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# The Role of Universal Jurisprudence in Bentham's Legal Cosmopolitanism

Robert Loring

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- 1 As the process of globalization continues, philosophers have become more interested in cosmopolitanism, its various ethical, political, cultural, and legal guises, and the historical origins of these contemporary themes. Where Bentham has been acknowledged as part of the history of cosmopolitanism, it is largely as a moral cosmopolitan, or as a critic of natural rights.<sup>1</sup> When reference is made to the legal aspect of his cosmopolitanism, the survey literature usually refers only to his nascent conception of international law,<sup>2</sup> a topic that has been addressed often in recent scholarship and which I will not deal with further.<sup>3</sup> This essay is interested in the cosmopolitan features of Bentham's legal philosophy beyond his international law writings, those which are associated with his universal jurisprudence. This mode of jurisprudence involves the analysis of what is common to the legal systems of all states, and the proposing of laws that should be common to all states.
- 2 Bentham's jurisprudential doctrines have been discussed at length in several excellent specialist works,<sup>4</sup> and William Twining's studies have done much to make Bentham's universal jurisprudence known to a wider audience of legal theorists.<sup>5</sup> David Lieberman has, like Twining, drawn explicit attention to the cosmopolitan quality of Bentham's universal jurisprudence,<sup>6</sup> though without giving an extended discussion of what that entails. Most of Bentham's energy for world-wide legal reform was directed to the improvement of domestic legal regimes, from the United States, to Russia, Greece, Portugal, Spain, and the states of Spanish America,<sup>7</sup> rather than to international law, and it seems that his universal jurisprudence deserves some renewed attention. My aim in this article is only to build on previous research by highlighting some neglected aspects of universal jurisprudence, and so contribute to an expanded understanding of what Bentham's legal cosmopolitanism involves.

# 1. Defining jurisprudence and its branches

- 3 The first step is to establish what Bentham means by jurisprudence in order to know what elements of his thought are included under this label. This is where we encounter the first difficulty, for, as Twining notes, 'jurisprudence' does not have a settled meaning.<sup>8</sup> In standard textbooks, the word is acknowledged to signify two different things: substantive case law, or theories about law.<sup>9</sup> Bentham also acknowledged both senses of the word, while recognising the particularly French provenance of the 'case law' meaning. As he writes in *Chrestomathia*:

The *science* corresponding to the *art* of judicature is termed Jurisprudence. But this is not the only sense in which the word Jurisprudence is employed. In France and in French it has been used to designate what, in English, is called *Common*, or *Unwritten, Law*, in contradistinction to *Statute*, or *Written, Law*.<sup>10</sup>

- 4 The meaning of jurisprudence varies with use. There are occasions when Bentham employs 'jurisprudence' as a synonym for 'law', referring to the substance and interpretive history of a particular legal norm, embodied in case law, precedents, and other legal commentary. He speaks, for example, of "that portion of Jurisprudence that is called the Civil Law".<sup>11</sup> There are other times in his writings when jurisprudence means something more like 'theory', the sense it currently has in the Anglo-American tradition where it refers to "the study of general theoretical questions about the nature of laws and legal systems".<sup>12</sup> We can find this theoretical sense present in Bentham's writings, where he claims: "Jurisprudence is the art of knowing what has actually been done in the way of internal Government".<sup>13</sup> Jurisprudence here refers to a set of philosophical principles, or interpretive theories, for making sense of laws. In light of this double meaning of jurisprudence—referring either to 'law', the legal *objects* to be studied, or to 'theory', the *principles* for performing the study—I will briefly examine Bentham's jurisprudential categories.
- 5 At the end of *Introduction to the Principles of Morals and Legislation*, Bentham presented a taxonomy of the branches of jurisprudence. His first division distinguished between "expository" and "censorial jurisprudence". The former ascertains "what the law is", and the latter, "what it ought to be".<sup>14</sup> In this case, jurisprudence seems to mean 'theory' in the sense explained above. Expository and censorial jurisprudence are different branches because they consist of different principles and theoretical tools for either explaining or proposing law. Bentham then makes a sub-division of expository jurisprudence, distinguishing between its "authoritative" and "unauthoritative" modes. The first occurs when it is the legislator that represents what the state of the law is, and the second when it is any other person.<sup>15</sup> Here, what is different about the two kinds of jurisprudence is not necessarily the principles being employed, but the legal status of the documentary product.
- 6 His next division refers to the geographic extent of the legal objects under consideration. When referring to the "laws of such or such a nation" it is local jurisprudence, and when referring to "the laws of all nations whatsoever" it is "universal jurisprudence". This is to use 'jurisprudence' in the first sense mentioned above, as referring to 'law'. The distinction seems not to be concerned with the nature of the jurisprudential principles being used, but with the kind of legal objects being dealt with. Local jurisprudence deals with local laws, and universal jurisprudence deals with universal laws.

