always synonymous with the legal application of economic theories[113] and that it is not devoid of ethics. Legal utilitarianism has its strengths – it is quite effective in terms of environmental protection – but also its weaknesses – because it prevents us from considering that optimum pollution could be zero, or even from considering the end of pollution or animal exploitation – excluding Peter Singer's approach, as seen previously. Legal utilitarianism is, thus, one doctrine of environmental law among others. Legal utilitarianism in environmental law is therefore neither

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[110] 'He bears a solemn responsibility to protect and improve the environment for present and future generations.'

[111] 'To find ways to recognize and protect the rights of present and future generations to an environment adequate for their health and well-being.'

[112] See eg M Prieur, 'La déréglementation en matière d'environnement' (1987) 3 *Revue juridique de l'environnement* 319–30, 319: 'the protection of nature and sites is partly outside the laws of the market.'

[113] Even if it were, protection of the environment and protection of the economy are not necessarily contradictory, and it is interesting to quote here Professor Martin, who devoted his life to these questions: 'the human species does not can be neither only biological nor only economic, it then appears necessary to think, at the same time and with tools capable of communicating and articulating with each other, about economic damage and ecological damage. Precisely because environmental economic law is the law of the organization of economic activity with the aim of protecting the environment, it is one of the rare approaches – perhaps the only one – which "holds the two ends of the string", which deals with both sides of the question.' See GJ Martin, 'Qu'est-ce que le droit économique de l'environnement?', in A-S Epstein, M Nioche (eds), *Le droit économique. Levier de la transition écologique?* (Bruxelles, Bruylant, 2023) 72–3.

a miracle solution to environmental problems, nor a product of big capital, to be destroyed everywhere and always.

25. Animal law through a utilitarian lens

Régis Bismuth

Utilitarianism, especially through the writings of its influential contemporary proponent Peter Singer, has been one of the most prevalent ethical theories to articulate how humans ought to treat non-human animals. It is thus not a surprise that it has played a key role in the evolution of the debates surrounding animal law[1] over the past decades. Before exploring how utilitarian thought has resonated in the development of animal law, it is first necessary to explore why, how, and to what extent it has taken into consideration the fate of animals. This chapter will specifically focus on the utilitarian approach as it pertains to the individual treatment of animals and does not address the protection of animals as species within an environmental context.

1. ANIMALS IN THE UTILITARIAN PERSPECTIVE

1.1 Foundations

Utilitarianism is a highly influential Western philosophy which has shaped the ethical discourse surrounding the treatment of animals. By asserting that animals, akin to humans, experience pain and, therefore, have interests deserving of protection, some utilitarians have argued that such considerations are essential in determining how humans should treat animals. This philosophical approach challenged the prevailing view that animals, allegedly being deeply different from humans and lacking reason, are not deserving of moral consideration. Utilitarianism's emphasis on the consequences of actions and the intrinsic value of pleasure and pain has broadened the scope of ethical obligations towards animals and has laid the groundwork for significant legal and societal changes aimed at improving their welfare.

Jeremy Bentham's writings, more specifically a footnote appearing in the *Introduction to the Principles of Morals and Legislation*, have been canonized by the animal liberation movement two centuries later. This short text holds two intriguing aspects. First, in the main text briefly referring to animals, Bentham pointed out the legal status of animals as objects of property. When comparing humans and other animals, he noted that 'other animals, which, on account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of *things*'.[2] Interestingly, the starting point of his commentary on animals is about a legal question pertaining to property rights. Second, the footnote represents

[1] In this chapter, the term 'animal law' is devoid of any ethical positioning or epistemological aspiration and is used to refer to the rules governing human-animal relations, including animal welfare, ownership and protection.

[2] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Clarendon Press 1996) 282.

the first identifiable formulation of anti-speciesism and draws a parallel between slavery and animal exploitation:

> The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the whims of a tormentor (See Lewis XIVth's Code Noir). It may come one day to be recognized, that the number of legs, the pilosity of the skin, or the termination if the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate? What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse, or dog, is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? The question is not, Can they *reason*? Nor, Can they *talk*? But, Can they *suffer*?[3]

Bentham's famous citation has, to some extent, overshadowed the positions of other utilitarian thinkers on the issue of animal treatment.[4] This is, for instance, the case of John Stuart Mill, who emphasized the importance of the 'Greatest Happiness Principle' and stated that its 'ultimate end' is 'an existence exempt as far as possible from pain, and as rich as possible in enjoyments'.[5] He further argued that this principle should determine 'the rules and precepts for human conduct […] to all mankind; and not only to them, but so far as the nature of things admits, to the whole sentient creation'.[6] He previously clearly articulated the immorality of 'any practice [that] causes more pain to animals than it gives pleasure to man'.[7]

Neither Bentham nor Mill built a full-fledged utilitarian theory of animal justice. They only mentioned in passing the fate of animals and that they are worthy of being included in the utilitarian equation. Nevertheless, Bentham's philosophy had some influence on the development of the first anti-cruelty laws in England at the start of the 19th century.[8] Amid increasing concerns about the development of intensive industrial farming practices and the use of animals in scientific research, it was only two hundred years later with Peter Singer's seminal book *Animal Liberation*, first published in 1975, that the issue of the treatment of animals was brought to the forefront of philosophical discourse.

Singer explains why animals should be included in the circle of moral consideration. In his view, the ethical principle on which human equality rests is normative rather than descriptive; it 'is not a description of an alleged actual equality among humans: it is a prescription of how we should treat human beings'.[9] The principle of equality of human beings 'does not depend on intelligence, moral capacity [or] physical strength'.[10] It rests upon the acknowledgement

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3 ibid 282-283 fn b.

4 On Bentham, see also Johannes Kniess, 'Bentham on Animal Welfare' (2019) 27 British Journal for the History of Philosophy 556.

5 John Stuart Mill, *Utilitarianism – With Related Remarks from Mill's Other Writings* (Hackett 2017) (Ch II(10) 37 (originally published in 1863).

6 ibid.

7 John Stuart Mill, *Whewell on Moral Philosophy* (1852) (CW vol X) 187 (cited in ibid 52).

8 Roderick Frazier Nash, *The Rights of Nature – A History of Environmental Ethics* (The University of Wisconsin Press 1989) 25.

9 Peter Singer, *Animal Liberation* (Ecco 2002) 5.

10 ibid 4.

and consideration of the interests of the individual.[11] Relying on Bentham's 'forward-looking passage',[12] Singer considers that, like humans, animals are living beings capable of suffering and experiencing enjoyment and happiness. Consequently, their interests, too, warrant equal consideration. This led Singer to develop the principle of 'equal consideration of interests'. Singer argues that akin to the act of prioritizing the interests of a particular ethnic or gender group – which would be deemed racist or sexist – favouring the interests of humans over animals constitutes what he refers to as 'speciesism'.[13] However, this equal consideration of interests does not require equal or identical treatment and may lead to different rights.[14] For example, unlike a human, a non-human animal could not be granted the right to vote because it would not comprehend its purpose.

1.2 Scope and Reach

According to utilitarians, sentience is the decisive criterion to determine that animals have a moral standing. Sentience is enough for animals to be considered moral subjects, but it does not provide a clear answer about what decisions should be made in a specific situation involving the treatment of an animal. Indeed, while sentience is a necessary condition for moral consideration, it has unclear boundaries. Moreover, sentience alone does not dictate the specific ethical decisions in scenarios involving animal treatment. Utilitarianism, with its varied nuances, lacks a singular formula for determining the correct treatment of animals.

There is first a question regarding where to delineate the boundaries of sentience, which is, according to Singer, 'the only defensible boundary of concern for the interests of others'.[15] The concept of sentience requires a scientific evaluation of an animal's ability to experience pain and pleasure. However, there are controversies about the limits of sentience and the possibility of non-sentient animals that would be disregarded from a utilitarian perspective.[16]

It is evident when examining the different fields of animal law that animal sentience plays a certain role, but it is not consistently taken into account across different branches of animal law.[17] Moreover, it is also noteworthy that assessing how animals should be treated also involves the incorporation, by a mirror effect, of how an individual perceives animal sentience.[18] It is sometimes also about imagining what we could empathetically infer another living being might experience.[19] By the way, Peter Singer did not reject this kind of intuitive

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[11] ibid 5.
[12] ibid 7.
[13] ibid 6, 213.
[14] ibid 2.
[15] ibid 8–9.
[16] Mary Anne Warren, *Moral Status: Obligations to Persons and Other Living Things* (Oxford University Press, 2000) 50.
[17] For an overview, see, Régis Bismuth and Fabien Marchadier (eds), *Sensibilité animale – Perspectives juridiques* (CNRS Editions, 2015).
[18] Régis Bismuth and Fabien Marchadier, 'La sensibilité de (et vis-à-vis de) l'animal, grille de lecture du droit animalier?' in Régis Bismuth and Fabien Marchadier (eds), *Sensibilité animale – Perspectives juridiques* (CNRS Editions, 2015) 25.
[19] Tristan Garcia, *Nous, animaux et humains – Actualités de Jeremy Bentham* (François Bourin Editeur 2011) 11.

approach when he stated that 'the basis of my belief that animals can feel pain is similar to the basis of my belief that children can feel pain'[20] and that for plants 'we cannot observe behaviour suggesting pain'.[21] Although utilitarianism aims to adopt a scientific approach, the inherent element of subjectivity inevitably affects the determination of what is considered acceptable treatment of animals.

Beyond these challenges, the utilitarian test is not merely a mathematical equation but also implies value judgments. The doctrine of utilitarianism presents numerous interpretations and even 'utilitarians differ as to what utility actually entails'.[22] Moreover, individual stances can evolve over time. Initially, Peter Singer advocated for 'preference utilitarianism', a concept aligning utility with the satisfaction of preferences. However, he later expressed growing scepticism about preference utilitarianism and started to consider 'hedonistic utilitarianism', which equates utility with pleasure, as a more defendable alternative.[23]

Under the 'principle of minimizing suffering',[24] utilitarians acknowledge that while animals' interests merit protection, there are situations where safeguarding a legitimate interest, whether human or non-human, may require inflicting harm on animals. However, this is permissible only to the extent that the benefits of protecting this legitimate interest significantly outweigh the harm caused. Some utilitarians consider that, as a matter of principle, in all cases, human life is more valuable than animal life.[25] Others might differ as to what constitutes 'a good life' for animals. Some will consider that the killing of replaceable animals is justifiable as long as it is done within the framework of animal-friendly farming practices,[26] while others may consider that their killing is not justifiable because they have a preference for the continuation of their own existence.[27]

Critics of Singer's consequentialist utilitarian approach, particularly those involved with animal rights theory, have pointed out that it could potentially justify animal exploitation if it results in a greater overall good. In other words, some consider that utilitarianism offers too many avenues for avoidance and 'this situation leaves animals extremely vulnerable to a range of harms'.[28] Tom Regan's animal rights theory, grounded in a deontological approach, counters this by asserting that animals, as 'subjects of a life', possess intrinsic value and rights that cannot be overridden. According to Regan, animals should not be treated merely as means to

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[20] Peter Singer, *Practical Ethics* (3rd edn, Cambridge University Press, 2011) 59.

[21] ibid 60.

[22] Alasdair Cochrane, *An Introduction to Animals and Political Theory* (Palgrave Macmillan 2010) 30.

[23] Peter Singer, 'Afterword' in Tatjana Višak and Robert Garner (eds), *The Ethics of Killing Animals* (Oxford University Press, 2016) 234.

[24] Singer, *Animal Liberation* (n 9) 21.

[25] Raymond G Frey, 'Utilitarianism and Animals' in Tom L Beauchamp and Raymond G Frey (eds), *The Oxford Handbook of Animal Ethics* (Oxford University Press, 2012) 177.

