

**Jurisprudence and the Art of Government:
Justice and public utility in Jeremy Bentham's
Elements of Critical Jurisprudence**

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**“If ... I explain these matters clearly I may be a means of giving
perpetuity to the constitution of my country, I may stifle in embryo
or rather prevent the conception of all manner of political disputes,
prevent civil wars, and save the lives of millions
[ms. alternative: fix the peace of Empires].”¹**

These words appeared in a body of manuscripts, comprising 661 sheets and about 1250 consecutively numbered but discontinuous and fragmentary sections, in which Bentham tried to work out the “preparatory principles” which he would employ in shaping - and when appropriate explicitly insert into - his ‘Magnum Opus’: the envisioned great work which would bring his radically innovative ideas on jurisprudence and politics to the attention of the European intellectual community of his day. This Magnum Opus was never published. Never having seen any of the unpublished manuscript portions of it which reside mainly at University College London (UK), most scholars interested in utilitarianism use as the basis for their understanding of Bentham’s thought his Introduction to the Principles of Morals and Legislation, a work hastily prepared and reluctantly published in 1781 – a work which in Bentham’s view was little more than a selective preliminary sketch of the massive system of jurisprudence which he deployed in his manuscripts of the 1770s. In my opinion, we shall never know exactly what the great book would have looked like. It was never entirely finished, and its title, size and components changed rapidly and repeatedly in Bentham’s imagination as the focal points of his writing and thinking shifted depending on the strategy he adopted for making an impact on the worlds of letters, law and politics. After an extensive (though, it must be said, not exhaustive) search of Bentham’s early manuscripts, I here suggest that there is one manuscript excerpt which indicates far more substantially than any other what The Elements of Critical Jurisprudence² would have looked like had Bentham ever finished preparing for it and actually generated it. The outline in question takes up only a single manuscript page:

UCL Mss Box xcvi, p. 72:

“General Contents of the Work – as divided into Books.”

¹ University College London Bentham Mss., Box LXIX, p. 156: “Preparatory Principles Inserenda section 271”; the marginal heading is “Prefat. Utility of these speculations”. The “Preparatory Principles Inserenda” [“PPI”] manuscripts can now be viewed at the Bentham Project’s web site: http://www.ucl.ac.uk/Bentham-Project/online_pub/ppi_ind.htm.

² As I shall show, other titles were considered. But such evidence as I have seen suggests that the others were all – or at least could all be - subsumed under this one.

[ed's note: "the Work" is not in fact named]

Preface: UCL xxvii, 1 – 12

Introduction: [a sample is at UCL vvxii, 13 – 23]

[i] Of Happiness, the End of Legislation

[ii] Laws, its Subject

[iii] Division of Laws

[Notes: UCL xcvi.74 headed "Introduction. Contents" gives ten 'Heads' roughly following this three-part plan;

UCL xcvi.74 (side ...?) gives 41 'Heads', still roughly conforming to this plan;

UCL xcvi. 102-127 deal in part with the idea of **happiness**

UCL lxx (a). 1 – 35 headed "INTROD." deal in part with the **principle of utility**

UCL lxx (a) 1 – 35 and lxxii. 1-2 deal with the **idea of a law**

UCL xcvi. 102-27 deal in part with the **division of laws**

Book I: Of Offences in General

1. Of Aestimation
2. Classification
3. Graduation
4. Tabulation
5. Exemptions from Criminality
6. Offences in Concatenation
7. Accomplices
8. Offences Radical and Excretitious
9. Offences Local & Universal
10. Offences Temporary and Perpetual
11. Definition of Offences

[Note: UCL xcvi.76, "Book I: Offences in General. Heads of the Book." follows this plan closely]

Book II: Of Punishments in General

1. Their End.
2. The right of prescribing Punishment
3. Their object.
4. Quantity.
5. Quality.
6. Species.

[Note" UCL xcvi.154 "Punishment. Contents of the Book." Follows this plan closely.

Book III: Of Offences in Particular: The several sorts of offences commonly called Crimes, with the punishments to each.

1st Of Offences against persons certain determined individually, offences against individuals.

2dly Of Offences against persons certain determined by place, offences against the Neighbourhood.

3^d. Offences against persons uncertain – against the State.

[Note: Little manuscript material for this Book has been found – unless the text headed “Crit. Jur. Crim.” is considered an analysis of ”crimes”. The three headings above are followed in UCLlxiii.101-4]

Book IV: Of the Composition of Laws – or the manner of describing Offences and Punishments

[Note: UCL xcvi.85 is headed ”COMPOSITION. Analysis of the Book” at the top of the page, and “COMPOSITION. Contents of the Book” at the bottom.

UCL xcvi.85-95 contain ‘Heads’ and ‘Brouillons’ concerning “Composition”]

Book V: Of the Promulgation of Laws

[Note: UCL xcvi.243 is headed “Promulg. Heads.” It yields 8 sketchy headings and several aphorisms such as “Composition fits the Law for men’s apprehensions. Promulgation conveys it to their organs.”]

Appendices:

1. Of the Obstacles to a reform in legislation.

[Note: The most interesting single body of untranscribed manuscript material related to the Elements is UCL xcvi.1 – 116. This very substantial body of writing (over 450 sheets) is almost all headed ”Obstacles”. xcvi.31 is headed “Advancement – Premiums”. “Obstacles” include the professional prejudices of Divines (16), Parliamentary privilege (23), party “interest’s” (sic – 24) and “indolence” (27ff).]

2. Of the Advancement of the Science.

The working hypothesis of this paper will be that “The Work” is the Elements of Critical Jurisprudence, and that:

1. Bentham’s “Preparatory Principles Inserenda” manuscripts (over 650 sheets)³ contain explications of at least some of the principles on which the Elements was to be based, along with comments and reflections on issues, events, personalities and other ‘preparatory’ material;
2. Bentham’s “Crit. Jur. Crim” [“Critical Jurisprudence Criminal”?] manuscripts comprise materials intended for inclusion in for the Book “Of Offences in Particular: The several sorts of offences commonly called Crimes ...” from the Elements of Critical Jurisprudence?] (ca. 275 sheets);
3. The Bentham manuscripts headed “”Key” (83 sheets) referred to in the pages of “Crit. Jur. Crim.” as a “chapter” to be entitled “Key Terms in Universal

³ As indicated above in fn. 1, these pages were published (ed. D. Long & O. Harris) in the Summer of 2007 at the web site of the Bentham Project [the agency charged with the production of the definitive Collected Works] at University College London UK where the bulk of the Bentham manuscripts are housed: go to www.ucl.ac.uk/bentham-project/online_pub/ppi_tit.htm

Jurisprudence” MAY plausibly have constituted a draft of a chapter in the book of the Elements concerned with “Crimes”, since it is referred to (indeed given its name) by Bentham in the “Crit. Jur. Crim. Mss.” .

In short: the table of contents for “The Work” gives us the shape of the bottle. “P.P.I.”, “Crit. Jur. Crim” and “Key” give us at least a flavour of the wine it was to contain.

I: The Context of the Work:

The experience of exploring the early manuscripts of Jeremy Bentham may be likened to that of attempting to assemble an extremely - one sometimes feels infinitely - large and complex jigsaw puzzle. To capture the feeling one would, I think, have to have in mind one of the 'new breed' of jigsaw puzzles recently developed by avowedly sadistic - and entrepreneurial - designers. These puzzles arrive in one's hands in pieces, of course, but without the picture traditionally supplied to give the puzzle assembler an image of where each piece 'fits in'. The boxes in the University College Manuscript collection which contain material dating from the 1770s and 1780s are like huge boxes of puzzle pieces, and in place of a clear picture into which all of these pieces fit, there is only the voice of Bentham, reiterating from time to time that his thought and his writings form a single comprehensive and consistent whole.