- 7 Bentham, on one occasion, gave universal jurisprudence a very narrow scope. In the opening pages of *IPML*, he said that the “exposition” of a “short list of terms... contains all that can be said with propriety to belong to the head of *universal jurisprudence*”. He listed some relevant terms as examples in a footnote: “obligation, right, power, possession, title, exemption, immunity, franchise, privilege, nullity, validity, and the like”.<sup>16</sup> This narrow descriptive task was the conception of universal jurisprudence that Bentham’s nineteenth-century positivist disciples advocated. Philip Schofield notes that many of Bentham’s successors claimed that the principles for censoring legislation had no place within general or universal jurisprudence, which was restricted to an analysis of the basic terms and form of law.<sup>17</sup> However, as Schofield shows, that was a departure from Bentham’s thought, whose “conception of jurisprudence was wide-ranging”,<sup>18</sup> and included normative principles for reforming and improving the law.
- 8 Bentham gestured toward this broader conception of universal jurisprudence during his taxonomical discussion of the various branches of jurisprudence. There, Bentham allowed that the “censorial line” of jurisprudence which had regard for what the “substance of the laws” ought to be, was just as “susceptible of an universal application” as the expository line which “regards the words.”<sup>19</sup> For this reason, it is misleading to suggest, as Gerald Postema once did, that local jurisprudence was concerned with substance, while universal jurisprudence was concerned only with terminology and form.<sup>20</sup> Instead, Bentham recognised that universal jurisprudence could be carried on in both the expository and the censorial modes, and have regard for both the form and substance of law. Bentham is concerned with both what is, and what ought to be, law in all nations of the globe. This essay will proceed by looking in turn at universal censorial jurisprudence then universal expository jurisprudence, as manifestations of Bentham’s legal cosmopolitanism.

## 2. Universal Censorial Jurisprudence

- 9 Bentham wrote of himself, “J.B. the most philanthropic of the philanthropic; philanthropy the end and instrument of his ambition. Limits it has no other than the earth.”<sup>21</sup> How might that philanthropy be employed? He believed that corrupt and faulty legal systems were responsible for much of the evil in the world and that the “greatest happiness” in “every political state” would be secured if they could each be “provided with an all-comprehensive body of law”.<sup>22</sup> Jurisprudence was, then, the “Science which holds in her hand the happiness of nations”.<sup>23</sup> The best contribution he could make to global happiness would be the development of that science, which was “of all services the greatest that can be render'd to mankind”.<sup>24</sup> In a letter to the American William Plumer Jr., Bentham made clear the global reach of his ambition. The work he was performing in drafting legal codes was not for New Hampshire or even the United States alone, but “had in view the population of the whole earth”.<sup>25</sup> Concerned, as it was, with what ought to be law in all countries, censorial jurisprudence done in a universal mode had a cosmopolitan aspect. The “Censor” who would assume such a task should be a “citizen of the world.”<sup>26</sup>
- 10 As we have seen, the task of universal censorial jurisprudence is concerned not merely with form and terminology but with “what regards the substance of the laws”, proposing laws that would apply to “all nations alike”.<sup>27</sup> For adhering to this line, Bentham was accused by his contemporaries of a naïve universalism which presumed

to impose a rigid uniformity upon societies widely different. John Stuart Mill referred to this “accusation sometimes made both against Bentham and against the principle of codification—as if they required one uniform suit of ready-made laws for all times and all states of society.”<sup>28</sup> Mill went on to point to Bentham's essay ‘On the Influence of Time and Place in Matters of Legislation’ as evidence that he was indeed attentive to differences between nations and the requisite legislative nuance. Bentham had in fact already adverted to the need to incorporate local variation into his universal system in *IPML*. There, during his taxonomy of the branches of law, after claiming that censorial jurisprudence could be universal, he added the following qualifier:

That the laws of all nations, or even of any two nations, should coincide in all points, would be as ineligible as it is impossible: some leading points, however, there seem to be, in respect of which the laws of all civilized nations might, without inconvenience, be the same.<sup>29</sup>

- 11 In what follows I will examine several central features of his censorial jurisprudence. I will begin with the most general principles, the fundamental normative principles of the greatest happiness its subordinate ends. Then I will look at the natural arrangement and the identification of offences. After that, I will consider how those principles are to be applied in detail in different contexts by looking at his essay ‘Place and Time’. At that point, the significant range of permissible variety may seem to obviate any claim to universality. I hope to show that Bentham's more plausible claim to universality lies more in the principles for generating laws than in the details themselves.