[26] See 'Why I Am Only a Demi-Vegetarian' in Richard M Hare, *Essays on Bioethics* (Clarendon Press 1993) 219. For a critique of the 'replaceabiliy argument', see, Nicolas Delon, 'Un Singer peut-il en remplacer un autre?' (2016) 32 Klesis 150. See also, Tatjana Visak and Robert Garner (eds), *The Ethics of Killing Animals* (Oxford University Press, 2016) 46.

[27] Nicolas Delon, 'La mort: Un mal non nécessaire, surtout pour les animaux heureux!' (2014) 2014 Revue Semestrielle de Droit Animalier 247.

[28] Cochrane (n 22) 45. See also, Gary L Francione, *Animals, Property, and the Law* (Temple University Press 1995) 6.

an end, irrespective of the outcomes. This stance challenges utilitarian views that sometimes allow the use of animals for perceived greater benefits.[29]

1.3 From Utilitarian Theory to Animal Law

This chapter examines whether utilitarianism offers an interesting framework for understanding and deciphering animal law and some of its evolutions. It does not intend to evaluate the various proposals for regulatory reform put forward by utilitarians, for instance, for farm animals, animals used in scientific experiments, or animals used for recreational purposes.

For clarity, we do not intend to limit our understanding of animal law to merely regulatory provisions. In this regard, the proposals of utilitarians are particularly interesting in explaining why a narrow and positivist conception of animal law is inadequate. Indeed, while utilitarians have made proposals for legal reform regarding the use of animals, they have also put forward suggestions aimed at individuals. For example, Peter Singer proposes changing consumption habits when viable alternatives exist and adopting a vegetarian diet.[30] At first glance, advocating individual moral choices may seem only distantly related to what is understood by animal law. However, this would overlook the full range of normative tools that can facilitate the implementation of individual moral choices. It is essential to consider norms set by private operators, nudge tactics[31] or more hybrid forms of soft law such as animal welfare labels, which play a significant role in informing consumers.[32] Therefore, we will adopt a very broad perspective on what constitutes animal law, while maintaining a critical analysis of the various normative tools deployed. It is important to note that what follows provides a fragmented and impressionistic view of the development of animal law, and our focus has been on jurisdictions with which we are more familiar.

Although this chapter focuses on how utilitarianism offers an interesting framework for understanding animal law, it is also worth quickly mentioning that, more recently, new disciplines, for instance economics or behavioural science, have also embraced the utilitarian doctrine to formulate normative proposals in the field of animal protection. The cross-disciplinary application of utilitarian principles is exemplified in the Animal-Welfare Levy, as proposed by Romain Espinosa and Nicolas Treich. Their proposal, grounded in non-anthropocentric economics, advocates for a levy on meat consumption to address concerns for animal welfare. This levy functions similarly to a Pigouvian tax, aiming to internalize the external costs associated with the production of animals for meat consumption.[33] Espinosa and Treich's proposal showcases the practical application of utilitarian principles in economics, moving beyond theoretical discourse to influence policy decisions and legal frameworks concerning animal welfare.

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[29] Tom Regan, *The Case for Animal Rights* (University of California Press 1983) 206.

[30] Singer, *Animal Liberation* (n 9) 159.

[31] See Malik Bozzo-Rey, 'Nudge and Utilitarianism: A Matter of Preferences', in this book.

[32] See for instance in the global context, Anne Peters, 'Animals in International Law' (2020) 410 Recueil des Cours de l'Académie de Droit International de la Haye 95, 175.

[33] Romain Espinosa and Nicolas Treich, 'The Animal-Welfare Levy' (Toulouse School of Economics 2024). See also, F Bailey Norwood, and Jayson L Lusk, *Compassion, by the Pound: The Economics of Farm Animal Welfare* (Oxford University Press, 2011); Romain Espinosa, *Comment sauver les animaux? Une économie de la condition animale* (PUF 2021).

2. MAIN AREAS OF IMPLEMENTATION AND CHALLENGES IN EFFECTIVENESS

In the realm of animal law, significant developments have emerged, prompting us to examine their resonance with the utilitarian doctrine. However, this exploration is no straightforward task. The rules governing animals vary dramatically based on their categorization: whether they are pets, animals used for food and goods production or for scientific research, recreational companions, wild creatures or invasive species.[34] Consider a seemingly innocuous rabbit – it could be subject to vastly different rules and treatments depending on which category it falls into.

Adding to the complexity, various constraints and interests come into play. Economic considerations, cultural norms and religious beliefs all shape the landscape of animal law. These multifaceted factors often hinder the development of a coherent utilitarian approach to animal welfare. Also, sometimes what appears as a utilitarian doctrine may merely serve as a veneer, masking the amoral justification for perpetuating the exploitation of animals.

2.1 Animals Used for Scientific Research

Utilitarians have given due consideration to the use of animals in scientific research. Moreover, in Peter Singer's *Animal Liberation*, the first chapter following the introduction does not discuss the treatment of animals in factory farms. Instead, as indicated by its title, 'Tools for Research',[35] it focuses on the use of animals in scientific research. This chapter reveals some disturbing practices, such as the infliction of intensive electric shocks, suffocation and administration of known toxic substances, causing prolonged pain to various animals (rats, dogs, rabbits, chimpanzees and the like). Many of these instances appear to be futile scientific experiments, at times driven by peculiar scientific curiosity, lacking clear or legitimate scientific objectives. It was unsurprising that a process of desensitization of animals was observed in that context, where they are referred to as items, tools or supplies. Singer also discussed how public outcry and the pressure from the animal welfare movement in the 1980s led scientists and pharmaceutical and cosmetics firms to explore alternative research methods.[36] Singer also sought to challenge the preconception that labelling research as 'medical' inherently carries a form of self-justification for its social necessity.[37] In this sense, clear principles must regulate the use of animals in scientific research and self-regulation alone is not sufficient. Some authors have sought to propose practical methodologies to implement Singer's utilitarian approach in the field of animal experimentation. This includes for instance the 'Non-Speciesist Utilitarian Test' proposed by Lori Gruen, according to which 'an experiment X would be justified if and only if: 1. of all the options open, X generates more pleasure or benefit than pain

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[34] This chapter will not address the specific situation of pest animals and invasive species, as this is not a dominant theme in utilitarian literature, and it is also an area where considerations of animal welfare are often overlooked in practice. The status of animals as pets will be briefly touched upon in the context of discussing animals used for recreational activities.

[35] Singer, *Animal Liberation* (n 9) 25.

[36] ibid 57.

[37] ibid 61.

or cost on balance; and 2. The justification for experiment X does not depend on irrelevant species prejudice, that is, equal interests are considered equally no matter who has them'.[38]

The principles defined by William Russell and Rex Burch in their book *The Principles of Humane Experimental Technique*[39] – published in 1959 following work under the auspices of the Universities Federation for Animal Welfare (UFAW) – have become the most influential ethical guidelines designed to minimize animal use and suffering in scientific research.[40] In their book, Russell and Burch advocate for the establishment of a scientific ethics based on a utilitarian approach, that of the '3Rs' principles: Replacement, Reduction, and Refinement. Replacement involves substituting traditional animal models with alternative methods (human tissues and cells, computer models, and so on). Reduction focuses on strategies to decrease the number of animals used in experiments (by improving experimental design and analysis, sharing resources, and so on). Refinement implies modifying experimental and care procedures to lessen pain, distress or discomfort in animals used in research. The 3Rs model is applicable in various contexts to guide research conduct, including domestic regulations, ethical guidelines for researchers, education, and even editorial policies of scientific journals.[41]

It was only in the 1980s that the 3Rs model began to gain significance among legislators. Within the EU, its general philosophy is reflected in Directive 86/609 on the protection of animals used for experimental and other scientific purposes.[42] This instrument was adopted a few months after the conclusion of the Council of Europe's Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes.[43] The general objective of the directive, as explained in its preamble, was to implement a harmonization of the legislations of the member states to ensure 'that the number of animals used for experimental or other scientific purposes is reduced to a minimum, that such animals are adequately cared for, that no pain, suffering, distress or lasting harm are inflicted unnecessarily and ensure that, where unavoidable, these shall be kept to the minimum'.[44] The directive was designed, at least *prima facie*, on the 3Rs model: no experiment shall be performed if another scientifically satisfactory method of obtaining the result sought, not entailing the use of an animal, is reasonably and practicably available;[45] when an experiment has to be performed, there should be the use of 'the minimum numbers of animals';[46] and experimental methods expected to cause 'the

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[38] Lori Gruen, *Ethics and Animals – An Introduction* (Cambridge University Press, 2011) 119.

[39] William MS Russell and Rex L Burch, *The Principles of Humane Experimental Technique* (Methuen & Co 1959).

[40] Robert C Hubrecht and Elizabeth Carter, 'The 3Rs and Humane Experimental Technique: Implementing Change' (2019) 9 Animals 754. See also Bernard E Rollin, 'Animal Research, Animal Welfare, and the Three R's' (2010) 10 Journal of Philosophy, Science & Law 1.

[41] Nicola J Osborne, Daisy Payne and Michael L Newman, 'Journal Editorial Policies, Animal Welfare, and the 3Rs' (2009) 9 The American Journal of Bioethics 55.

[42] Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes [1986] OJ L 358/1.

[43] European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes (18 March 1986) European Treaty Series No. 123.

[44] Directive 86/609 (n 42) Preamble para 6.

[45] ibid Article 7(2).

[46] ibid Article 7(3).

least pain, suffering, distress or lasting harm and which are most likely to provide satisfactory results shall be selected'.[47]

The directive has been subject to several criticisms, some regarding the fact that it was not uniformly implemented, failing to ensure sufficient conditions for a level playing field and creating competitive distortions between member states. Others criticized it for not providing adequate animal welfare conditions or for only protecting 'non-human vertebrates',[48] thereby marginalizing invertebrates, and classifying animals based on their 'degree of neurophysiological sensitivity'.[49]

Before revising that directive, the EU expanded its regulatory framework regarding animal experimentation for the development of cosmetic products. The EU has adopted measures for a phasing-out of animal testing for cosmetic products and banning, among other things, animal testing of finished cosmetic products and of cosmetic ingredients[50] and also allowing producers to claim that no animal testing was carried out in relation to its development.[51] This development is notable from a utilitarian perspective because it shows that the EU distinguishes between different objectives for using animals. The use for cosmetic product development is deemed not to have sufficient legitimate interest.

The revision of the 1986 directive by Directive 2010/63 was undertaken with the ambition of better incorporating the 3Rs model.[52] It includes several provisions on improving animal welfare, rules applicable to facilities housing animals, enhanced ethical evaluation of projects and the development of alternative methods.[53] This directive is also interesting on a more specific point, highlighting how the utilitarian logic supposed to underlie it can also be tinged with other considerations. The directive indeed sets stricter rules for the use of non-human primates, and more specifically concerning great apes.[54] Great apes can only be used 'where a Member State has justifiable grounds for believing that action is essential for the preservation of the species or in relation to an unexpected outbreak of a life-threatening or debilitating clinical condition in human beings'.[55] The preamble of the directive refers to 'practical problems in terms of meeting their behavioural, environmental, and social needs in a laboratory environment',[56] which seems to follow a utilitarian logic. However, it also refers to the 'genetic proximity of non-human primates to human beings'[57] and the fact that great apes are among the 'closest species to human beings with the most advanced social and behav-

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47 ibid Article 7(4).

48 ibid Article 2(a).

49 ibid Article 7(3).

50 Article 18 of Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products [2009] OJ L 342/59.

51 Article 20 of Regulation 1223/2009 (n 50).

52 Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes [2010] OJ L 276/33.

53 I Anna S Olsson and others, 'Protecting Animals and Enabling Research in the European Union: An Overview of Development and Implementation of Directive 2010/63/EU' (2017) 57 ILAR Journal 347; Hubrecht and Carter (n 40) 5.