It is clear from both published and unpublished sources that Bentham did believe that all of his writings formed part of a single Encyclopedic project. It would be difficult to find a moment in his authorial life at which Bentham did **not** believe that what he was working on at that instant was an integral part of a larger whole. But in his long and indefatigably industrious intellectual career he entertained many different conceptions of this larger whole. The idea of a 'Pannomion', for example, was an essentially linguistic and abstract expression of this aspiration. The idea of a 'logic of the will' featured in Bentham's 'preface' to An Introduction to the Principles of Morals and Legislation⁴ linked in a unique way the spheres of philosophical explanation and the systematic study of motivation and action, as did his idea of a motivational table, or 'Table of the Springs of Action'.⁵ The Panopticon, so effectively exploited by Michel Foucault as the symbol of an inescapable web of 'power/knowledge' permeating our modern 'disciplinary society'⁶ and so carefully explained to us by the late Janet Semple⁷, was a more concrete, 'applied' expression of Bentham's urge to bring all behaviour within some single set of linguistic, conceptual or physical parameters⁸. The ultimate influences behind this urge, as we shall see, were Bacon and Newton.

To resume the metaphor with which this paper began, the scholar adrift amid the early manuscripts hears the voice of Bentham saying 'all of this is part of one great project', but the underlying project is a protean one. Bentham is part Prometheus and part Proteus. Our jigsaw metaphor, then, may not quite capture the Bentham scholar's experience. One might think instead of the reader making his way through one of the endlessly allusive semiotic novels of Umberto

⁴ Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, ed. J.H. Burns & H.L. A. Hart, Methuen, London & New York, 1982, p. 8.

⁵ Eventually published with his Deontology as a volume in the Collected Works of Jeremy Bentham.

⁶ For 'Panopticism' see Foucault's Discipline and Punish.

⁷ See Bentham's Prison: a Study of the Panopticon Penitentiary, Oxford UP, 1993.

⁸ Examples could be multiplied. Scholars interested in the later Bentham might cite the set of Codes he undertook to create as fulfilling the promise made earlier in his career of a complete *Corpus Juris*. The forty chapter work outlined in Bentham's famous letter to Lord Ashburton in 1782, and the series of volumes listed in the Preface to IPML as sufficing to lay down the principles of legislation are other incarnations, so to speak, of Bentham's vision of his 'project'.

Eco such as Foucault's Pendulum: everything is a sign pointing to another sign: everything leads to something else, but nothing leads to an exit from the maze. Is there a point of exit from the maze of Bentham's early manuscripts?

We can get our bearings amid the confusing reshuffling and 'repackaging' of the components of Bentham's system of thought which we find in the early manuscripts if we bear in mind the exact meaning of one of the more frequently quoted passages from those very pages:

'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 branch⁹ 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,' UC clvii.32¹⁰

Bentham was, in my opinion, true to this claim throughout his career. His understanding of 'the experimental method' drew heavily upon the ambitious and transformative impetus of Bacon, not the scepticism which coloured Hume's account of experimental thinking. And Bentham's Neo-Newtonianism was avowedly inspired by that of Helvetius, who in De L'Esprit wrote as follows:

'If the physical universe be subject to the laws of motion, the moral universe is equally so to those of interest.'¹¹

Bentham's 'project', however entitled and generated in whatever proximate context, always bore the neo-Newtonian and Helvetian characteristics suggested here. Bentham was always trying to link philosophical and legal analysis in a single enterprise. The decisive advantage for him of utility as a principle was that, as developed by Helvetius and Beccaria (and as Bentham seems to have **thought** it was developed in Hume), it would do just this job. The Elements of Critical Jurisprudence was Bentham's first, and perhaps his clearest and best, attempt to explain how 'law' in a broad Newtonian sense and 'moral science' as understood by Helvetius might be conjoined. It was for that reason that Bentham wrote to his father in 1776 that he was now 'at work upon my capital work: I mean the Critical Elements of Jurisprudence'¹². It was not only for the purpose of coaxing continued financial support out of his father that he described the work in this way. Earlier (1774-5), in the chapter of the Comment on the Commentaries devoted to natural law, Bentham had contrasted with Blackstonian law his own notion of 'Critical Law or Critical

⁹Ms. alternatives: 'department' and 'world'.

¹⁰I pointed out in my 'Censorial Jurisprudence and Political Radicalism', in The Bentham Newsletter June 1988, No. 12 esp. at p. 8-9 that Helvetius was explicitly **Newtonian** in his claims.

¹¹Claude Adrien Helvetius, De L'Esprit, or Essays on the Mind and its Several Faculties, New York, 1810, reprinted 1970; Essay II, Chapter ii, p. 42.

¹²CW Correspondence, I, #186, J. B. to Jeremiah Bentham, 1 October 1776, pp. 358-9.

Jurisprudence¹³. In the process of preparing the Comment for publication, he also prepared an 'Advertisement' which read, in part, as follows:

Upon the Anvil
By a hand concerned in the present publication
Elements of Critical Jurisprudence¹⁴

Bentham used his "Preparatory Principles' manuscripts as a sort of sourcebook of ideas, definitions, illustrations and and rhetorical *bon mots* for use in his campaign to promote his views at the expense of Blackstone and others. In those pages he explained clearly and emphatically the relationship between the 'science' of jurisprudence and the 'art' or 'business' of government. It was in his view a relationship so close as to be symbiotic. Government was not only the locus but the original source (as opposed to 'Nature' or 'the Divine') of law:

The term Law ... was invented it should seem to denote a general Commend of Public Government ... [which] was observed to produce a certain degree of uniformity among the human acts that were the objects of it. [UC lxix, p. 142 "PPI"]

By taking this position Bentham meant to undermine the positions (as he saw them) of both. Blackstonian Whiggism and Natural Jurisprudence. The validity of Law was not rooted in a natural or divine order of things, but simply in the basic reciprocal political relations of commend and obedience. Equity and justice were for Bentham the offspring, not the parents, of the habits of political conduct exhibited by rulers and ruled. The appropriate stance of jurisprudence in relation to these basic power relations was a critical one, not an apologetic one. Thus his pejorative label for the jurisprudence of his opponents was "expository" or "conjectural jurisprudence", and he denounced it as a basis for lawless government:

There are in the world two ways of carrying on the business of Government. The one is that of governing by Laws. The other is that of governing without laws. When the business is carried on without Laws, it is either by particular transient commands, or by punishment: by punishment alone, without any commands general or particular to announce it. Of these three methods, the two first may be comprehended under the common denomination of enuntiative; for under [both] ... the mode of conduct which it is the will of the governing power to have observed is announced a time before a man is punished for not observing it. The last may be indicated by the epithet silent; For by this nothing is in words announced ... The process in the first two is, first a word, then a blow: in the last it is pure blows without a word.... [UC lxix, p.195, 'PPI']

On the three objects thus distinguished shall we now stamp their current appellations? The first two are Statute; the last is Common Law - Lawyers, behold your idol." [Ib.]

¹³ See CW Burns, J.H. & H.L.A. Hart (eds.), A Comment on the Commentaries and a Fragment on Government, London, Athlone Press, 1977, p. 20.

¹⁴ Ibid, editors' introduction, p. xlvi.

The only genuine law was thus Statute Law: civic life in a common law-based community was but a series of 'blows without a word'. The only legitimate jurisprudence, by extension, was the jurisprudence of Statute Law. Bentham defined Jurisprudence generically as "the science of / art of knowing / what has actually been done in the way of internal Government". [Ib.] The "Jurisprudence of Common Law" was, predictably, characterized as "the art of knowing what has been done in the way of Government according to the silent method", while that of Statute Law expounded government by the "enuntiative method". [Ib.] Common Law jurisprudence could only enable its practitioners, on the basis of past cases, to "conjecture what will probably be done in future ones supposed similar". In Statute Law jurisprudence the publicly declared intent of government proceeding by the enuntiative method could be known with "certainty". [Ib.] But all of this was, as Bentham put it, mere "words and blows". The "censorial" element essential to a true science of jurisprudence was entirely absent. A *politically* critical jurisprudence was what was needed, but none as yet existed:

A Science which might be conceived is, the art of knowing what ought to be done in the way of internal government. Now the fact is no such science as yet existeth. No wonder therefore there should be no name for it ... no such book hath as yet appeared as professes to contain a body of any such science, or any regular branch of such a body. ... Bodies of Jurisprudence we have several: For our own state and for most others (that are tolerably civilized). Body of this art that I am speaking of, we have none. The science (the art, it matters not which) is not born. Montesquieu and Beccaria have made large advances toward it's [sic] production. - Our Author [i.e. Blackstone] has done what he could to prevent it's [sic] birth

....