## 2.1 Principle of Utility

- 12 Bentham's entire normative program was grounded on the principle of utility. It has been discussed at length in the extensive secondary literature, and I will only offer the briefest sketch here.<sup>30</sup> Bentham's basic value theory was hedonistic. “Good is pleasure or exemption from pain...Evil is pain or loss of pleasure”.<sup>31</sup> According to the principle of utility, actions that produce more pleasure than pain result in a preponderance of good. They augment the happiness of the community and are said to be right, and approved of. Actions that produce more pain than pleasure result in a preponderance of evil. They diminish the happiness of the community and are said to be wrong, and disapproved of.<sup>32</sup> Approval should be “proportioned”<sup>33</sup> to the tendency acts have to increase happiness; the more happiness an act produces, the better it is supposed to be. The best state of affairs for any given community is that in which the happiness in the community is as great as it can be.
- 13 For Bentham, the proper aim of government is the greatest happiness of the members of the community. However, government cannot, by and large, bring about that happiness directly. Instead, it must pursue that ultimate goal indirectly, by pursuing more immediately the four ‘subordinate’ ends of utility, and these ends are just as universally applicable as the greatest happiness principle:
- In every country, and for every race, at every time,—of the all-comprehensive and only defensible end—the *greatest happiness* of the greatest number—of the four most comprehensive particular and subordinate *ends*, viz. subsistence, abundance, security, and equality...will the description be found the same.<sup>34</sup>
- 14 At the highest level of generality, then, Bentham insists on a real uniformity. The greatest happiness is a universal political principle that should be the aim of

governments everywhere. This uniformity applies not only at the highest level of generality, but also at the lower level of the subordinate ends of government. Subsistence, abundance, security, and equality are the four subordinate ends which are universally appropriate for facilitating the greatest happiness.

## 2.2 Natural Arrangement

- 15 There also ought to be uniformity at one step below the subordinate ends, in the division of offences. The main subordinate end of government, security, protects the happiness of the community by proscribing as offences actions that will diminish the community's happiness. The identification and division of offences is carried out according to the 'natural arrangement',<sup>35</sup> and Bentham thinks a universal uniformity will likewise apply here. This 'natural' method of arrangement is said to be natural because it takes as its organizing principle that which humans are most naturally interested in: it is concerned with phenomena which, due to the "common constitution of man's *nature*", are ones which "*naturally*, that is readily, engage, and firmly fix the attention of any one to whom they are pointed out."<sup>36</sup> For Bentham, the phenomena of human life which most readily 'engage' and 'fix' people's attention are of course pleasure and pain, and this was part of the natural condition. "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*".<sup>37</sup> If this applies to action in general then it also applies to the spheres of life touched by the legal system, and so "of any Law, or of any act which is made the object of a Law, the only consequences that men are at all interested in, what are they but *pain* and *pleasure*?"<sup>38</sup>
- 16 The natural arrangement is primarily a procedure for identifying and classifying as offences those harmful modes of conduct which produce more pain than pleasure and so do not conform to the principle of utility. The division of offences takes account first of the class of sufferer of harmful acts, and then considers the probable modes of the harm inflicted.<sup>39</sup> The offence will be categorized according to the sufferer of a harmful action, being either the offender himself (self-regarding offences), another person (private offences), a distinct group of persons (semi-public offences), or the entire community (public offences).<sup>40</sup> In each of these cases, there will be acts characteristically harmful to the particular class of sufferer, and of special concern are private offences, acts where one individual harms another individual. Bentham develops the class of private offences by saying that a person suffers harm in one of two ways, either directly, "in his own person", or indirectly by means of "some *material* relation".<sup>41</sup> These relations must either be to things or to other persons, and in the first case refers to property, and in the second, to one's reputation or condition in life.<sup>42</sup> There are four ways, then, in which Bentham perceives a person may be harmed: "in his person, his property, his condition in life, or his reputation."<sup>43</sup>
- 17 Bentham repeats his analysis at length for the other classes of sufferer, producing an elaborate classification of all the modes of conduct in which an offender may diminish the happiness of a community. He called this classification "a map of universal delinquency, laid down upon the principle of utility".<sup>44</sup> This abstract map of possible offences served the censor in a particular way. "To the legislator", he writes, the natural arrangement,  
is a kind of perpetual lesson: serving at once as a corrective to his prejudices, and as a check upon his passions. Is there a mischief which has escaped him? in a natural