54 Article 8 of Directive 2010/63 (n 52).

55 Article 55(2) of Directive 2010/63 (n 52).

56 Directive 2010/63 (n 52), Recital 17.

57 ibid.

ioural skills'.[58] From this, it emerges that the approach adopted by the directive is also tainted with anthropocentric considerations, as it adjusts the treatment accorded to an animal based on its proximity to humans, thus permitting discrimination between different animal species for reasons unrelated to utilitarian calculus. To some extent, European legislation specifically protecting great apes also falls within the movement aimed at granting personhood and recognizing fundamental rights for these animals (right to life, protection of individual liberty and prohibition of torture).[59]

2.2 Animals Used for Production

The production of food and some goods involves a wide range of activities, using numerous animals for different types of products. In food production, animals such as cattle, pigs, chickens, sheep, goats, fish and shellfish are primarily used for meat. Cows and goats also provide dairy products, while hens are used for egg production. In terms of goods, particularly accessories and clothing, animals such as cows, crocodiles, snakes, rabbits, minks, and foxes are utilized for their skins and furs. In these processes, animals are generally killed to obtain meat, leather or fur. Additionally, in the dairy and egg industries, most animals, including dairy cows and egg-laying hens, are eventually killed at the end of their productive lives. Moreover, egg production often involves the culling of male chicks, as they are considered unproductive. The rise and proliferation of factory farming have marked a pivotal shift in the treatment of animals under human control.[60] This industrialized approach to animal husbandry has significantly increased production efficiency but has also led to serious ethical concerns regarding the welfare of animals.

Unsurprisingly, Peter Singer's utilitarianism has led him to think that, given the rearing conditions (overcrowding, confinement, lack of natural behaviour and so on) that structurally inflict suffering on animals turned 'into machines',[61] paying attention to the legitimate interests of animals should result in the prohibition of factory farming and other intensive farming methods. However, as has already been pointed out,[62] there is disagreement among utilitarians as to the morally justifiable continuation of killing animals for human consumption. Some consider that it would be conceivably acceptable for replaceable beings 'not capable of having desires for the future'[63] provided the animals could lead a pleasant life. Others think that killing is not justifiable since animals have a preference for the continuation of their own existence.[64]

Considering the enormous economic impact of the various sectors within the food industry alone, implementing the solutions advocated by utilitarians regarding the end of factory farming or intensive animal rearing is not a viable political option. This is precisely why Peter Singer advocates for changes in individual behaviours (such as adopting vegetarian or vegan diets, or at least showing a preference for products produced in animal-friendly environments, such as free-range eggs), to influence the practices of the relevant industries.

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58 ibid Recital 18.
59 Paola Cavalieri, 'The Meaning of the Great Ape Project' (2015) 1 Politics and Animals 16.
60 Cochrane (n 22) 32.
61 Singer, *Animal Liberation* (n 9) 147.
62 See Section 1(b).
63 Singer, *Animal Liberation* (n 9) 228.
64 Delon (n 27).

Several activities in which animals are used for production are subject to restrictions, particularly when they involve products for which alternatives exist and, most importantly, when they generate disproportionate animal suffering relative to the trivial nature of the products in question. The case of fur is particularly relevant. Several clothing brands, especially in the luxury industry, have committed in recent years to no longer producing fur-based products. Some countries have also embarked on this path. As early as 2003, the United Kingdom implemented a fur ban; it was followed by Austria in 2005. Several other countries have since followed suit, particularly in Europe from the early 2020s, including Italy and France.[65] Initiatives have also been taken to ban the sale of fur-based products, as seen in Israel in 2021 and in several cities in the United States, such as Los Angeles and San Francisco. It is worthwhile to nuance the utilitarian dimension of these regulatory changes. First, the acceleration of the fur ban from 2020 can also be explained less by a concern for animal welfare than by human health considerations, as several fur farms have contributed to the spread of Covid-19.[66] Also, while Israel was the first country to ban the sale of fur, the regulation nonetheless includes exceptions for the use of fur in 'scientific research, education or instruction, and for religious purposes or tradition',[67] allowing for the continued sale of shtreimels, fur hats traditionally worn by Orthodox Jewish men, and which represent the most significant share of fur sales in the country. As observed in other areas of animal exploitation, progress in animal welfare is sometimes justified by other reasons or undermined by exceptions, particularly those of a cultural or religious nature.

Regarding animals used for food production, the issue can be viewed from a different perspective. We could provide an overview of the various reforms aimed at improving the conditions of animals on farms, during transport, or at slaughter. However, it seems more appropriate to decipher the overall logic governing the consideration of the animal welfare imperative, which, despite appearances, does not stem from an authentically utilitarian approach.

Despite regulatory advancements, many private initiatives have led to actual improvements in farming practices. This market-based aspect of animal welfare should be viewed within the broader framework of 'agricultural exceptionalism'. This term is frequently used to refer to the many regulatory benefits, exceptions, exemptions and waivers that have shielded agricultural producers from laws typically applicable in various domains (such as labour regulations, environmental law, bankruptcy law, competition law and international trade law).[68] This exceptionalism, 'sustained by widely held views […] that farmers do us a service by providing

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[65] Article 50 of Loi No. 2021-1539 visant à lutter contre la maltraitance animale et conforter le lien entre les animaux et les hommes (30 November 2021).

[66] US International Trade Commission, 'Fur Real: Did the COVID-19 Pandemic Signal the End of the Mink Farm?' (2023) Executive Briefings on Trade; FAO, OIE and OMS, 'Le SARS-CoV-2 chez les animaux élevés pour leur fourrure' (2021) www.fao.org/3/cb3368fr/cb3368fr.pdf accessed 11 February 2024.

[67] Humane Society International, 'Israel Becomes First Country in the World to Introduce "Historic" Ban on Fur Sales' (9 June 2021) www.hsi.org/news-resources/israel-introduces-historic-ban-on-fur-sales/ accessed 11 February 2024.

[68] Charlotte E Blattner and Odile Amann, 'Agricultural Exceptionalism and Industrial Animal Food Production: Exploring the Human Rights Nexus' (2019) 15 Journal of Food Law & Policy 92, 102.

the public with food',[69] has also influenced animal welfare legislation. There are indeed many producing countries that 'are characterized by animal protection laws that either explicitly or implicitly exempt farmed animals from their purview'.[70] A prime example of this is the main US federal law governing animal treatment, the Animal Welfare Act, which explicitly excludes 'farm animals'[71] from its coverage.

Although some jurisdictions display notable progress in animal welfare and have developed strategies in this regard,[72] the insufficient regulation of animal welfare through legislation has not adequately met consumers' demand for information about the treatment of animals in production processes. This gap has provided an opportunity for private entities within the food industry to independently adopt voluntary standards and labels.[73] Labelling schemes, which merit special consideration in the area of animal welfare, are regulatory frameworks designed to inform consumers about various aspects of a product.[74] These include its characteristics, properties, and qualities, as well as the processes and methods used in its production. Animal welfare labels are based on the concept of 'consumer empowerment' – a notion that is prominent in the discourse of EU institutions and a declared goal of EU policies regarding the harmonization of animal welfare.[75] Animal welfare labelling aims to address information asymmetries between producers and consumers, enabling the latter to make informed choices based on personal preferences. At first glance, there seems to be a form of synergy between how labelling works and the strategy advocated by Peter Singer for consumers to change their consumption habits when regulation is not satisfactory. The industry has developed its own animal welfare labels, or it has depended on those established by public institutions. In this context, the standards set by the World Organisation for Animal Health (also known as the OIE – Office International des Epizooties) warrant particular attention.[76]

Owing to their universal scope, the OIE's standards, particularly the Terrestrial Animal Health Code (TAHC),[77] have gained significant traction in the private sector. When devising their animal welfare strategies and labels, private actors explicitly rely on the 'Five Freedoms'

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[69] ibid.

[70] Jessica Eisen, 'Down on the Farm: Status, Exploitation, and Agricultural Exceptionalism' in Charlotte Blattner, Kendra Coulter and Will Kymlicka (eds), *Animal Labour and the Quest for Interspecies Justice* (Oxford University Press, 2019).

[71] 7 U.S.C. § 2132(g)(3).

[72] For the EU, see for instance, Peters (n 32) 236.

[73] Sarah J Morath, 'Private Governance and Animal Welfare' (2018) 9 George Washington Journal of Energy & Environmental Law 21; Régis Bismuth and others, 'La concurrence des normativités au coeur de la labellisation du bien-être animal' (2018) XXXII *Revue Internationale de Droit Économique* 369.

[74] For more details, see, Régis Bismuth, 'Private Regulation and Labelling Schemes of Animal Welfare' in Anne Peters, Kristen Stilt and Saskia Stucki (eds), *Oxford Handbook of Global Animal Law* (Oxford University Press, 2025) (forthcoming).

[75] European Commission, 'A Farm to Fork Strategy for a Fair, Healthy and Environmentally-Friendly Food System' (2020) COM(2020) 381 final 13.

[76] On the OIE, see Anne Peters, 'The Office International Des Epizooties (World Organization for Animal Health) and Its Regulation' in Anne Peters, Kristen Stilt and Saskia Stucki (eds), *Oxford Handbook of Global Animal Law* (Oxford University Press, 2025) (forthcoming).

[77] World Organisation for Animal Health, 'Terrestrial Animal Health Code (2021)' www.oie.int/en/what-we-do/standards/codes-and-manuals/terrestrial-code-online-access/.

that have been endorsed by the OIE's TAHC: freedom from hunger, thirst and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behaviour.[78] However, these 'freedoms' are not interpreted as rights, and the dimension of animal welfare they promote presents significant ethical shortcomings. It is important not to confuse animal welfare with utilitarism (which incorporates a welfarist dimension).[79] The latter is based on values while the former is a multidisciplinary field (encompassing biology, neurobiology, veterinary medicine, immunology, psychology, cognitive sciences and so on) also subordinated to economic considerations. The approach to animal welfare promoted by the OIE through the Five Freedoms is mostly economic- and efficiency-driven. The OIE Terrestrial Animal Health Code even specifies that 'improvements in farm animal welfare can often improve productivity and food safety, and hence lead to economic benefits'.[80] It is also inspired by a zootechnician perspective (zootechnics being defined as the scientific art of maintaining and improving animals under domestication). Contrary to common belief, animal welfare in everyday practice is a critical aspect of factory farming, albeit with a technical and managerial dimension. This approach often sidesteps major ethical concerns and fails to address the fundamental questions of what constitutes a 'good life' for animals.[81] It focuses mainly on adapting animals to industrial conditions. Practices such as chicken debeaking, cattle dehorning or pig castration are painful but serve to minimize harm these animals might cause each other in factory farms (freedom from injury). Optimizing processes in slaughterhouses aims to reduce stress for livestock awaiting slaughter (freedom from fear and distress), while also preserving meat quality and economic value. Providing nest areas enclosed with plastic curtains allows laying hens to hide while laying eggs, attempting to mimic natural nesting behaviour (freedom to express normal patterns of behaviour).

In this context, although it cannot be denied that some private labels have significantly improved the condition of animals, the Five Freedoms endorsed by the OIE are less an international Bill of Rights for animals, and more a cover to perpetuate their exploitation on a large scale and make it more socially acceptable. This serves as further confirmation that animal welfare laws, standards, and labels are 'structurally constituted by the ambivalence of humanizing the inherently inhumane and violent institution of animal exploitation.'[82]

2.3 Animals Used for Recreational Activities

A multitude of animal species are used for recreational and entertainment purposes. From circuses and zoos to marine parks, horse riding, bullfighting, hunting, dog racing, and even as pets, animals are integral to various forms of human entertainment. The environments these animals are placed in often differ vastly from their natural habitats. In many of these

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[78] ibid Article 7.1.2.

[79] Cochrane (n 22) 30.

[80] World Organisation for Animal Health (n 77) article 7.1.7.

[81] David Fraser, *Understanding Animal Welfare – The Science in Its Cultural Context* (Wiley-Blackwell 2008) 41.