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? [See "PPI" sections 432 & 438, on UC lxix pp. 195 & 197]

The completion of such a work about politics and law, Bentham thought, would presuppose the completion of a work on the 'Metaphysics of Jurisprudence', a 'Novum Organon Juris', a 'Key to the Nomenclature of Universal Jurisprudence'.¹⁵ At a more practical level, there would have to be a work on the 'Policy of [Penal] Jurisprudence' (UC lxix.13) or more broadly the 'Principles of Legal Policy'.¹⁶ All of these marginally differing formulations combine the same basic elements: on one hand, the work must be 'principled' - it must be philosophical; on the other hand, it must deal with practice: it must provide a plausible and practical approach to law reform and a guide to policy. But all of this remains hypothetical: a matter of intention, not of record. Did Bentham ever succeed in putting on paper any sustained exposition of the nature of his new moral and political science?

¹⁵UC lxix.214, 'PPI' #506.

¹⁶UC lcxl.14 and see Bentham's draft letter to Voltaire in CW Correspondence, I, 367.

It is widely assumed that scholars in search of texts which articulate the essential features of Bentham's critical jurisprudence must content themselves with reading the first few pages of IPML. Yet nowhere in Bentham's works, including in those famous opening pages, will scholars find a clearer, more reflective, crisper exposition of Bentham's intellectual enterprise than is provided in the opening pages of the Elements. A direct look at the text of the 'preface' and the 'introduction' to the Elements will provide grounds for this claim.

II. The Nature of the Work

'Beccaria ... may be styled the father of *Censorial Jurisprudence*... Before Montesquieu all was unmixed barbarism. Grotius and Puffendorf were to Censorial Jurisprudence what the Schoolmen were to Natural Philosophy.'¹⁷

The text of the preface and introduction to the Elements of Critical Jurisprudence make it perfectly clear that Bentham saw his system of critical jurisprudence as an unique and harmonious marriage of complementary conceptions of philosophy and law. In the Comment on the Commentaries and the Fragment on Government, he had tried to give some indications of the superiority of this system over the more rhetorical and (Whiggishly) historical approach to law of Sir William Blackstone. But he had closed his preface to the Fragment by reminding the reader that 'the chief employment of this Essay' [and he might as well have included the Comment] was 'to *overthrow*'. It had, he wrote, done little in the way of '*setting up*'.¹⁸ Moreover, Blackstone was not the only antagonist he had in mind as he worked on his own system. He also rejected the philosophy of the Scottish moral sense and common sense schools, dismissing them en masse as 'a host of Scotch Sophists' whose moral philosophy amounted to a form of 'sentimentalism'.¹⁹ This repudiation was conveyed in part in the opening chapters of IPML²⁰; it was also to be quite noticeable in the pages of the later Deontology.²¹ But when Blackstone's Jurisprudence and Scottish Moral Philosophy had in Bentham eyes been discredited, there still remained one extremely influential school of philosophy and jurisprudence with which he knew he must deal. This was of course the school of Natural Jurisprudence associated with the names of Grotius and Pufendorf.

In a draft letter to Voltaire of November 1776, Bentham represented the fathers of natural jurisprudence as forgotten men: 'The repose of Grotius and Puffendorf and Barbeyrac and

¹⁷Fragment on Government, CW edition ed. J.H. Burns & H.L.A. Hart, London, Athlone Press, 1977, 'preface', p. 403 fn. g.

¹⁸Fragment, preface, CW edition ed. Burns & Hart, p. 421.

¹⁹See my "'Utility" and the "Utility Principle": Hume, Smith, Bentham, Mill', in Utilitas, Vol. 2, No. 1, May 1990, pp. 16, 17.

²⁰See IPML, ed. Burns & Hart, Methuen, 1982, Chap. II, 'Of Principles Adverse to that of Utility', Para. 14 & notes.

²¹For examples, see Ibid, pp. 15-8.

Burlamaqui I would never wish to see disturbed.²² But in fact he knew better than this. He saw the influence of natural jurisprudence, for example, on Blackstone's concept of the Law of Nature, putting the following words in Blackstone's mouth in the Comment:

'This Law of Nature ... (or, to give it some signification he should have said, 'these conceits of *Grotius*, *Puffendorf*, *Woolaston*, *Burlamaqui* and *my own*') 'being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other'.²³

Aside from an isolated reference to Pufendorf's Of the Law of Nature and Nations in Of Laws in General - a reference which shows that Bentham had indeed read Pufendorf's work²⁴ - the published works show Bentham dismissing natural jurisprudence without engaging in any substantial discussion of its arguments. But in the preface and introduction to the Elements, natural jurisprudence is the primary target of Bentham's polemics - and this despite the fact that Bentham's own enterprise as outlined in the Elements bore some surprising similarities to theirs.

When Samuel Pufendorf set out to provide a concise guide to the principles of natural jurisprudence in On the Duty of Man and Citizen (1673), he defined the nature and scope of natural jurisprudence by 'demarcat[ing] the study and practice of natural law from civil jurisprudence and the institution of civil law on one side and from moral theology and divine law on the other'.²⁵ In so doing, James Tully tells us, Pufendorf made natural jurisprudence a 'field of study ... independent of the disciplines of legal studies and theology and possess[ing] its own specific vocabulary, organized around Pufendorf's original concept of sociality (*socialitas*) and its cognates'.²⁶ Is it simply a coincidence that in the opening paragraphs of the preface to the Elements, Bentham situates his 'master science' between the intellectual poles of 'Moral philosophy above and ... Practical Law²⁷ beneath'?

'The great Bacon, in a passage of his works, a part of which stands as a motto in my title page, takes notice of the uncultivated state of that important but hitherto nameless master-science which I have here ventured to speak of under the new appellation of Critical Jurisprudence. The field of it lies on the declivity of a mountain between two busy spots, both in a high state of population if not of culture, that of Moral Philosophy above and that of Practical [Jurisprudence] Law beneath. Between these two lies a dreary waste:

²²CW Correspondence, Vol. I, ed. T.L.S. Sprigge, #192, p. 367.

²³Comment, CW Edition ed. Burns & Hart, I.2, p. 20.

²⁴'Whosoever draweth blood in the streets shall be severely punished', was 'given as a law of Bologna, by Puffendorf, B. V.Ch. 12 Sec'n 8' [De Jure Naturae et Bentium (1672)]. See CW Of Laws in General, ed. H.L.A. Hart, Athlone Press, 1970, chap. 14, para. 7, notes d & 1, p. 161.

²⁵Tully, J. (ed.), Pufendorf: On the Duty of Man and Citizen, Cambridge, 1991, ed's introduction, p. xxii.

²⁶*Ibid.* I take Tully's spelling of Pufendorf's name to be correct, and Bentham's (with three f's) to be incorrect.