[82] Saskia Stucki, '(Certified) Humane Violence? Animal Production, the Ambivalence of Humanizing the Inhumane, and What International Humanitarian Law Has to Do with It' in Anne Peters (ed), *Studies in Global Animal Law* (Springer 2020) 122.

settings, animals are not able to engage in their natural behaviours due to confinement, training methods, or the very nature of the activities they are involved in. The extent to which animals experience pain or are killed also varies across these activities. In contexts like bullfighting and hunting, animals often endure significant pain and meet their deaths. In contrast, pets may live in more comfortable environments but can still face issues of improper care or breeding practices. Hence, it is not surprising that utilitarians have viewed these questionable activities as requiring a 'radical challenge'.[83]

Regulations and standards governing animal welfare in recreational activities differ significantly from one activity to another,[84] and from one country to another, making a uniform approach to animal welfare in these contexts challenging to achieve. Despite the disparity in regulations across different activities and countries, largely due to cultural differences, it is still possible to identify some trends that might be explained by utilitarian logic.

We are witnessing a gradual prohibition of certain recreational activities that involve keeping wild animals in captivity, in environments radically different from their natural habitats. Excluding zoos, which may implement measures to improve animal conditions, this particularly pertains to the use of wild animals in circuses (such as lions, tigers, elephants, bears and so on) and marine mammals in dolphinariums (such as dolphins and orcas). It is noteworthy that in some countries this movement started with local initiatives, where municipalities banned the use of wild animals (sometimes only specific ones) in travelling shows. New Jersey was the first state in the US to prohibit such a practice in 2018.[85] A statement by a senator from New Jersey, tainted with utilitarian thought, is particularly telling: '[t]hese beautiful creatures suffer from routine abuse and mistreatment by their handlers for the sake of entertainment. This by no means justifies the emotional and physical abuse animals are forced to endure.'[86] Similar bans on the use of wild animals in circuses have been adopted in European states, for instance in Austria, Belgium, Denmark, France, Ireland, the Netherlands and Portugal.[87] Some states have gone even further by prohibiting the presence of any animals in circuses. This includes Cyprus, Greece and Malta.[88]

The recent French legislation on this matter is particularly insightful in explaining how these seemingly utilitarian-inspired advancements regarding the use of animals for recreational purposes are necessarily limited by economic obstacles or cultural considerations. The French law, tellingly titled *Law to Combat Animal Abuse and Strengthen the Bond Between Animals*

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[83] Singer, *Animal Liberation* (n 9) 17 (referring in this context to 'areas of entertainment like circuses, rodeos, and zoos').

[84] This section does not address the use of animals in sporting activities. However, the following article is pertinent as it explores the issue from a utilitarian perspective: Madeleine LH Campbell, 'Ethical Justifications for the Use of Animals in Competitive Sport' (2023) 17 Sport, Ethics and Philosophy 403.

[85] State of New Jersey, 218th Legislature, Assembly No. 1923 (2018).

[86] State of New Jersey, 'Governor Murphy Signs "Nosey's Law," Outlawing the Use of Wild and Exotic Animals in Traveling Animal Acts' (14 December 2018) https://nj.gov/governor/news/news/562018/approved/20181214b.shtml accessed 11 February 2024.

[87] Eurogroup for Animals, 'Wild Animals in EU Circuses – Problems, Risks and Solutions' (2021) 16 www.eurogroupforanimals.org/files/eurogroupforanimals/2021-08/E4A-Circus_Report-09-08-2021.pdf accessed 11 February 2004.

[88] ibid.

and Humans,[89] indeed envisions a range of measures to ensure a gradual prohibition of wild animal shows in travelling circuses, as well as dolphin and orca performances. It also plans for the establishment of refuges or sanctuaries to house captive wild animals. Animal performances in nightclubs or private parties are banned, and there will no longer be wild animals in variety shows or game shows on television. This same legislation also includes several provisions to protect domestic animals (such as a ban on selling dogs and cats in pet shops, the prohibition of online pet transfer offers and the ban on selling or giving pets to minors). While the preamble of the bill[90] referred to the concerns of the French people for animal welfare and even, surprisingly, cited the deontological perspective of Kant's Doctrine of Virtue – 'violent and cruel treatment of animals is […] intimately opposed to a human being's duty to himself' – the most cruel acts towards animals are not covered by this legislation. Several amendments had been proposed to ban bullfighting or certain cruel hunting practices (stag hunting, glue trapping and so on), but these faced strong political opposition.

The example of bullfighting, which benefits from an exemption in the French penal code from the offence of cruelty to animals when there is an 'uninterrupted local tradition',[91] is striking. It is indeed questionable to justify the different treatment between, on one hand, a ban on shows in circuses or marine parks where animal abuse is structurally a result of captivity conditions incompatible with the biological imperatives of the species involved and, on the other hand, bullfighting, a show open to the public and families, that intends to magnify the aesthetics of violence and suffering.[92] Even though its position is not grounded in the harm to sentient animals, it is still pertinent to reference the UN Committee on the Rights of the Child's recommendation to Spain that it should 'prohibit the participation of children under 18 years of age as bullfighters and as spectators in bullfighting events' to prevent the harmful effects of this practice on the youngest.[93]

When it comes to animals, the issue is not one of regulatory consistency but rather the possibility of evolving legislation on activities such as travelling circuses or marine parks, which are less economically powerful, have limited political support and cannot rely on a cultural exception.

3. CONCLUDING REMARKS: EVOLVING PARADIGMS OF ANIMAL LAW

Although there may be doubts that the developments concerning animal welfare, particularly since the start of this century, reflect a genuinely authentic, consistent and sincere utilitarian

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[89] Loi No. 2021-1539 visant à lutter contre la maltraitance animale et conforter le lien entre les animaux et les hommes (30 November 2021) (Translation by the author).

[90] Proposition de loi No. 3661 visant à renforcer la lutte contre la maltraitance animale, 15ème Législature (14 December 2020).

[91] Code pénal, Article 521-1.

[92] Régis Bismuth, 'The Universal Recognition of Animal Welfare and Its Dark Sides' in Jean d'Aspremont and Işıl Aral (eds), *International Law and Universality* (Oxford University Press, 2024) 194.

[93] UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Spain' (2018) CRC/C/ESP/CO/5-6.

approach, the overview previously outlined nonetheless shows a fundamental trend in which the reflections of Peter Singer have been particularly influential. Animal law has mechanically mirrored this evolution, albeit more diffusely, in an environment where national regulations coexist and intertwine with international soft law, as well as private standards and labels. As noted above, one must not be naive and understand that some of these initiatives, under the guise of a generous idea of 'animal welfare', are approached from a zootechnical perspective that is more concerned with the efficiency and profitability of processes than with the individual fate of the animals.

Another aspect of this overview also highlights the geographies of animal protection. Initiatives arise from states and private operators, but also, in many cases, from territorial subdivisions of states (municipalities, provinces and so on), each representing responses to local social demands and often serving as the first steps towards more ambitious national legislation. This is especially the case for animals used in recreational activities, as opposed to those used in scientific research or for production, with the latter two primarily regulated at the state level.

The geographies of animal welfare also encompass state-to-state relations in a more transnational perspective. Animal protection is far from being uniform and coherent across jurisdictions, which vary as to the standards applicable to different species and different activities. This results in frictions that expose the inconsistencies, and even insincerity, of state positions. For example, when the European Union banned the importation of seal-based products due to 'citizen and consumer concerns about the animal welfare aspects of the killing and skinning of seals',[94] Canada and Norway challenged the EU regulation before WTO courts, criticizing the inconsistency of EU's approach to animal welfare, applying very stringent trade restrictive measures for seal products while being significantly more flexible with respect to slaughterhouses and wildlife hunts.[95] The risk of criticism for double standards in animal welfare concerns is likely to increase as national regulations primarily target foreign practices that are more easily deemed less acceptable and that are less prone to provoke political opposition. But as Singer pointed out, 'it is easy to take a stand about a remote issue [and] to protest about bullfighting in Spain, the eating of dogs in South Korea, or the slaughter of baby seals in Canada while continuing to eat eggs from hens who have spent their lives crammed into cages'.[96]

Beyond these frictions between states, the deficiencies of market-driven animal law and even the instrumentalization of animal law for other purposes (such as targeting the rights of minorities),[97] recent advancements in animal welfare have generally had more structural effects on the law extending far beyond mere improvements in practices. It is noteworthy that the recognition of animals as 'sentient beings' – even though they are still classified as products or objects of property[98] – has become a central focus and has been acknowledged

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[94] Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L286/36, Preamble para 5.

[95] For more details on this case, see Bismuth (n 92).

[96] Singer, *Animal Liberation* (n 9) 162.

[97] Alice Di Concetto, '"Desordem e Regresso" : Evolution de La jurisprudence constitutionnelle de La Cour suprême brésilienne en matière de protection de l'animal (1997–2017)' (2017) 2017–2 Revue Semestrielle de Droit Animalier 465.

[98] For an EU law perspective of this duality, Katy Sowery, 'Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals under Union Law' (2018) 55 Common Market Law Review 55.

in recent years by an increasing number of major legal texts, inter alia, Portugal's Civil Code (2007), France's Civil Code (2015), Colombia's Civil Code (2016), Sweden's Animal Welfare Act (2018), Spain's Civil Code (2021) and the UK Animal Welfare (Sentience) Act (2022). In a similar vein, albeit on a smaller scale, following the initial precedents set by India (1976) and Brazil (1988), animals have started to appear in national constitutions, for instance in Germany (2002), Luxembourg (2007), Austria (2013), Egypt (2014) and Italy (2022).[99] The next frontiers concerning animals' legal personhood and fundamental rights are beginning to be eroded.[100] The recent 2022 ruling of the Ecuadorian Supreme Court is particularly telling in this context:

> Law in modern times has been characterized by a marked anthropocentrism, whereby the human being has been considered the center of all legal expression. This approach has been accompanied by an evident speciesism […] However, neither anthropocentrism nor speciesism are conclusive, finished and immovable approaches in law, and human beings have progressively admitted the need to legally protect animals […] [T]he recognition of animals as subjects of rights constitutes the most recent phase in the development of their legal protection, which is based on the recognition of animals as living beings with an intrinsic value that makes them holders of rights.[101]

Even though we are at the very early stages of what promises to be a lengthy process, ultimately, as Bentham long ago hoped in his famous footnote, '[t]he day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny'.[102]

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[99] Jessica Eisen, 'Animals in the Constitutional State' (2017) 15 International Journal of Constitutional Law 909.

[100] Saskia Stucki, 'Toward Hominid and Other Humanoid Rights: Are We Witnessing a Legal Revolution?' (*Verfassungsblog*, 30 December 2016) https:// verfassungsblog .de/ toward -hominid -and -other -humanoid -rights -are -we -witnessing -a -legal -revolution/ accessed 11 February 2024; Michelle C Pardo, 'Legal Personhood for Animals: Has Science Made Its Case?' (2023) 13 Animals 2339.

[101] Corte Constitucional del Ecuador, *Estrellita Monkey* (27 January 2022) Final Judgement No. 253-20-JH/22 https:// aldf .org/ wp -content/ uploads/ 2023/ 01/ Final -Judgment -Estrellita -w -Translation-Certification.pdf accessed 11 February 2024.

[102] Bentham (n 2) 282–3 n b.

26. Fictions and legal ideology

Claire Wrobel

1. INTRODUCTION

Legal fictions are creatures of excess. Once one goes beyond the classic definition of fiction as a procedural legal device, treacherous territory opens up. Devices as diverse as the personality of the ship, constructive trusts or the reliability of eyewitness testimony have been labelled as fictions. After several decades of 'jurisprudential dormancy', discussions on legal fictions have resumed, but some questions remain open: Are fictions necessarily false? Are they inherently deceitful? Are they meant to circulate beyond the legal sphere? Should they be celebrated, merely tolerated or – if possible – eradicated?

Utilitarianism's contribution to the discussion comes mainly in the shape of Jeremy Bentham's 'theory of fictions', itself a misleading reconstruction which jumbles together fictitious entities, jurisprudential fictions and political fallacies. Interest in the topic is relatively recent, as it was 'rediscovered' by Charles Kay Ogden, who published an edition of *Bentham's Theory of Fictions* in 1932, a century after the philosopher's death.[1] Ogden's edition is problematic for fostering confusion between fictitious entities, fallacies and legal fictions as well as for leaving aside quite a few sources on the latter.[2] Bentham is partly to blame for the confusion since he sometimes used 'fiction' and 'fictitious entity' interchangeably. A first element of distinction is that while a fiction is a proposition that is known to be false in fact, a fictitious entity is 'not a proposition, but a term'.[3] While real entities refer to ideas of things observable by the senses, fictitious entities cover '*quality – property* (in the sense in which it is nearly synonymous to *quality*) *relation*, *power*, *obligation*, *duty*, *right*, and so forth'. They have a '*verbal*

[1] It should be noted that Bentham does not refer to this material as 'Theory of Fictions' and there is no evidence that he ever used the phrase. In addition to coining the title, Ogden also designed the structure of the book, offering a compilation of material which includes the whole of *A Fragment on Ontology* and extracts from *Rationale of Judicial Evidence*, *Essay on Language*, *Essay on Logic*, *Chrestomathia*, and *A Fragment on Government*. Moreover, as often, the status of the Benthamite text is problematic, as these texts were edited by John Bowring as well as Bentham's physician Thomas Southwood Smith. Schofield points out that their versions of *Ontology*, *Language* and *Logic* are themselves a 'mish-mash taken from Bentham's unpublished manuscripts' (P Schofield, 'The Epicurean Universe of Jeremy Bentham: Taste, Beauty and Reality' in A Julius, M Quinn and P Schofield (eds) *Bentham and the Arts* (UCL Press, 2020) 30).

[2] Bentham's critique appears for instance in *Constitutional Code* or *Scotch Reform*, where he defines fiction in law as 'a wilful falsehood, uttered by a judge, for the purpose of giving to injustice the colour of justice'. J Bentham, *Scotch Reform* in *The Works of Jeremy Bentham*, ed. by J Bowring, vol. 5 (W Tait, 1843) 13.

[3] P Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford University Press, 2006) n14; P Schofield, 'The Epicurean Universe of Jeremy Bentham', 31.

reality'[4] and are indispensable to thought, communication and discourse, including legal and political ones, as illustrated by the word 'right': 'The word right, is the name of a fictitious entity: one of those objects, the existence of which is feigned for the purpose of discourse, by a fiction so necessary, that without it human discourse could not be carried on.'[5]

While Bentham perceived fictions, in the sense of 'fictitious entities', as indispensable, he spared no pains in exposing fictions, in the sense of 'procedural fictions' and 'political fallacies', which according to him plagued the dominant discourse of his time and were harmful because they actively contributed to the establishment and perpetuation of domination. The common point between the three categories is the centrality of language. Indeed, it has been argued that '[a]s strange as it may seem, utilitarianism is fundamentally a theory of language'.[6] This chapter focuses on legal fictions and fallacies to explain how Bentham's attention to fictions enabled him to analyse the role played by language in the development of legal hegemony and the juridification of society, but also highlights some limitations of his critique. It ends by trying to imagine what a Benthamite critique of fictions might look like today.

2. LEGAL FICTIONS: TIMES AND TERMS OF THE DEBATE

2.1 Historical and Notional Survey

In Roman law, *fictio* consisted in a false procedural statement which made it possible to extend a right of action beyond its intended scope, for instance by treating foreigners as if they were Roman citizens. Medieval English courts produced a significant amount of legal fictions, often to make a rigid system more flexible. Bentham's most sober definition of fiction as 'a false assertion of the privileged kind, and which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true',[7] is in that respect quite close to what one may find in, for instance, *Black's Law Dictionary*: 'an assumption that something is true even though it may be untrue, made especially in judicial reasoning to alter how a legal rule operates; specifically, a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object.'[8]

Lawyers in Bentham's time had no choice but to study legal fictions, especially the procedural ones, since they were such an essential part of common law. Jurisdictional fictions, developed by English courts in the 15th and 16th centuries to enlarge their jurisdiction, featured prominently among them, such as the writ of *quominus* (which required the averment that the plaintiff owed a non-existent debt to the Crown to secure jurisdiction in the Court of the

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4 J Bentham, 'Chrestomathia', in *Works,* vol. 8, 126n; original emphasis.

5 J Bentham, 'Pannomial Fragments', in *Works*, vol. 3, ed. by J Bowring, 218. Bentham even specifies in the note that there is no intention to harm in this particular case: 'Though fictitious, the language cannot be termed *deceptious*—in intention at least, whatsoever in some cases may without intention be the result.' Bentham's treatment of obligations, right and duty and fictitious entities is quickly commented on in HLA Hart's *Essays on Bentham*, 'Bentham and Beccaria' and 'Legal Duty and Obligation' (Clarendon Press, 1982) 42–3 and 128–31.

6 JP Cléro and C Laval, *Le Vocabulaire de Bentham* (Paris, Ellipses, 2002) 61 (my translation).

7 J Bentham, 'Constitutional Code Rationale', in *Works*, vol. 9, 77.

8 *Black's Law Dictionary*, 4th pocket ed (West, 2011) 446.

Exchequer), the bill of Middlesex (which required the averment by that plaintiff that trespass had taken place in the County of Middlesex to secure jurisdiction before the King's Bench) or the writ of *latitat* (a writ of summons to appear and answer in the King's Bench which declared the person to be in hiding).[9] Another legal fiction assumed that certain contracts had been made at the Royal Exchange in London when in fact the promises had been exchanged at sea, which was a way of taking jurisdiction away from the Court of the Lord High Admiral.[10] When a defendant was charged with fictional trespass *vi et armis*, the plaintiff was free to proceed against him for almost any kind of wrong before the King's Bench. Such jurisdictional fictions were common in Bentham's time, as illustrated by the *Mostyn v Fabrigas* case (1773), in which Minorca – which was then occupied and controlled by England – was declared by Lord Mansfield to be part of London for the purposes of legal action.[11]

Procedural legal fictions could also be used to extend substantive remedies such as false allegation of deceit in assumpsit; allegation of loss and finding in trover; or collusive common recovery, which allowed parties to transfer property or resettle estates.[12] In ejectment, a civil action to recover title to land, John Doe and Richard Roe, two imaginary tenants to actually existing parties, were invented and one was alleged to have evicted the other from rightful possession.[13] Ejectment involved a fictitious lease, fictitious tenants and a fictitious letter written by Roe to the real defendant. Even though the plaintiff, the defendant and the judge knew that John Doe never existed, the defendant was barred from raising this objection. The point of the fiction was to obtain a desired result even though the actual facts fell outside of the existing rule of law. Historically established procedures were used for purposes other than their original one, enabling lawyers to obtain 'better and cheaper remedies for their clients'.[14]

English law was rid of such procedural fictions in the 19th century in the aftermath of reports by Commissioners appointed to inquire into the Practice and Proceedings of the Superior Courts of Common Law. A simple writ of summons was introduced in 1832 by the Uniformity of Process Act. The majority of real actions were abolished; the device of common recovery was made redundant by legislation; fictitious allegations in ejectment and trover were dispensed with in 1852. However, this did not mean that English law had grown out of legal fictions. Jurists invented new ones, although they would not have been labelled as 'fictions' before the age of reform. Lobban mentions the implied warranty of authority which attached to the acts of a professed agent (*Collen v Wright* 1857);[15] fictions of substantive law such as conclusive presumptions, constructive trusts or fraud; and tort fictions including vicarious liability, or the doctrine that children lured by 'attractive nuisances' had been 'invited' onto land, as well as implied conditions resting on agreement. Knauer suggests that today, legal fictions are 'patently false statements and deeming principles [which] empower lawyers and

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[9] JH Baker, *An Introduction to English Legal History*, 3rd edn (London, Butterworth, 1990) 50–1 and 57–9. Useful definitions are also provided in NJ Knauer, 'Legal fictions and juristic truth' (2010) 23 *St Thomas Law Review* 9, notes 53 and 54.

[10] JH Baker, *An Introduction to English Legal History*, op. cit., 141-43.

[11] Mostyn v Fabrigas 1 Cowp. 161, 98 Eng. Rep. 1021 (K.B. 1774) (Mansfield, LJ).

[12] Ibid., 384, 449–50, 319–20.

[13] JH Baker, *An Introduction to English Legal History*, 341–2.

[14] M Lobban, 'Legal Fictions before the Age of Reform' in M Del Mar and W Twining (eds), *Legal Fictions in Theory and Practice* (Springer, 2015) 52.

[15] Collen v Wright (1857) 8 E. & B. 647.

decision-makers to resolve novel legal questions through arguments of equivalence and creative analogical reasoning'.[16] They do not originate from common law only but are also part of statutory and regulatory law. They include instances of metaphorical, 'as if' reasoning, for instance when a corporation is treated as if it were a legal person or an adopted child is treated as if they were reborn as a member of their adoptive family for the purposes of inheritance. Statutory legal fictions may be found in tax code, food and drug law, environmental protection law, inheritance law, anti-discrimination laws and securities regulation. (The example of the doctrine of substituted judgment is discussed in the final section of the chapter.) Power relations are patently inscribed in some legal fictions, for example in the contract ideal, which, in contradiction with everyday experience, assumes equal bargaining power between the parties, or the fiction of 'terra nullius', which attempts to legitimate colonial conquest.

2.2 State of the Art

Fictions were debated in Bentham's time and continued to be studied even after Victorian reforms by authors such as Henry Maine, John Chipman Gray, John Austin and Roscoe Pound. In the United States, Lon Fuller's trilogy of essays was a significant contribution and remains the starting point for many theoretical discussions.[17] His definition of a fiction as 'either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility', although contested, remains a point of reference.[18] In the 1950s, fictions were still part of legal education and featured in courses on Roman law and English legal history, fuelled by an interest in historical jurisprudence, or on company law, but 'scholarly silence' on the topic became the norm after Fuller's work.[19]

Scholarly interest seems to have revived since the 2010s. In Lind's words, '[t]he legal fiction recently has risen from its jurisprudential dormancy', with scholars taking two directions: 'the traditional inquiry into understanding the concept of legal fictions' and 'a new, critical tack' focusing on 'new legal fictions'. New legal fictions include 'the institution of slavery, the entire field of tax law, certain evidentiary and interpretative presumptions, and the doctrine of discovery that figures so prominently in American Indian law'.[20] For instance, Peter Smith, in an attempt to complement Fuller's list and to prevent abuses, draws attention to the 'fictions' of the reliability of eyewitness testimony, the ability of jurors to disregard testimony and predictions of future dangerousness, which he treats as biases, unjustified relics or weaknesses of the system.[21] This second line of inquiry is quite critical and 'legal fiction' in this context is

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[16] NJ Knauer, 'Legal fictions and juristic truth', 3.

[17] L Fuller's trilogy includes 'Legal fictions' (1930) 25 *Illinois Law Review* 363–99; 'Legal fictions' (1930) 25 *Illinois Law Review* 513–46; 'Legal fictions' (1930) 25 *Illinois Law Review* 877–910. They were published together in 1967 with Stanford University Press.

[18] Ibid.

[19] A Soifer, 'Reviewing Legal Fictions' (1986) 20 *Georgia Law Review* 874. See also W Twining, 'Preface' in Del Mar and Twining (eds) *Legal Fictions in Theory and Practice* (Springer, 2015) V–VI; L Harmon, 'Falling off the vine: Legal fictions and the doctrine of substituted judgment' (1990) 100 *Yale Law Journal* 16.

[20] D Lind, 'The Pragmatic Value of Legal Fictions' in Del Mar and Twining (eds) *Legal Fictions in Theory and Practice* (Springer, 2015) 86.