²⁷Ms. alt. deleted 'Jurisprudence'.

trackless except where marked by the short and irregular excursions of the inhabitants of those two bounding regions. It is this waste I propose to put in a state of culture²⁸

Bentham uses Bacon's words to characterize the practitioner of critical jurisprudence neither as a pure philosopher nor as a simple lawyer, but instead as 'statesman' ['law giver' might have been more appropriate]:

'...all those which have written of laws, have written either as philosophers or as lawyers, and not as Statesmen. As for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars, which give little light because they are so high. For the Lawyers, they write according to the states where they live, what is received Law, and not what ought to be law: for the wisdom of a law-maker is one, and of a lawyer is another.'²⁹

Philosophers and Lawyers, Bentham went on to say, saw their professions as separated by a 'great gulph': the lawyer immersed in 'the ditch [ms. orig. 'slimy /muddy/ ocean'] of his particulars' and 'the Philosopher delighted and captivated by his generals.' The 'first architect' to attempt to bridge this 'gulph' was Montesquieu:

But his structure neither having any solid foundation on the shore of Philosophy nor reaching hence to that of Law, nor being built of any other than light & crumbling materials, is unable, as men begin already to perceive and to acknowledge, to stem the tide of time.'³⁰

Bentham saw philosophy [his own of course excepted] as 'for want of more substantial stuff spinning with Cob-webs' while Jurisprudence on the other hand was engaged in 'piling up upon one another a huge heap of odds and ends for want of spinning.' '[U]nassisted Jurisprudence', he asserted, 'has done her part - she has furnished Her assortment of raw materials: an assortment which, to regard the quantity alone, nobody can well think less than competent.'³¹ Like Pufendorf, Bentham sought to position a new moral science between the extremes of pure philosophy on one hand and legal practice on the other. But where Pufendorf's natural jurisprudence was meant to co-exist with existing theological morals and legal conventions, Bentham's critical jurisprudence was clearly meant to transform and ultimately supersede both. Like Pufendorf, Bentham felt it essential to identify a new and distinctive principle of social action as the focal point for his system. Pufendorf chose *socialitas*. Bentham chose utility.

²⁸UC xxvii.12; Footer: 'PREFACE. Beginning.'

²⁹Ibid. Bentham gives this reference: 'See p. V and VI Advancem't of Learn'g B. II. Works V.II p. 539 Ed. Mellet. Folio.'

³⁰UC xxvii.6 Headed 'Prefat. [V]'.

³¹UC xxvii.7 Headed 'Prefat. [VI]'.

As Burns & Hart have shown us³², Bentham used his 'Preparatory Principles Inerenda' [PPI] manuscripts as a sourcebook of ideas for several of his early works. In the case of his treatment of natural jurisprudence this pattern clearly holds. Was Bentham's paired rejection, in the pages of PPI, of the 'law of nations' and the 'law of nature' not a critical response to the title of Puffendorf's great and influential work De Jure Naturae et Gentium Libri Octo (1672)?³³ A few pages farther along in the PPI manuscripts Bentham resumed his dismissive comments on the Law of Nature, observing that no rational argument can 'prevail on some men to throw away this rattle'. Natural Law doctrine is 'soothing to ... indolence' and 'flattering to ... pride'. It is 'a sort of conjuring trick, by which any man that pleases may turn himself into a Legislator: and opposition to his notions, into an act of rebellion.' To this way of thinking, 'every man has the sceptre of Nature in his own keeping. The law then that grieves him becomes illegal. For inexpedient will not serve him. Inexpedient is too cold a term.' The comes an attack on Grotius and Puffendorf:

'As good a way to the full as this is the old sober method of Grotius and Puffendorf who without talking either of a sense or of an understanding, without form or ceremony, without justification or apology, without troubling themselves about privilege or patent, but with all the composure and self-satisfaction imaginable, make as many Laws of Nature at a minute's warning as they have occasion for.'³⁴

Bentham continues the discussion in this vein at some length, concluding that the idea of a Law of Nature is 'mischievous' and 'not reconcilable to utility'. Thus

'I can not help concluding upon the whole, that till the Law of Nature is erased from the vocabulary of Jurisprudence, and banished to the land of second intentions, and quiddities and quoddities and substantial forms, it will be in vain to expect precision or perspicuity among the first principles of the science.'³⁵

The last of the linked series of attacks on natural jurisprudence found in the PPI manuscripts prepares the way for the discussion of 'Utility VS. Natural Justice' that figures prominently in the introduction to the Elements. Just as Bentham had held, in his disagreement with the Scots, that their philosophy was too subjective and abstract to provide rigorous and testable standards of behaviour³⁶, he now held vis a vis natural jurisprudence that its principle of

³²See CW Comment/Fragment volume, ed. Burns & Hart, eds' intro. at p. xlvi.

³³See 'PPI' headings 369 - 380 in UC lxix.122-3. Note that Bentham focussed, as he was to do in the introduction to the Elements, on how '**expectation** may be generated by such an usage' [Uc lxix.122 Heading 374].

³⁴UC lxix.124, 'PPI' Headings 386-8. Marginal headings: 'Law of Nature - Obstinate Attachment to.'; '--- Subserviency to impatient tempers'; 'Grotius & Puffendorf etc.'

³⁵UC lxix.124-5, PPI Headings 389-94; marginal [inter alia] 'Law of Nature - Mischief of - not reconcilable to Utility'.

³⁶See my "'Utility" and the "Utility Principle" in Utilitas, II, No.1, May 1990, pp. 15, 17.

sociality and its use of the fiction of a state of nature made it useless as a source of principles for a 'master-science' of legislation and morals:

'Grotius and Puffendorf, and Heineccius and Vattel[,] Burlamaqui and the many others who have hitherto professed to give treatises on Natural Law, or on Universal Law, or on Public Law, not having settled with themselves which of ...several objects they had in view, have written large books that have contained everything and nothing. There they tell us what men have done or do or would do in an ungoverned state [ms. orig.: 'the state of nature']; next of something men ought to do, as they are pleased to say, without telling us why or wherefore; then of something men do actually do in all governed states: then of something men do in the governed state in which the writer lives; then of something they ought to do in all states; then of something they ought to do in that particular state. No notice perhaps given all this while, or but seldom given of the transition from one of these very different objects to another.'³⁷

The source of difficulties for natural jurisprudence in this context, Bentham believed, was the plasticity, the malleability of its central principle of sociality (in combination with the illusory nature of the fiction of a 'state of nature'). The answer to all such difficulties lay in a careful working out of Bentham's alternative to that principle: the principle of utility. In the introduction to the Elements, Bentham undertook the longest, most reflective, the clearest and perhaps the most persuasive analysis of pleasures, pains, happiness, utility and the principle of utility that I have found in any one location in his writings, published or unpublished. I think that I have shown why and to what end he did so. It is now time to look at some of the key arguments he employed in 'setting up' his system now that the work of 'overthrowing' was complete.³⁸

III. The Jurisprudence of Happiness: Politics, Utility and Justice in the Elements:

In the 'Plan of the Work' shown above, Bentham divided its introduction into three sections: "[i] Of Happiness, the end of Legislation; [ii] Laws, its Subject; [iii] Division of Laws". The 40,000 words of text which I have so far recovered from their scattered locations in Bentham's manuscripts include discrete parcels of material covering each of these headings. A very high proportion of this material is in some degree original: i.e. either it addresses points with which Bentham scholars are already familiar in novel ways, or it raises points of evaluation or methodology which Bentham was not known to have addressed at all on the basis of his published works. There is a great deal here that is both intrinsically interesting and historically and analytically important. But time and space do not permit anything like a full and contextualized discussion of these materials in this essay.

I shall begin with a few observations about the nature of laws ([ii]) and the division of laws into civil and penal ([iii]), reserving one special feature of section [iii] for additional

³⁷UC kxix.127, PPI heading #414, marginal heading 'Grotius etc. their object "unsettled".'

³⁸Here I echo the language Bentham had used in his Comment on Blackstone: see above at fn. 12.

comment farther along in my argument.³⁹ It would require a complex feat of collation to clarify the relationship between the treatment of laws in this Introduction and their analysis in the work eventually (1971) published as Of Laws in General under the editorship of H. L. A. Hart.⁴⁰ It is noteworthy, however, that the division of laws into civil and penal was the problematic topic which caused Bentham to delay the publication of Of Laws in General's better known sister volume, An Introduction to the Principles of Morals and Legislation (hereinafter IPML), a work which was in print by 1780 but was finally published only in 1789.⁴¹ The civil – penal distinction was so problematic in large part because Bentham found that he could not get to the bottom of it without settling the larger question of the relationship between the co-dependent realms of legislation and ethics. The long final chapter of IPML, 'Of the Limits of the Penal Branch of Jurisprudence', consists of two sections and a "Concluding Note". It is the chapter in which the methodological tidiness of IPML begins to unravel – in which it appears that Bentham realized that he could not do within the covers of this Introduction what he had planned to do so carefully in the Elements as a much more extended work. Some of the identifiable connections between the two texts throw new light on this problem.