[21] P Smith, 'New Legal Fictions' (2007) 95 *Georgetown Law Journal* 1435–1496.

often used as a 'term of rebuke', 'an inflammatory concept marking a legal doctrine or regime as manifestly unjust, needlessly complex, or intentionally deceptive', on the assumption that 'any legal fiction *as such* is substantively clandestine'.[22] Surveying Smith's and others' work, Nancy Knauer notes that fiction now encompasses empirical legal errors but also discredited legal regimes and complex statutory schemes, and she questions whether these can actually be called legal fictions by Lon Fuller's standards. To her, for example, slavery and Jim Crow are rather 'big lies' in the Orwellian sense than 'fictions'.[23]

Alternative conceptions have been offered, which are less critical and plead for a better consideration of the specificity of legal language and legal communication. Thus, Maksymilian Del Mar defines legal fictions as 'any suspension of one or more of the required operative facts leading to the imposition of an associated normative consequence'.[24] To him, they are 'one of the ways in which a tentative (rather than assertive) cognition can be exercised' and are used by courts to communicate with each other, since the court introducing the suspension 'invites subsequent courts to consider whether, on the facts before them, the required operative fact ought again to be suspended, and if so, whether the time is now ripe for a rule to be introduced'.[25] For Karen Petroski, the use of the phrase 'legal fictions' in contemporary decisions signals the writers' sense of 'the futility of further justification to a non-legal audience'.[26] Rather than 'consciously false assertions', Lind suggests defining fictions as 'propositional legal truths – doctrines, rules, principles – asserted in conscious recognition that they are inconsistent in meaning or otherwise in semantic conflict with true propositional claims made outside (or elsewhere within) the law'.[27] To him, they should be assessed on their merits, that is, on the level of damage they may or may not produce in relation to the improvements they bring. He insists that '[t]he technique *as such* is neither sickly nor sinister' and that individual instances need to be studied in context.[28]

3. LOCATING BENTHAM IN THE HISTORICAL DEBATE, FROM BLACKSTONE TO FULLER

3.1 Blackstone's 'Troublesome, but Not Dangerous Evils'

William Blackstone came to the defence of legal fiction in several passages of his *Commentaries on the Laws of England* (1765–9). One of his arguments, based on historical precedent, appeared during a discussion of the legal fiction – mentioned above – about the place of contract formation.[29] His attitude was rather formalist, as he minimized the effects

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22 D Lind, 'The Pragmatic Value of Legal Fictions', 87 (original emphasis).

23 NJ Knauer, 'Legal fictions and juristic truth', 7, note 43.

24 M Del Mar, 'Legal Fictions and Legal Change in the Common Law Tradition' in Del Mar and Twining (eds) *Legal Fictions in Theory and Practice* (Springer, 2015) 226.

25 Ibid., at 227.

26 K Petroski, 'Legal Fictions and the Limits of Legal Language' in Del Mar and Twining (eds) *Legal Fictions in Theory and Practice* (Springer, 2015) 142.

27 D Lind, 'The Pragmatic Value of Legal Fictions', 83.

28 Ibid., 84–5 (original emphasis).

29 W Blackstone, *Commentaries on the Law of England*, 14th edn (A. Strahan, 1803) 3, 107.

of the fiction, claiming that the locality of such contracts is not important. When commenting on the fictional trespass committed *vi et armis* he claimed that legal fictions were 'highly beneficial and useful' and that 'no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law', an idea which he also phrased, characteristically, in Latin – '*in fictione juris semper subsistit aequitas*'.[30] This method of calculated falsehood made it possible to find fair solutions without changing the general rule of law. Such an approach on Blackstone's part is not surprising, as he regarded fictions as a product of the English constitution, the integrity of which was to be preserved at any cost: legal fiction was 'one of those troublesome, but not dangerous, evils which have their root in the frame of our constitution, and which therefore can never be cured, without hazarding everything that is dear to us'.[31] Lawyers were thus expected to put up with the 'intricacy of our legal process' caused by 'arbitrary fictions and expedients' for the sake of preserving the fabric – or Gothic castle – of English law, even though fictions made access 'winding and difficult'.[32] Blackstone seemed troubled by the functioning of fictions, evoking 'awkward shifts', 'subtle refinements' and 'strange reasoning' inherited from the past, but still valued them as a means to allow gradual change in the law, achieve fairness and preserve the English system.[33]

3.2 Bentham's View on Legal Fictions: Money-snatching and Moral Turpitude

It was precisely in response to a short passage in Blackstone's introduction to his *Commentaries* that Bentham stated that English law was characterized by 'Fiction, tautology, technicality, circuity, irregularity, [and] inconsistency', adding that 'the pestilential breath of Fiction poisons the sense of every instrument it comes near'.[34] He presented legal fiction as a disease that spread to the entire system: '[I]n English law, *fiction* is a *syphilis*, which runs in every vein, and carries into every part of the system the principle of rottenness.'[35] His critique of legal fictions was part of a more general attack on the common law system, embodied in 'everything-as-it-should-be Blackstone', with whom he engaged indirectly in a 'life-long dialectic'.[36] The common law system failed to provide 'a complete body of law', offering instead a 'fictitious composition which has no known person for its author, no known assemblage of

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[30] Ibid., 43.

[31] Ibid., 267.

[32] Ibid., 267–8.

[33] Quoted in NJ Knauer, 'Legal fictions and juristic truth', 14, note 93.

[34] J Bentham, *A Fragment On Government* in *The Collected Works of Jeremy Bentham: A Comment on the Commentaries and A Fragment on Government*, ed. by JH Burns and HLA Hart (London, The Athlone Press, 1977), 392–501, 411n.

[35] J Bentham, 'Elements of Packing as Applied to Juries' in *Works*, 92, note 10 (original emphasis).

[36] JH Burns, 'Bentham and Blackstone: A Lifetime's Dialectic' (1989) 1 *Utilitas: A Journal of Utilitarian Studies* 22–39.

words for its substance'[37] and was but 'an assemblage of fictitious regulations feigned after the images of these real ones that compose the Statute Law'.[38]

For Quinn, Bentham's explanation for the prevalence of procedural fictions was 'the commitment of common lawyers to the overarching fiction that the common law had existed since time immemorial, and that judges did not make law, but merely applied existing law'. Drawing on Postema, he adds that 'Bentham's core objection to common law was that it was a fictitious entity masquerading as law: a set of customary rules alterable at the will of judges, which did not satisfy the essential criteria for law, that is clarity, determinacy, authority and content'.[39] At numerous points in his writing, Bentham stressed that legal fiction was a usurpation of legislative power, a 'wilful falsehood, having for its object the stealing legislative power'.[40]

Bentham targeted both substantive fictions (such as the one by which thefts which were actually worth more than 40 shillings were estimated at 39 in order to avoid qualification as 'grand larceny', which was punishable by death) and procedural ones (such as the common recovery whereby entails were 'barred', the addition of an *ac etiam* clause to writs whereby actions could be tried in the central common law courts that were not otherwise entitled to try them and the action of ejectment discussed above, which he discredited as '[a] foolish story […] about somebody called Doe, that was turned out by somebody called Roe – an imaginary man by another').[41] His very literal description of the fiction by which grand larceny was avoided also produces an absurd effect:

> [T]ake two pieces of gold coins, two guineas, each of full weight, and, under the eye of an approving judge, to change the prisoner's doom from death to transportation, the two-and-forty-shillings' worth of gold coin be valued by twelve jurymen, speaking upon their oaths, at nine-and-thirty shilling, and no more.[42]

The idea that fictions were necessary was also absurd in that the lawyers' reasoning was artificial and circular:

> Behold here one of the artifices of lawyers. They refuse to administer justice to you unless you join with them in their fictions; and then their cry is, see how necessary fiction is to justice! Necessary indeed; but too necessary: but how came it so? and who made it so?[43]

The reliance on fictions by jurists was, however, not absurd at all and in fact quite rational, as it was motivated by greed. Fictions were 'money-snatching lies', meant for 'pillage'.[44] Bentham

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[37] J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. by JH Burns and HLA Hart (The Athlone Press, 1970) 8.

[38] J Bentham, *Comment on the Commentaries*, 120.

[39] M Quinn, 'Fuller on Legal Fictions: A Benthamic Perspective' in in Del Mar and Twining (eds) *Legal Fictions in Theory and Practice* (Springer, 2015) 66. Quinn makes reference to GJ Postema, *Bentham and the Common Law Tradition* (Clarendon Press, 1986) 295–9.

[40] J Bentham, *Preface for the Second Edition to A Comment on the Commentaries and A Fragment on Government*, 509, note 11.

[41] J Bentham, 'Rationale of Judicial Evidence' in *Works*, vol. 7, 283–7 and 278.

[42] Ibid., 418.

[43] Ibid., 287.

[44] J Bentham, 'Justice and Codification Petitions' in *Works*, vol. 5, 452–3.

was particularly incensed by jurisdictional fictions which enabled judges to 'steal' jurisdiction – and therefore fees – from others:

> Thief to catch thief, fraud to combat fraud, lie to answer lie. Every criminal uses the weapon he is most practised in the use of; the bull uses his horns, the tiger his claws, the rattle-snake his fangs, the technical lawyer his lies. Unlicensed thieves use pick-lock keys; licensed thieves use fictions.[45]

Far from being harmless or laughable relics from the past, legal fictions were therefore dangerous. False assertions were necessarily suspicious, prone to being 'employed to every bad purpose whatsoever', and attested to 'moral turpitude' in their inventors and users, as well as 'intellectual weakness, stupidity, and servility' in those who endured them.[46]

Bentham was not alone in his time in criticizing fictions. Michael Lobban mentions authors such as Daine Barrington or Edward Randall who believed that what was achieved with fiction could be better done by legislation, or that, in James Humphreys's words, the 'crude and scanty institutions of early ages' were not fit to 'the complicated relations of cultivated society' and that a 'uniform system of laws' would offer better regulation.[47] The idea that fictions were to be pruned away constitutes a common point between Bentham and another 'heavyweight' on legal fictions, Sir Henry Maine.[48] After acknowledging that the fiction of the social contract may have been useful in the past, Bentham proclaimed that 'the season of *Fiction* is now over'.[49] Maine had an evolutionary theory of legal history according to which fiction preceded equity which preceded legislation. Fictions were seen as a sign of the immaturity of the legal system, but were not to be mocked: 'To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law.'[50] They were one of the instrumentalities by which law could be made to evolve and brought into harmony with changing social attitudes. Although he criticized Bentham for his harsh, universal condemnation of legal fictions, Maine too saw them as obstacles, which made access to the law extremely complicated, including for lawyers.

3.3 The Rehabilitation of Fictions by Vaihinger and Fuller

Fictions were rehabilitated in the wake of Hans Vaihinger's *The Philosophy of As If* (1911).[51] Although Vaihinger discussed fictions in fields as diverse as mathematics, physics, ethics, law and natural sciences, legal fictions provided the archetype. Fictions have four features

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[45] J Bentham, 'Rationale of Judicial Evidence' in Works, in *Works*, vol. 7, 285–6. See G Tusseau, *Jeremy Bentham, La Guerre des mots* (Paris, Dalloz, 2011), especially 71–91.

[46] J Bentham, 'Constitutional Code' in *Works*, vol. 9, 77.

[47] J Humphreys, *Observations on the actual state of the English laws of real property, with the outlines of a code* (J Murray, 1826) 3–4, quoted in M Lobban, 'Legal Fictions before the Age of Reform', 216.

[48] Sir H Maine, *Ancient law: Its connection with the early history of society, and its relation to modern ideals* (London, John Murray, 1861).

[49] J Bentham, *A Comment on the Commentaries and A Fragment On Government*, 268–9, n10.

[50] Sir H Maine, *Ancient Law*, in *The Problems of Jurisprudence*, ed. by L Fuller (1946) 371 (chapter reprints first half of Sir H Maine*, Ancient Law* (1861)).

[51] H Vaihinger, *The Philosophy of 'As-If'. A System of the Theoretical, Practical and Religious Fictions of Mankind*, trans CK Ogden (London, Routledge and Kegan Paul, 1924).

for Vaihinger: they include a contradiction with reality or a self-contradiction; they have to be fundamentally provisional; awareness of fictivity has to be stated; they must be expedient. He sought to understand how with consciously false ideas we are nevertheless able to reach conclusions which are right or true.

Vaihinger believed that fictions were necessary and useful elements in thought – including legal thought – and Fuller followed him on that point. As Quinn explains, Vaihinger devoted a few pages to Bentham, but only discussed whether he regarded the idea that all human motivation was self-interested as a fiction or rather as a hypothesis, that is, 'an empirically testable assertion'. Vaihinger's conclusion is that Bentham did not appreciate the difference between the two.[52]

Lon Fuller, who was influenced by Vaihinger, also took a broad vision of fiction. The first essay in his trilogy offered definitions, the second was an explanation and attempt at taxonomy, and the third discussed Vaihinger. Influenced by the latter, he suggested that the construct of fiction is an 'indispensable instrument of human thinking'.[53] Like Vaihinger, Fuller sought to rehabilitate fictions as necessary and useful elements in human thought. In Fuller's taxonomy, legal fictions were not limited to matters of procedure and jurisdiction, but included devices such as constructive delivery, implied provisions in contracts and different kinds of legal provisions.

Two points are worth highlighting in connection with Bentham's view of fictions.[54] First, although Fuller did not really cite or discuss Bentham, he treated legal fiction as a linguistic phenomenon which, as shall be seen in the next section, is a key element in the utilitarian critique of legal hegemony. Second, Fuller contended that the legitimacy of fictions depended not on their truth but on their usefulness, and that fiction was always used with knowledge of its falsity. This is a fundamental difference with Bentham. For Fuller, fictions never intended to deceive and therefore a wholesale rejection of legal fictions was not justified. Fiction was not a lie, a fraud or a swindle as it was not meant to deceive. It only became dangerous if the user was unaware of falsity.[55] Fuller was not an apologist for fictions. He wrote for instance that 'it seems exceedingly questionable whether it is ever truly convenient to employ a fiction where the judge introducing the reform can state the new rule in non-fictitious terms'.[56] He took a critical distance from the motivations for using legal fictions, including the capacity to mask the exercise of power or to hide a substantial innovation behind a formal form of conservatism, but Bentham was much more radical in his critique.

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[52] M Quinn, 'Fuller on Legal Fictions', 64.

[53] L Fuller, *Legal Fictions*, 93.

[54] For a detailed discussion of Bentham, Fuller and Vaihinger see M Quinn, 'Fuller on Legal Fictions', 37, but note Schofield's remark that the chapter is built on a confusion between fictitious entities and legal fictions: '[Quinn] purportedly compares Bentham and Fuller on legal fictions but, having argued that Bentham viewed any proposition involving a fictitious entity as a fiction, spends much of the article comparing Bentham on fictitious entities with Fuller on legal fictions'. P Schofield, 'The Epicurean Universe of Jeremy Bentham', 42, n56.

[55] L Fuller, *Legal Fictions*, 9–10.

[56] Quoted in M Quinn, 'Fuller on Legal Fictions', 66.

4. FALLACIES AND SINISTER INTEREST: TOWARDS A CRITIQUE OF LEGAL HEGEMONY

4.1 Political Fallacies

Bentham recalled that when he heard Blackstone talk about the fiction of the original contract, he 'immediately detected his fallacy respecting natural rights'.[57] He exposed the fictions of the state of nature, natural rights, contract, the king's two bodies, the fact that the Crown never dies and divine right. These fictions were fallacies because they were deliberately used to deceive, 'arguments that are considered as having been employed or considerations suggested, for the purpose, or with a probability of producing the effect of deception'.[58]

His attack on the legal establishment was part of a political critique of the rule of the few over the many, fictions being one of the means by which domination is maintained. For instance, the personification of fictions, by which kings were referred to as 'the Crown', churchmen as 'the Church', lawyers as 'the Law' and rich men as 'Property', created a fictitious object of respect which hid and protected the individuals who were actually exerting power and enjoying its benefits. One such fiction that had gone particularly unnoticed was that of property:

> In the last case, it seems scarcely to have been observed. But perceived, or not perceived, such, by the speakers in question, has been the motive and efficient cause of the prodigious importance attached by so many to the term *property*: as if the value of it were intrinsic, and nothing else had any value: as if man were made for property, not property for man. Many, indeed, have gravely asserted, that the maintenance of property was the only end of government.[59]

The social contract being a basis for political obligation was another instance of political fallacy. Bentham, like Thomas Paine would in *Rights of Man*, suggested that if the contract supposedly drafted at the time of the Glorious Revolution could not be shown to him, then it had no existence:

> This drug of theirs they administered to me to calm my scruples. But my unpractised stomach revolted against their opiate. I bid them open to me that page of history in which the solemnization of this important contract was recorded. They shrunk from this challenge; nor could they, when thus pressed, do otherwise than our Author [Blackstone] has done, confess the whole to be a fiction.[60]

The opiate simile also appears after an attack on lawyers who believe in social contract: 'They [lawyers] feed upon untruth, as the Turks do upon opium, at first from choice and with their eyes open, afterwards by habit, till at length they lose all shame, avow it for what it is, and swallow it with greediness, not bearing to be without it'.[61]

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[57] J Bentham, 'Memoirs and Correspondence', in *Works*, vol. 10, 45.
[58] UC cii. 23 (1838–1843, ii. 379) quoted in M Quinn, 'Fuller on Legal Fiction', 57.
[59] J Bentham, 'Constitutional Code' in *Works*, vol. 9, 77 (original emphasis).
[60] J Bentham, 'A Fragment on Government' in *Works*, vol. 1, 168–9, note h.
[61] J Bentham, *A Comment on the Commentaries*, 59.

4.2 Sinister Interest and the Critique of Legal Hegemony

In *Utility and Democracy*, Schofield draws a distinction between the 'enlightenment Bentham' of the eighteenth century and the 'radical Bentham' of the nineteenth century (he was born in 1748 and died in 1832) with a turning point around the year 1804, corresponding to the emergence of the notion of sinister interest, which refers to a carefully planned strategy on the part of the rulers (or the few) – which include judges, lawyers, priests and politicians – to keep the ruled (or the many) in submission by means of deceit and manipulation, with a strong linguistic component. In this context, the abuses of words achieved through legal fictions were not fortuitous at all:

> By the priest and the lawyer, in whatsoever shape Fiction has been employed, it has had for its object, or effect, or both, to deceive, and, by deception, to govern, and by governing, to promote the interest, real and supposed, of the party addressing, at the expense of the party addressed.[62]

Fictions were used to produce 'demoralization' in the community, with the following end in view: 'to cause men to regard with indifference, or even with approval, both "the perpetration of injustice" and the employment of "falsehood [*sic*] – wilful, deliberate and self-conscious falsehood – in a word *mendacity*" as a means of producing that injustice.'[63] It was not just the will of the people that was 'confounded and overwhelmed'; their very understanding was 'deluded'.[64]

Here, it may be useful to introduce the notions of mystification and demystification, which HLA Hart spotted in the literature of the radical New Left in the 1970s and which meant that 'unjust, anachronistic, inefficient or otherwise harmful social institutions, including laws, are frequently protected from criticism by a veil of mystery thrown over them'.[65] Hart traces these notions back to Marx and Engels, and claims that Bentham may have had more in common with them than Marx's remarks on Bentham as 'that insipid, pedantic, leather-tongued oracle of the ordinary bourgeois intelligence of the nineteenth century' might suggest.[66] To Hart, they agreed on two fundamental points:

> first, that their tasks as social thinkers were to clear men's minds as to the true character of human society, and, secondly, that human society and its legal structure which had worked so much human misery, had been protected from criticism by myths, mysteries and illusions, not all of them intentionally generated, yet all of them profitable to interested parties.[67]

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[62] J Bentham, 'A Fragment on Ontology' in *Works*, vol. 8, 199.

[63] P Schofield, 'The Epicurean Universe of Jeremy Bentham', 31. Schofield is quoting J Bentham, *The Collected Works of Jeremy Bentham: First Principles Preparatory to Constitutional Code*, ed. by P. Schofield (Oxford, Clarendon Press, 1989) 267–9.

[64] J Bentham, 'The Book of Fallacies' in *Works*, vol. 2, 466.

[65] HLA Hart, 'Bentham and the Demystification of the Law' (1973) 36/1 *Modern Law Review* 2.

[66] K Marx, *Capital*, vol. 1, 3rd edn, transl. Moore and Aveling, 609, quoted in HLA Hart, 'Bentham and the Demystification of the Law', 5.

[67] Ibid., 6.

Bentham paid attention to the role language played in generating such myths, focusing for instance on recurrent expressions which he regarded as 'passion-kindling appellatives' and 'impostor terms'.[68] Even the choice of the word 'fiction' was a misleading fallacy, since it tended to associate with that process the favourable connotations of poetic fiction, and therefore to ward off rational criticism.[69] Using specialized language that was out of the reach of laymen served a triple function: it created a 'bond of union' between lawyers; it constituted an 'instrument of depredation' since it enabled lawyers to charge extravagant fees for their mastery of that impenetrable language; and it 'created an atmosphere of awe around the lawyer, which intimidated the critic and fostered the impression that human faculties are not really equal to the task of law reform'.[70]

Tusseau takes the parallel with Marxist analysis further by showing how Bentham's approach to the role of language in the legal mystification highlighted above can be linked to concepts such as hegemony and ideology.[71] By installing distance from the dominant legal and political discourse of his time, Bentham deployed what Paul Ricoeur called a 'hermeneutics of suspicion', an approach which 'aims to demystify meanings and reestablish their often hidden real scope, through a critical analysis' and was practised by Marx, but also Freud and Nietzsche.[72] Marxist criticism of hegemony – understood as 'the way a specific group manages to impose its own worldview on another group that is subject to its authority' while 'ensur[ing] that the culture of the ruling class is assimilated by the subjected one', which 'has the impression that it is natural, necessary, and does not offer any alternative'[73] – entails an analysis of the linguistic mechanisms by which domination is established. Bentham opposed – maybe naively – ordinary language, the goal of which was to convey true information, and lawyers' language, which had a twofold object: 'partly to prevent information from being conveyed to certain descriptions of persons; partly to cause such information to be conveyed to them as false, or at any rate fallacious: to secure habitual ignorance, or to produce occasional misconception'.[74] Jurists established their hegemony by creating and using a specialized language which excluded laymen, through a phenomenon of 'linguistic capture': 'This monopolising of words ensured solidarity among jurists by separating them from the rest of society, reinforced their opposition to reform and made people adopt a reverential and intimidated attitude toward them.'[75] Here, one can see how the use of technical legal fictions within the judicial sphere specifically and the spreading of fallacies in the broader social context – two of the senses of 'fiction' explored in this chapter – could work hand in hand to keep the rulers in

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[68] J Bentham, 'Book of Fallacies' in *Works*, vol. 2, 438.

[69] J Bentham, 'Justice and Codification Petitions' in *Works*, vol. 5, 452, 512. See also J Bentham, 'The Book of Fallacies' in *Works*, vol. 2, 466.

[70] HLA Hart, 'Bentham and the Demystification of the Law', 9.

[71] G Tusseau, 'Towards a Linguistic Criticism of Legal Hegemony: Some Remarks on "Bentham v. Judges and Co."' (2019) 32 *Canadian Journal of Law & Jurisprudence* 176.

[72] Ibid., 181.

[73] Ibid., 174.

[74] J Bentham, 'Rationale of Judicial Evidence' in *Works*, vol. 7, 280.