The "Concluding Note" to which I have referred attempts to fill the gap in the argument of IPML left by the absence, in its early chapters, of a discussion of the nature of Law. Lamenting the "deplorable state of the science of legislation ... in respect of its form"⁴², it calls for a new (and of course scientific) approach to philosophy of law, and an aggressive movement toward the codification of civil, penal and constitutional law: thus it gestures in the direction of Of Laws in General and the various codification projects domestic and international in which Bentham engaged decade after decade until he died, in his own words, "codifying like any dragon". The second section of the cumbersome concluding chapter of IPML is entitled "Jurisprudence, its Branches". Its structure is symptomatic of Bentham's fondness for what he called "exhaustive bifurcation". The section is a sequence of pairings: "ancient" and "living" jurisprudence, "statutory" and "customary", "international" (Bentham is said by the OED to have coined this term in English in Essays penned in 1782) and "internal"; "internal" is in turn divided into "national" and "provincial, local or particular". "Local" jurisprudence in a different sense is contrasted with "Universal". But the chapter begins with Bentham's most important distinction: the one between "expository" and "censorial" [or critical] jurisprudence.⁴³ An Introduction to the Principles of Morals and Legislation was, in fact, an introduction to the principles of Critical Jurisprudence. Section I of IPML's closing chapter is concerned with the issue discussed above, one that arose for Bentham as part of the construction of a scientific

³⁹ I shall provide specific locations in the Bentham manuscripts for quoted material in the following form: U[niversity] C[ollege] lxx (a) [Box 70(a)] .3 [page 3].

⁴⁰ UC Mss Box lxx (a), page 56, dealing with the requirements for a complete analysis of a law, was originally entitled "Of Law in general", but that title was deleted and the page was identified instead as being part of the Introduction [Head 23 Page 21] to the Elements of Critical Jurisprudence.

⁴¹ Bentham, Jeremy, An Introduction to the Principles of Morals and Legislation, ed. J. H. Burns and H. L. A. Hart, Methuen, London and New York, 1982; Eds' Introduction, p. xxxiii.

⁴² IML, ed. Burns & Hart, p. 308.

⁴³ IPML, ed. Burns & Hart, p. xxx.

system of critical jurisprudence: the matter of the “Limits between private ethics and the art of legislation”.

Bentham began the first section of the Introduction to the Elements of Critical Jurisprudence [see UC xxvii, p. 15] with an “Encyclopaedical Sketch” of the relationship of a long list of sciences to human happiness. The last two sciences in that list are legislation and ethics. He begins by asserting that “[h]appiness” is the end of every human action, of every human thought, [sic] how can it, or why ought [sic] to be otherwise?’ Moreover, “To Happiness, or Well-being, Being is in the 1st place necessary”. He then provides a one-paragraph statement of how each of the following contributes to happiness or well-being: husbandry, medicine, Architecture, “the miscellaneous tribe of Mechanical Arts”, Natural History, Natural Philosophy (including ‘Chymistry’), Geography, Navigation, Astronomy, Mathematics, and ‘Musick’. He completes this sketch of broad Baconian intellectual context of his science of legislation by inviting the reader to join the dots, as it were:

I have done, the imagination of the reader may compleat the draught – Poetry, Painting in all their various branches History, Grammar, Logic Metaphysics, all the remaining arts or sciences which have or ever will have a name, may in the like manner be connected ... with Happiness their ground work, and with each other. [UC xxvii, 15]

“What then”, he next asks [UC xxvii, p. 16⁴⁴], “is the Province of Legislation? In what way does it lend its aid to happiness? What is its aspect to the other arts?” And beside the marginal heading “LEGISLATION” [caps Bentham’s] he writes:

Legislation contributes to Happiness by securing men [sic] in their possession, directing them to 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 a 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. [Ib.]

Legislation may hold the penultimate position in this catalogue of the hedonistic arts, but the final position is allocated to Ethics, which is characterized as legislation’s complementary sister – a strange formal echoing of Aristotle’s classification of politics and ethics as symbiotic human sciences in Book V of the Nichomachean Ethics:

Ethics as it respects a man’s conduct to others contributes to happiness by teaching how to demean himself in the use of the several instruments of enjoyment, as not to impede but forward the enjoyments of those around him, in the instance as well ... of such actions of his as Legislation can reach, as of those it cannot: And this it does, bringing him to act in conformity to its purposes, by pointing out the copious but unliquidated allotments of pain & pleasure likely to accrue to him from the spontaneous dispositions of men at large according as he pursues this or that plan of conduct. [Ib.]

⁴⁴ “Elements of Critical Jurisprudence – Introduction – Head 1 page 10.

The second of the three sections which make up the introduction to the Elements was concerned with the nature of law, and in many respects reads like a ‘dry run’ for the writing of Of Laws in General. But of course one section of an introduction to a large and comprehensive work on law, politics and ethics is not as self-contained an entity as a stand-alone volume on the subject of Law. Bentham begins the section by connecting the philosophical analysis of Law with his extended analysis of Happiness in the preceding section: “happiness is man’s end: Law is an instrument he has for compassing it [UC lxx (a) p. 2]. The ensuing taxonomy of law focuses on three aspects: ‘origination’, ‘matter’ and ‘form’ [Ibid p.3]. The different ‘senses’ of Law are examined through the unusual device of a fictional dialogue on property law between two Egyptians, Chemmis and Philonomus [Ib. p. 9-10]. The parts of a law, the distinction between ‘Substantive’ and ‘Adjective’ laws [UC lxiii p. 51-2] and the idea of a ‘complete’ Law [UC lxx (a) p. 8] are all briefly discussed. The long passage in which Bentham lays out in exhaustive arithmetical detail a calculation of the net pleasure or pain produced by a law as a basis for the assessment of its ‘expedience’ [UC lxix, p. 98-101] echoes the long passages in section [i] of the introduction to the Elements in which he examines the qualities and values of pleasures and pains [and asserts the indispensability of money as the best – the only – measure of social pain and pleasure!⁴⁵]. In another passage he states in what he considers to be the simplest possible terms the basic criterion for assessing the validity of a law in the context of a system of critical jurisprudence – a criterion which underlines the subsidiary role of law and legislation in relation to the larger enterprise of maximizing human happiness in the form of an optimal accumulation of discrete and measurable net pleasures: “A LAW is good, according to the more or less of clear Happiness which it produces”. [UC lxix, p. 98 side 2] On the basis of this principle he then draws a picture of an enlightened legislator which is meant to contrast sharply with the confusion he had attributed to Grotius, Pufendorf and others in these matters:

1

I am a Legislator – I have a State to govern. What I have to do is to produce Happiness in it. I set to work. I look around me. I see a sort of act done which appears to me to produce unhappiness ... I will that it be not done. This is the first scene in the drama. It lies within my breast.

2

... If my will is to have any consequence, if men are to desist from the act in consequence of their understanding that my will is so, I must enable them to understand it ... I must express it.

Our present concern is with the different sorts of wills which it can happen to the Legislator to form and to express ...

⁴⁵ The analysis of the use of money as a measure and source of pleasures and pains is lengthy [UC xxvii pp. 35-7], but its flavour is captured in the following excerpt at p. 36: “If then, speaking of the respective quantities of various pains and pleasures and agreeing in [sic] 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.”

The simplicity of this picture and the (surprisingly) succinct and unembellished style in which it is presented reflect Bentham's continual effort to demonstrate the superior rigour and clarity of his scientific jurisprudence in comparison to the systems of his competitors.