[75] G Tusseau, 'Towards a Linguistic Criticism of Legal Hegemony', 187.

their position, without requiring the use of violence or coercion but by relying on ideology, as suggested by Louis Althusser.[76]

Fictions contributed to reinforcing the juridification of society, in the sense of 'the tendency towards an increase in formal (or positive, written) law that can be observed in modern society':[77] 'By focusing on the linguistic dimensions of the use of fictions by jurists, Bentham highlighted the progressive establishment, self-preservation, and spread of the realm of the law.'[78] However, one of the limitations of his analysis, and one of the tensions to be explored in the next section, is that it may well have contributed to such a process.

5. LIMITATIONS AND TENSIONS WITHIN BENTHAM'S THEORY

While Bentham exposed the general lack of clarity of the common law and the fact that legal language was deliberately kept obscure so as to ensure the monopoly of jurists, his own style, especially in later writings, came under criticism – so much so that William Hazlitt suggested his writings should be translated into English.[79] As a censor, Bentham was prone to heavy-handed outbursts of metaphorical flurry – within the course of this chapter, we have come across syphilis, pestilence, opium, poison, theft and swindle as well as all sorts of wild animals – which are all part of a rhetoric of abjection that may not foster clarity. His writings as expositor could be so abstract as to become incomprehensible. Bentham's intent was not to deceive or mystify his readers, but he probably lost a few due to the abstruseness of his style, and one may wonder whether his stylistic choices did not exclude lay people as much as convoluted legal language did.

Moreover, his attempt to tear off the masks of 'Judge & Co' or to lift the veil of mystery deliberately cast over jurisprudence often reads as a narrative that is akin to a form of conspiracy theory. By pledging to tear off the 'mask' or 'curtain' of mystery, Bentham seemed to be promising revelations on a par with those offered by conspiracy theories.[80] He referred to 'a perpetual conspiracy of lawyers against the people' and defined the judicature as 'a permanent, compact, experienced body, composed of connected individuals, participating in the same affections and pursuing the same views'.[81] Judges and their accomplices were endowed with the characteristics of plotters in conspiracy theories: they pursued the same end as a per-

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[76] L Althusser, 'Ideology and Ideological State Apparatuses (Notes Towards an Investigation)', trans Ben Brewster in *Lenin and Philosophy and Other Essays* (Monthly Review Press, 1971).

[77] J Habermas, *Theory of Communicative Action* quoted in G Tusseau, 'An Old English Tale?', in G Tusseau (ed) *The Legal Philosophy and Influence of Jeremy Bentham* (Routledge, 2014) 80–133, 119.

[78] G Tusseau, 'Towards a Linguistic Criticism of Legal Hegemony', 187.

[79] W Hazlitt, 'Jeremy Bentham' in *The Spirit of the Age* [1825], reproduced in *The Fight and Other Writings* (Harmondsworth, Penguin, 2000) 265–9, quoted in JM Schrammn, 'Jeremy Bentham's Imagination and the Ethics of Prose Style: Paraphrase, Substitution, Translation', in A Julius, M Quinn and P Schofield (eds) *Bentham and the Arts*, 126–7.

[80] J Bentham, *A Comment on the Commentaries and A Fragment on Government*, 327.

[81] J Bentham, *Rationale of Judicial Evidence*, 270; J Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed. by P Schofield (Oxford University Press, 2010) 227–8.

fectly organized group with utmost rationality, agency and success. As Tusseau points out, this 'conceiving of legal hegemony as the offspring of a form of plot' prevents Bentham from imagining that the legal structure itself could have its own agency and could escape the control of its creators: 'Because of his atomism and nominalism, he fails to imagine the possibility of an even more naturalised version of this form of hegemony, by which the legal language's own necessity would impose practical and intellectual constraints upon the actors themselves.'[82] This approach to legal phenomena may be described as simplistic since, as with conspiracy theories, everything is explained by means of the same master narrative and traced to the same agents.

Finally, since Bentham's response to the legal hegemony he exposed was to offer more legal concepts, it seems as though he was 'incapable of reaching outside his panlegalism'.[83] Is it possible for critical jurisprudence to overcome a type of hegemony that is precisely tied to legal language? Is it possible to reform the law from within? Is codification the only solution to eradicate the flaws of the common law? Bentham's plan was to get to a *pannomion*, a full legislative body which would include civil and criminal law and which would enable all citizens to know their rights and duties. Tusseau suggests that Bentham was a victim of his own 'kind of epistemic panlegalism': '[H]is thought does not really allow for a questioning of the reign of the law, but reinforces it and naturalizes it all the more, by including in this framework other kinds of visions, and especially by understanding any form of social criticism as the legal discourse of "censorial jurisprudence".'[84] Thus, Bentham contributed to juridification in that in his analysis all social interactions could be reduced to purely legal relationships, or 'read' as such, including in private ethics and education, whereas 'the legal mindset is but one among the ways in which our social experience can be framed and expressed'.[85] One of Bentham's contradictions may have been that he perpetuated the legal mindset which he had so well proved to be related to sinister interests.

6. THE BENTHAMITE LEGACY ON FICTIONS

As several authors have pointed out, some of the points which were controversial in Bentham's time are now well accepted. For instance, Bentham's claim that judges made law, especially when they used devices such as legal fictions, rather than simply finding or interpreting law has become a truism.[86] Twining makes a similar point when he writes that 'nearly all recognize that upper courts in the common law tradition are agents of at least interstitial change, but in ways that differ from legislation and vary by time and place and situation'.[87] Twining also mentions the fact that no jurist today would accept Bentham's characterization of common law fictions as 'wicked falsehoods' because no legal fiction ever deceived anyone. Have the changes in legal fictions and in the controversy that surrounds them weakened the contemporary relevance of Bentham's critique? Twining notes that 'no one believes fictions

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82 G Tusseau, 'Towards a Linguistic Criticism of Legal Hegemony', 191.
83 Ibid., 192.
84 G Tusseau, 'An Old English Tale?', 120.
85 Ibid., 43.
86 L Harmon, 'Falling Off the Vine', 57.
87 W Twining, 'Preface', VII.

are a thing of the past' although some may object to their use as 'a crude and unnecessary way of solving particular kinds of problems'.[88] As opposed to what Maine's teleological reading of the evolution of common law suggested, then, legal fictions are still very much present and probably deserve the same level of suspicion – if not the same level of spite – they attracted in Bentham's writing.

Soifer suggests that reverential attitudes towards judges persist and that the latter's skill at manipulating legal fictions to hide the part they play in developing the law is precisely a factor that contributes to their prestige. Taking insights from Herman Melville's *Benito Cereno*, Soifer discusses American constitutional law, especially Brandeis's much-admired *Olmstead* dissent,[89] to suggest that 'we tend to revere precisely these judges who are most adept at maintaining the seemly façade of seamlessness as they develop the law. Our great judges are those who most effectively use the fabric of fiction to camouflage their creativity.'[90] In terms which are less evocative of conspiracy theory than Bentham's dramatic unveiling of the mischief caused by 'Judges & Co', Soifer nevertheless reminds us that '[p]erhaps we judge judges by their skill at covering their tracks, as Cardozo did so well. In other words, the successful and creative judge may be the one who is best at maintaining the protective coloration of legal fictions.'[91] Although Bentham's masks and veils have become a somehow thinner 'coloration', judicial reliance on legal fictions to introduce covert changes in the law still seems to deserve examination. In this context, Louise Harmon's essay entitled 'Falling off the vine' can be used as an illustration of what a Benthamite take on legal fictions might look like today.

What the author addresses in her essay is the doctrine of substituted judgment, which has its origins in the early 19th-century law of lunacy and consisted, in Lord Eldon's words, in 'doing that which it is probable the lunatic himself would have done'.[92] The doctrine permitted equity courts to make gifts of the lunatic's surplus income to relatives to whom the lunatic owed no duty of support. The doctrine entered the American law of lunacy in 1844 with *In re Willoughby* and was brought in the 1970s into the law of informed consent, which went along with two problematic shifts.[93] First, in the *Strunk* case, it was introduced into a decision about an 'idiot' (that is, someone who had never had a sane mind, as opposed to a lunatic, who had once had one).[94] Second, the doctrine of substituted judgment was brought to bear on the incompetent's body and not just his or her property, so that it has been used to allow removal of organs or vital tissue, sterilization, forced medication and termination of life-support systems.[95] In Harmon's analysis, not only would Bentham have disapproved of the initial doctrine because it had introduced hidden change in the law without legislation, but also, he would have regarded the kind of utilitarian analysis required by the cases in which the doctrine of substituted judgment is used as 'appropriate only to the legislative process' since '[j]udges

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88 Ibid.

89 H Melville, *Benito Cereno* (1885) in *Billy Budd, Sailor and Other Stories*, ed. by F Busch (1986); Olmstead v. United States, 277 U.S. 438 (1928).

90 A Soifer, 'Reviewing Legal Fictions', 885.

91 Ibid., 909.

92 Ex parte Whitbread, 2 Meriv. 102, 35 Eng. Rep. 879 (Ch. 1816), quoted in L Harmon, 'Falling Off the Vine', 1.

93 In re Willoughby, 11 Paige 257 (NY ch. 1844).

94 Strunk v Strunk, 445 SW2d 145 (Ky 1969).

95 L Harmon, 'Falling off the Vine', 64–5.

were not supposed to engage in the formulation of public policy'.[96] She believes Bentham would have read Lord Eldon's fiction as 'a noxious poison, a prime example of the usurpation of legislative power'.[97] Harmon's essay contends that an initially benign legal fiction may become dangerous when transposed into another context, and that such shifts should be the object of public, open discussions. She suggests that the reason for judges' reluctance to 'put their utilitarian analysis down on paper' is that it would have forced them to 'admit that the property of a lunatic was worthy of less protection' and 'say things about the lunatic that no one wants to say: things reflecting an attitude that the lunatic is something less than a person – or something less than alive'.[98] To Bentham's insight that 'power could be used illegitimately, perhaps even immorally, under the protective camouflage of a legal fiction', Harmon adds that it is the borrowability of Lord Eldon's fiction that made it dangerous, i.e. 'the ease with which it could be transplanted from the law of lunacy into the law of informed consent', and she warns that '[s]omething hidden, something potentially dangerous or brutal, can go on beneath the surface of a legal fiction'.[99] Therefore, even though fictions tend to be regarded today as useful devices which make it possible to solve practical problems in a creative way, Harmon's article reminds us that their use calls for an explanation and should arouse suspicion.

7. CONCLUSION

In his own time, Bentham was not ready to accept legal fictions as the only way for jurists to bypass the complexities of a multi-layered legal system and to introduce innovations while preserving continuity. In a quite consistent manner, he also laid bare the political fallacies which prescribed reverence for custom and the established order. His vision of history was teleologically organized on the principle of progress, so that it was obvious that their ancestors could not be wiser than his contemporaries and that fictions were a sign of immaturity of the legal system which were meant to disappear when judges stopped usurping legislative power.

Historically and philosophically, Bentham stands out for the attention he paid to language. Current discussions on fictions raise the question of whether legal language, which is specialized, should be held up to the standards of ordinary discourse. Bentham would probably have answered in the affirmative and have been suspicious of attempts at redeeming fictions by keeping them within a self-contained, self-referential legal system. As several authors have pointed out, legal fictions, contrary to literary fictions, have very real consequences in society. Therefore, for Bentham, it would have been essential to make sure that the law did not constitute a hegemonic field governed by jurists only.

By today's standards, Bentham's faith in ordinary language may seem naïve. One may also argue that some of the points he made so vigorously have now been widely accepted. Yet his theory of fictions – if such a label is appropriate – has not lost its relevance, especially when it comes to judicial law-making or to public attitudes towards the judiciary.

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[96] Ibid., 55–6.
[97] Ibid., 60.
[98] Ibid., 57.
[99] Ibid., 70.

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