I pass now to section [i] of the introduction to the Elements, the section dealing with the nature of happiness and its status as the end or goal of legislation. Those who have subscribed to the 'conventional wisdom' that Bentham's utilitarian premises are simplistic on the basis of a reading of the first few pages of the Introduction to the Principles of Morals and Legislation will find here a corrective to the common caricature of Bentham as a monomaniac who did not think the foundations of utilitarianism through with any thoroughness or discernment. Fully 80 sheets of manuscript work are devoted to the topic of the anatomy of happiness. Bentham observes in these pages that he got "the idea considering happiness as resolvable into a number of individual pleasures" from Helvetius, whose De L'Esprit he contrasts with the works of Cicero ('a heap of nonsense') and the French philosophe / moralist Maupertuis, whose "false and melancholy conclusions" reflected "the wrong turn he gave to his definition of the word pleasure" and have resulted in "his book's⁴⁶ having been still less noticed than it deserves". [UC xxvii, p. 34]. Many more sheets of text in this section are taken up with an analysis of the "Dimensions of Happiness", by which Bentham means the dimension of pleasure: intensity, duration, proximity or remoteness and degree of certainty [e.g. UC xxvii, p. 38]. This approach, Bentham says, he took from Beccaria's Dei delitti et dele pene [Ib. p. 34]. There is also a long and interesting section on money, which Bentham sees as "the only current instrument of pleasure" (alluding to its role as currency?) [Ib. 35] and perhaps more importantly as

"... the only original measure of such pleasure as it belongs to the Legislator to bestow, and of such pain as is derivable from the same source." [Ib. 36]

Many of the features of Bentham's famous calculus of pleasures and pains are laid out here as clearly, fully and reasonably as one could wish. But the most important feature of this section of the Introduction for my present purposes is Bentham's statement that he derived the essential "foundation" for his "complete system of moral science" from Beccaria's analysis of crimes and punishments in terms of pleasures and pains:

Considering that punishment is but pain applied to a certain purpose, that the value of a pleasure is composed of the same articles, and *that pains and pleasures, and actions in so far as they had a tendency to produce or prevent the one and the other were all that morals and politics or so much as was of any use or meaning [in] those sciences had in view*, it seemed to me that such an analysis was the very thing that was wanted as the foundation for a complete system of moral science. [UC xxvii, p. 34 emphasis added]

In short, Bentham's analysis of happiness, understood as an aggregation of discrete pleasures and pains, inspired by Helvetius and Beccaria, was the foundation of his science of Critical Jurisprudence – a 'complete' and rigorous hedonistic systematization of morals and legislation

⁴⁶ Maupertuis was well known for his Systeme de la Nature and his Essai de Cosmologie, but the work to which Bentham probably refers here is his Essai de Philosophie Morale (Berlin, 1749)

capable of supplanting with ease – or so Bentham hoped – the woolly-minded efforts of his competitors, if only divines, politicians, lawyers and citizens would listen to the voice of practical reason.

I alluded above to one ‘special’ feature section [iii] of the Introduction to the Elements, and I now return to that feature to bring my investigation of the text of the Introduction to a close. This section on “The Division of Laws” may at first blush appear to be less significant and more technical than the sections of Happiness or on the nature of Law. This is a misleading impression, however, for the section deals with more than one division. The one to which I now turn is not that between civil and penal laws, but the tripartite division of laws into “Divine, Natural and Municipal” [UC xcvi.110]. This division, characteristic of theories of jurisprudence from Aristotle to Grotius, is in Bentham’s view the source of the ‘erroneous’ idea that laws differ not only in their ‘subjects’ but in their ‘origins’ [Ib.]. As a result,

... instead of one consistent System of Laws whose end therefore is consistent and the same, we have three different though if one may say so not always distinct Systems jarring and crossing each other at every turn: whose ends ... may be different, and contradictory and inconsistent. [UC xcvi, pp. 108-9]

Almost all of the (so far discovered) text of this discussion is continuous, and is contained in one block of manuscripts – UC lxx (a), pp. 14-30. The argument is too complex to be conveyed here in full, but its essential features are as follows: Bentham rejects both theological and naturalistic foundations for legal and political justice, and asserts that justice properly understood cannot be anything more or other than a function of “public utility”. What is commonly referred to as “natural justice”, as distinct from public utility, is nothing but an articulation of the established “expectations ‘ of political society as to the consequences (in terms of happiness) flowing from public or private actions occurring within it: ”*Natural Justice is nothing but conformity to General Expectation*” [UC lxx(a), 19 emphasis added], which Bentham sometimes calls “natural expectation” [See UC lxx(a), 20 marginal heading]. But natural jurisprudence offers no better foundation for its ideas of “natural expectation” than “general opinion” or “an universal opinion (supposing there is such a thing in the world as an universal opinion on any question)”. But, says Bentham, “opinion is what I am not satisfied with”. “Truth”, he asserts, “cannot rest upon an eternal circle of opinions”. His scientific approach to politics, morals and justice is “founded upon sensation – that is certain – and sensation is the highest evidence – that is also certain. [All references from UC lxx(a), p. 22] It gives intrinsic weight to “popular expectation” but only in so far as expectation IS the expectation of utility (i.e. of pleasures and pains “in prospect”):

Where original utility is neuter ... consult popular Expectation. From thence results a derivative Utility – where that Expectation is neuter, Utility follows certainty fixed on either side - [UC lxx(a), p. 20]

“The great advantage” of this scientific approach to the evaluation of expectations is that it offers a single comprehensive, flexible, pragmatic, accessible and clear criterion for the adjudication of every case to which it is applied.

... it presents all along a certain matter [ms. original: ‘fact’] on which the opinion pronounced in any instance that such a thing is right or wrong, is equity or is not equity, is founded.

Now this matter of fact is no other than this viz. – the state of sensations upon the commission of an act of the persons within the circle of its influence: viz. of sensations ... partly present, partly future in certainty partly future in contingency, oestimated all together at their present value. [UC lxx(a), p. 22]

“The science of Jurisprudence”, Bentham concluded, “(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.” [Ib.] The contrast between this model of scientific explanation and the speculations of natural law theorists could not possibly, he argued, be more absolute:

Founding our notions of what is politically right & wrong by enquiring what is the will of the Deity in that behalf as it stands in revelation, we build a foundation for our enquiries which is comparatively obscure; but endeavouring to found them upon something that is not the principle of utility, nor yet of revelation, we have none [ms. original “no foundation”] at all. [UC lxx(a), 16]

So much for justice as the offspring of Divine Law – or, for that matter, of Pufendorf’s *socialitas*. Justice is public utility – nothing more and nothing less. At UC lxx(a), p. 17, Bentham begins a section of manuscript with the marginal heading “Imports of JUSTICE and UTILITY contrasted”.⁴⁷ He begins by pointing out that the utility he intends to contrast with justice as the goal of legislation and morals is public utility: “‘Utility’ standing by itself without any epithet (as ‘Private’) to restrict it shall mean public or general utility”:

viz: utility accruing either to many at once, or even to a single person so it be not counterbalanced by a prejudice equal in magnitude (viz: intensity and duration) & number to any others.

Bentham sees the potential for conflict between public utility and traditional ideas of justice, and in a sustained discussion of this issue he attempts argue the problem away. It is only in an ‘erroneous sense’, he says, that public utility is said to be ‘opposed to justice’. The mistake lies in separating categorically, rather than weighing together, the utility of individuals as such on one hand and of the public on the other. Only, to use Bentham’s own example, if the personal utility of A is ‘laid wholly out of the question’ can it be [mistakenly] asserted that public utility is advanced by the confiscation of her property, such that justice must be invoked to prohibit such confiscation. The trick is, Bentham seems to say, to remember that the distinction between individual and collective utility is not the same as that between private and public utility:

The question lies not between the Public on one part, & himself distinct from the public on the other: but between that part of the public which he is, on the one

⁴⁷ The Capitals are Bentham’s. It may be noteworthy that alongside this heading he writes “Utility etc. Definiend[a]” – i.e. definitions to be given of utility and related terms or phrases. He then lists a series of such ‘definienda’, beginning with Utility itself, “a neutral term & of the highest abstraction”. The next entry in this list of definienda is “Principle of Utility”. Might this mean that it was just at this exact point that Bentham first undertook to define what eventually became the most familiar and fundamental of his principles? One thing that is clear from this page is that this definition was to be presented in the Elements “After Dimension of Happiness”.

part, & the remainder of the persons of which the public is composed, on the other. [UC lxx(a), 17]

The utility of the citizen simply IS public utility. Bentham's position seems almost Rousseauian: The Sallus populi consists not in the sacrificing of private or Public interest; but in the union of both [Ib.]

He took a slightly different approach to the problem of private vs. public utility in the manuscripts (referred to above) for the chapter to be called "Key Terms in Universal Jurisprudence"⁴⁸. Here he emphasized the invariably coercive nature of any system of jurisprudence, and in effect addressed the private / public problem in terms similar, *mutatis mutandis*, to those later used by John Stuart Mill in articulating his famous 'harm principle' in his essay On Liberty:

The whole system of Jurisprudence displays itself in the coercing of one party for the benefit of another. It may admitt of controversy whether the Law would do right to coerce a man merely for his own good. But what admitts of no controversy is that it does right in coercing him for the good of others. Under this description there is no operation of Jurisprudence whatsoever but may be comprized. [UC lxxix, p. 44]⁴⁹

The problem which troubles Bentham most in the Elements mss., however, is not that of personal vs. Public utility, but the problem of popular and political prejudice: the notion of justice is "favoured more than utility" because it is "more sublime – obscure – popular –" and in the end simplistic [Ib.]. Devotees of justice are all too likely to develop an "indiscriminate & unqualified admiration of sacrifice of interest":

... people ... get a notion that the more interest or utility is sacrificed the more justice is promoted – this induces a general prejudice or indisposition against General Utility, which is but the aggregate of particular utilities; not sacrificed but promoted. [Ib.]

Conceding "the difficulty of stating these matters clearly", Bentham nonetheless succeeded in hinting, in a more fragmentary passage, at perhaps the most fundamental problem he faced in arguing for public utility as a thing superior to and inclusive of justice. Justice, he suggested, has "two senses – a neutral and a favourable" [UC Lxx(a), 17]. The neutral sense of justice is the sense in which it "is an imaginary metaphorical being, raised by abstraction from the aggregate body of the subsisting Laws". This I take to be the sense in which we speak of or Canadian "system of justice" as a great and beautiful unitary thing, and use this iconic representation of it

⁴⁸ These are to be found mainly at UC lxxix pp. 44ff.

⁴⁹ To speculate: this passage was not hidden away – it is the text of page one, paragraph one, of a key chapter in Bentham's Magnum Opus. The manuscripts are well organized, and the handwriting is exceptionally clear. We know that J. S. Mill read a great deal of Bentham manuscript material. Indeed, he edited some of the most Byzantine, illegible and formidable materials of all, the manuscripts on the laws of evidence. He COULD easily have read this text long before 1859.

to deflect criticisms of its very real and visible injustices and inefficiencies. “In its favourable sense”, Bentham continues, “it means that course of legislation or decision ... which in the instance proposed has the speaker’s approbation.” Whether speaking as an interested participant (in the sense of vested interest – what Bentham was later to call ‘sinister interest’) in the existing system of justice, or as an individual favoured by one of its decisions or policies, the partisan of ‘justice’, Bentham thought, could all too easily disguise personal interests contrary to public utility by associating them with justice, a thing held to be “superior in utility to utility itself” [Ib.].

Conclusion: scientific jurisprudence and political radicalism

It is useful to be aware (and a study of these early manuscripts heightens, I think, this awareness) of the fact that the project which enabled Bentham to combine his youthful interests in Law and Science was the project of developing a critical jurisprudence. We have seen that Bentham turned to jurisprudence **before** he coined the term "utilitarian". Before he was a democratic radical or a utilitarian radical he was a philosophical radical in a particular sense – a surprisingly political sense. He defined his project **against Blackstone** - yet Bentham used a rhetoric of his own; against **Natural jurisprudence**: yet the preface to the Elements echoes faintly the beginning of Puffendorf's On the Duties of Man and Citizen; against "**A host of Scotch Sophists**", though Bentham was in some respects a strong admirer of both Hume and Smith. What concerns me here, however, is a particular question: having rejected Whiggish rhetoric, Natural jurisprudence and sentimentalism as bases for his own project, how did Bentham characterize his censorial [critical] jurisprudence?

Methodologically it was to be 'scientific', which meant to Bentham that it would draw its vocabulary from "the sterling treasury of the sciences".⁵⁰ This vocabulary [the early Bentham manuscripts go on at great length about this] was to be a carefully constructed one - neither colloquial nor rhetorical but authoritatively descriptive. Unlike Hume, however, Bentham would not hesitate to derive a world of 'oughts' from this catalogue of what 'is'. The experimentalism of David Hume - and indeed the naturalism of his friend Adam Smith - was pursued in an interrogative voice, and both men accepted philosophically the contingency of all identifications, prescriptions and systems. If they are to be considered liberals, they must be thought of as liberal pluralists. Bentham, if thought to be classifiable as a liberal, must be considered a liberal perfectionist. One of Bentham's proudest boasts was that his system of thought constituted a "logic of the will" [or of 'imperation'] as comprehensive as Aristotle's logic of the understanding.⁵¹ His empirical studies - initially, to be sure, carried out via a questioning of many established structures of power and knowledge - were to generate both descriptions and prescriptions expressed in the imperative, not the interrogative, voice. In a way the ultimate realization of Bentham's system of jurisprudence in its broadest sense comes not with the publication, of Of Laws in General or An Introduction to the Principles of Morals and Legislation, but with the appearance of his Table of the Springs of Action. This empirical critical

⁵⁰ Bentham used this phrase, either in the Fragment on Government or in the Comment on the Commentaries, in distinguishing his own scientific mode of discourse from the rhetorical ‘cosmetic arts’ of Blackstone. FULL REFERENCE NEEDED XXXXXX

⁵¹ See IPML ed. Burns & Hart, preface, p. 8. Cited above.

science of jurisprudence, this imperational logic of human action, was to use external not internal criteria for the identification and evaluation of "What Things Exist".⁵² Only on this basis, Bentham thought, could the study of the law cease to be a mere course of familiarization with what the powerful members of the religious and political establishments felt the law ought to be. Finally, Bentham's new science of jurisprudence would be Newtonian - "universal" - in scope: inspired by Helvetius's characterization of Newtonian science in *De L'Esprit*, Bentham aspired to construct an analysis of law that could be applied to any legal system at any time and in any place. It would account for the impact of law on "the universal system of human actions"⁵³; it would narrate the legal development of society and government from a hypothetical temporal point of origin which Bentham at one point in *OLIG* likened to Genesis: "As yet there is no law in the land. The legislator hath not yet entered upon his office. ... This is the first day of the political creation: the state is without form and void".⁵⁴ And its goal was nothing less than "the perfection of the law" combined with the "optimization" of "the condition of mankind as far as depends upon the Law".⁵⁵

All of the above meant to Bentham that his jurisprudence must be 'critical' or 'censorial', not apologetic or merely descriptive, and therein lay its novelty and its peculiar excellence as he saw it. Bentham seems to have despised descriptions (whether political or religious) that were simply meant to evoke awe or deference, and he had no time, enthusiast that he was, for description for its own sake. He was not interested in portraiture where caricature would suffice to produce the appropriate response. Description in his jurisprudence must lead logically and inexorably to prescription.

We have seen that Bentham strove to distinguish his radically new and scientific principles of jurisprudence, politics and ethics from the abstract systems of legal theorists such as Blackstone, philosophical moralists like Hume and Smith, and philosophers of the natural jurisprudence school. But this essay's concern with such competitors might incline the reader to see Bentham, as many in the past have done, as a 'closet philosopher', unengaged in the politics of his day until dragged into involvement by the politically radical James Mill after 1800. Much has been written about Bentham's 'conversion' to political radicalism, apparently based on the understanding that he had no sense of himself as politically radical (as distinct from philosophically radical) in his early works. It is difficult to sustain this perspective in the face of a reading of the manuscript sheets (some 450 of them) which make up the extant text of the *Appendices to the Elements of Critical Jurisprudence* which deal with the question of how to

⁵² A substantial part of the "PPI" mss. In UC Box lxix are given this heading and devoted to laying out a Benthamic critique of traditional metaphysics. An excellent example is at p. 52: "I assume in a word the existence of what is called the material world. ... and that without scruple: notwithstanding it has been the subject of so much controversy. I assume it boldly for this reason: because in point of practise, no bad consequences can ... arise from supposing it to be true; and the worst consequences can not but arise from supposing it to be false."

⁵³ See *Of Laws in General*, Chap. 10, section iv, "Alterative [Laws]", para. 16, p. 120. Cited in *Bentham on Liberty* at p. 126.

⁵⁴ See *Of Laws in General*, Appendix B, pp. 252-3. Cited in my *Bentham on Liberty*, U of T Press, 1977, p. 130.

⁵⁵ The phrase occurs in an important passage from Bentham's essay "On the Influence of Place and Time on Matters of Legislation", quoted at length in *Bentham on Liberty* at p. 148-9.

advance the new science of jurisprudence in the face of the “Obstacles” which are ranged against it. These obstacles are not hostile or competing philosophical system, but plainly political “establishments”. They are the groups of powerful and wealthy people whom Bentham will later in his career famously come to identify as “sinister interests” inherently opposed to the utilitarian advancement of the public interest. These sinister interests, *avant le nom*, dominate the “Obstacles” mss because they ARE the obstacles.

In an overview of the intended Appendix on “Obstacles” [UC xcvi, p. 1] Bentham divided obstacles into “interests” and “prejudices”. It almost goes without saying that prejudices were, in his view, largely symptomatic of, protective of, even generative of, counter-progressive interests. His list of examples of entrenched interests is both prophetic (for we know that he will do battle with these interests all his life) and accurate as an indication of the arguments he will deploy in the subsequent lengthy but fragmentary body of text devoted to this topic. He cites the “professional” interests of “lawyers”, “Divines”, “Authors” and “Booksellers”. Legislators” are said to have an interest in “Indolence”. “[P]arty – men as such” have an interest in “opposing a good thing because proposed by their antagonists who would gain credit, besides the bona fide prejudice ... of all profitters by abuses”.

All persons interested in abuses of any kind behave to make common cause against an extensive plan of inquiry & reformation. The aspect of the eye of scrutiny is malignant to them.

“Prejudices” [sometimes “prejudges”] include the “professional” prejudices of “Divines”, of Lawyers and Legislators who are said to exhibit “prostration to authority”, “an extravagant idea of the excellence of the law” and “indifference to evil”, and specifically the “Aristocraticall” prejudices of members “of the Upper House”. This may be thought a familiar rogues gallery of Bentham’s political foes, but these manuscripts are the only evidence we have that Bentham systematically identified them and critically analyzed the nature of their opposition to reform as early as the 1770s. To the expected list of elite adversaries I have mentioned, he made two curious additions. He identified a popular prejudice “concerning liberty – against repeal of Mag[na] Charta”, and, ironically in view of his eventual elder-statesman status among reformers and radicals, he listed also the prejudices “Of Age” in “Old men”. [All references are to UC xcvi, p. 1]. But he did not stop at identifying the interests and prejudices which would naturally incline members of the key British “establishments” of Church and State to oppose radical reform. He also attacked a specific problem which so far as I know he has not been thought ever to have addressed anywhere but in these manuscript pages: the problem of the relationship of theory to practice. This was perhaps a moment when the author whom Marx memorably dismissed as “a genius in the way of bourgeois stupidity” showed, even by Marx’s own standards, more of the former than of the latter. Under the heading of “Obstacles Prejudges Professional – against Theory X Practise [which means, according to the conventions of Bentham’s marginal symbols, against the separation of theory from practise], he wrote:

There exists no good foundation for the opposition betwixt Theory and Practise, or for the common saying, “such Proposition has been said to be good in Theory but bad in practise.” – the consequence of this inaccurate and abusive expression has been that the establishment of general principles in practical sciences has been

discouraged and considered as useless, not upon the pretense of their being false, but merely because they are general [UC xcvi, p. 5 side 1]

At issue here for Bentham is the question of the “establishment of general principles in practical sciences”. His opponents in this debate are not the proponents of alternative systems of ‘general principles’, but those in power who dismiss theoretical principles as irrelevant to ‘practise’ as a way of undermining all improvement, advancement and reform. Bentham’s radicalism, in this context, is expressed not in the nature of his principles, but in his insistence that practical sciences must be principled – that traditionalism and “prostration to authority” must not be allowed to govern the moral and political practices of his country – indeed of any country. The unity of theory and practise in Bentham means not only that practise must be principled, but that principles must be practical:

... a proposition people will sometimes ... say is good in theory but it won’t do in practise [UC xcvi, p. 5 side 1]

“This inaccuracy of expression [is] the ... source of many important and universal [ms. original ‘real’] mistakes” [Ib., side 2]

The consequence has been drawn that no theory deserves attention because however true it may be in itself, when applied to practise it will be found erroneous. I say, in that case it never was true, but appeared so from the twisted view we took of it & for want of applying it to practise. [Ib.]

Produce a doctrine which you assert to be true in theory and false in practise, and I will engage to show either that it is false in theory, or if true that it is true also in practise. [Ib. side 3]

Bentham’s point is that the interpenetration of theory and practice is essential and, when both are correctly understood, inescapable. As he said more famously of the principle of utility⁵⁶, those who attempt to deny this only succeed in confirming it unintentionally:

they think they have found a sure way to escape error by laying down none but particular positions – and yet if they were to take the pains to examine the construction of their arguments they would find that all the foundation their particular positions have lies in their being necessary consequences from some general principles which they recognize without express acknowledge[ment] [ms. original “tacitly refer to], in such a manner that if those general propositions are erroneous, [the] particular positions have no foundation. Thus by not examining and establishing those general positions, by not ?enquiring? they think they escape error – by proving them, they think they should run into Theory, which as being Theory would be useless ... as the safer way therefore, they take them for granted without proving them or even considering whether they are either self-evident or capable of being proved or what makes them still more unexceptionable, evident to sensation. [Ib.. side 1]

⁵⁶ In the most famous passage from Chapter 1, parag. 1 of IPML att p. 11.

The Elements of Critical Jurisprudence was a work addressed to issues in law, legislation, politics & government, and ethics at the level of a kind of Benthamic *praxis*. It was precisely this quality which gave it its radical character. “Censorial jurisprudence” supplied a reservoir of general practical principles whose truth was “evident to sensation”, and Bentham was willing to subject them all to the same ‘acid test’: do they work – are they true – in practise? It was by this chain of reasoning that he arrived at the single test and the single principle which could unite theory and practice in such a way as to “optimize the condition of mankind” by maximizing human happiness. This was, of course, the test, and the principle, of utility. Readers of the present essay will have to decide whether it is appropriate or not to describe the project that has been laid out here – the project of a scientific, critical jurisprudence that is also a science of government as it ought to be conducted - as an exercise in “bourgeois stupidity”. It is to be hoped that at least some readers may, on the other hand, appreciate the critical and inventive genius that animated that project. We can know with certainty, in any event, that Jeremy Bentham would have thought that Marx’s characterization of him was only 50% correct.⁵⁷

⁵⁷ When Bentham read Helvetius at age 21 (1769) Bentham decided that he himself possessed a “genius” for “legislation”. See Bowring’s Works of Bentham, Vol. X, pp. 26-7, and Mack, Mary P., Jeremy Bentham: an Odyssey of Ideas, 1748-92, London, Heinemann, 1962, pp. 55-6. Helvetius (see De L’Esprit, Essay IV, Chapter 1,) and Bentham (see Bentham on Liberty p. 70) both equated “genius” with the capacity for “invention”.