arrangement, if at the same time an exhaustive one, he cannot fail to find it. Is he tempted ever to force innocence within the pale of guilt? the difficulty of finding a place for it advertises him of his error.<sup>45</sup>

- 18 By mapping an ideal list of offences, the natural arrangement serves as a standard for the legislator, showing her where there is an unjustified law, and where she should consider creating a prohibition where currently there is none. This analysis is, for Bentham, “as applicable to the legal concerns of one country as of another”.<sup>46</sup>

## 2.3 Principles of Punishment

- 19 It would, however, be too simplistic to think that all the possible offences identified by the natural arrangement should be subject to legislative prohibition. As a moral rule, each person ought to refrain from every “act which promises to be pernicious upon the whole to the community”. But it is “not every such act that the legislator ought to compel him to abstain from.”<sup>47</sup> Instead, Bentham’s starting point is always that a law in itself is evil.<sup>48</sup> Every efficient law, whether it be a command or prohibition, creates an obligation in some form or other that restricts the freedom of individuals and thereby creates some measure of evil. That evil is the moral ‘cost’ of a law, and if the law only produced evil, it would not receive the approval of the principle of utility. To justify the evil produced by imposing a law, “it is necessary that in some *shape* or other, good be produced, and in *quantity* such as to make up for and *outweigh* the evil.”<sup>49</sup> If the evil of punishing an offence is greater than the evil it seeks to prevent, then Bentham thinks that kind of act is “unmeet for punishment”.<sup>50</sup> Of all possible kinds of wrong acts, it is in practice only acts by which happiness is “in the *highest* degree diminished” that shall be classified “under the several names of *offences*”.<sup>51</sup> The principle of utility determines not only which acts are morally wrong and liable to be made legal offences, but for those which are made offences, it guides the proportionality of punishment in such a way as to optimize deterrent effectiveness while producing the least suffering possible.<sup>52</sup> Applied in this way to the enforcement and consequences of laws, the principle of utility operates as a ‘rule for making rules’.

## 2.4 Axioms of Mental Pathology

- 20 When legislators consider the creation of offences, they are concerned “only with respect to those broad lines of conduct in which all persons, or very large and permanent descriptions of persons, may be in a way to engage”.<sup>53</sup> Being concerned with generalisations, the question which the law maker confronts is: does this *kind* of act in *most* cases produce more pleasure or pain? In order to make these generalisations, there need to be some assumptions about what both the agents and patients of certain sorts of acts experience. To serve this purpose, Bentham developed a set of empirical generalisations about human emotional reactions to typical events, and he termed these “axioms of mental pathology”.<sup>54</sup> The knowledge consisting in “moral *pathology*” dealt with “feelings, affections, and passions, and their effects upon happiness.” These feelings of women and men, Bentham believed, “are sufficiently regular to become the object of a science or an art”.<sup>55</sup> The regularity of these reactions led Bentham to claim that, having “universal experience as their immediate basis, they are incapable of demonstration”;<sup>56</sup> one could not appeal to any more basic facts to support them. In



virtue of the “incontrovertibility and extensive applicability” of these regularities, they could be given “the name of axioms.”<sup>57</sup>

- 21 What is important to realise is that though these axioms are in themselves just general psychological laws, they actually play a fundamental role in Bentham's censorial jurisprudence. He drew an analogy between legal science and medical science, saying that just as medicine was practiced according to axioms of physical pathology, politics ought to be practised according to mental pathology: “morals are the medicine of the soul: legislation is the practical branch; it ought, therefore, to be founded upon the axioms of mental pathology”.<sup>58</sup> He repeats this claim for the foundational status of the axioms in his *Pannomial Fragments*, writing that each axiom serves as the “ground for a legislative arrangement”.<sup>59</sup>
- 22 The relation between the axioms and legislation becomes clearer when we look at how they operated for Bentham. The axioms were grouped into classes, each class being related to one the four subordinate ends of utility: one class “relative to security, another to subsistence, a third to abundance, the fourth and last to equality.”<sup>60</sup> As such, the axioms guide the legislator in the proper “distribution of proprietary and other civil rights”<sup>61</sup> that are related to the relevant subordinate end. To the end of equality, for example, Bentham attached the axiom of diminishing marginal utility, which stated:

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...will be less and less at every particle.<sup>62</sup>
- 23 This axiom implies that any redistribution of material goods towards the least well-off would be conducive to an increase in the overall happiness of the community. This fact is captured in his principle of equality: the more equal the distribution of wealth in society, the greater the overall happiness. Bentham did not support complete equalization, and he strongly resisted the ‘levelling system’.<sup>63</sup> But he did think that inheritance and tax laws designed to effect a slow and gradual process of equalization were justified by the diminishing marginal rate of utility, and so the axiom served as a guiding reason to the legislator to enact such laws.
- 24 The goal of equality was not absolute. It had to be reconciled with the pursuit of security, which was for Bentham the most important of the subordinate ends. Related to the end of security, he proposed axioms like: “It is worse to lose than simply not gain.—A loss falls the lighter by being divided.—The suffering, of a person hurt in gratification of enmity, is greater than the gratification produced by the same cause.”<sup>64</sup> Taking the last axiom, we can see how it grounds legislative decisions regarding the security of the person. We might imagine a hypothetical scenario in which one or several persons were being gratified by their infliction of harm upon an innocent person, enjoying a degree of pleasure greater than the amount of suffering. In theory, this act would be morally justified by the principle of utility, and our intuitive opposition to this conclusion might lead us to reject utilitarianism. However, Bentham's axiom here tells us that we *cannot* conclude that the perpetrators of malicious retribution have more pleasure than the sufferer has pain. The axiom instructs us to assume that the sufferer's pain is always worse in such a case, and so we must judge the malicious act as an offence, and prohibit it accordingly.



- 25 The axioms served in this way to constrain the legislator in terms of what estimations could or could not be made about the degrees of utility an act was likely to produce. Viewed in this light, they function in a similar way to what Robert Nozick called 'side constraints'.<sup>65</sup> For Nozick, moral rights were not necessarily an end goal to be pursued; they were rather limitations on activity directed toward some other goal: "the side-constraint view forbids you to violate these moral constraints in the pursuit of your goals".<sup>66</sup> While different in content and scope from Nozick's moral rights, Bentham's axioms of mental pathology likewise create limitations on what legislators may or may not do in pursuit of their utilitarian goals. The constraining role that the axioms play led Paul Kelly to argue that "it is these axioms which are the foundation of Bentham's legislative project" and the basis of a "utilitarian theory of justice".<sup>67</sup> Despite the obvious importance of these axioms, they do not often receive the attention they deserve. They belong to the foundation of his censorial legislative science, and are universal, applying in all societies, everywhere.

## 2.5 Local Circumstances

- 26 I turn now to the grounds for legitimate difference in utilitarian legal codes in different countries. In *Codification Proposal* Bentham asserted that the broad outlines of a utilitarian legislative program were applicable to "all countries, to all races of men, and all times", while admitting that there would be local variation. He reiterated that there were, of course, features of human life that were specific to "different countries... different races of men, and in different times", and these he called "*exclusively applying circumstances*".<sup>68</sup> Bentham explained his notion of 'variation within uniformity' by appeal to the distinction between a genus and a species, noting that any apparently unique mischievous act "is a *species*, which, upon observation, will be found comprehended in a *genus* of injury, to which, in every country, men of every race stand at all times exposed".<sup>69</sup> Allowable local variations in species, then, must always find a place within the genera of categories derived by the natural arrangement.
- 27 Bentham worked out the grounds for variation in the species of offence in his essay 'Place and Time', written in the same period of output which produced *IPML* and *Limits*. The manuscripts for this work were edited by Richard Smith and a version of the essay was published in the Bowring edition of Bentham's collected works.<sup>70</sup> However, recent scholarly attention paid to the original manuscripts has shown how Smith distorted Bentham's work by smoothing over his criticisms of the British, giving the impression of a one-sided sense of civilized superiority.<sup>71</sup> A newly edited and published version of the essay<sup>72</sup> is now giving scholars the chance to re-examine Bentham's philosophy of legal transplantation, and that essay forms an important part of the picture concerning his universal censorial jurisprudence.
- 28 Bentham establishes the scope of enquiry by asking: "what is the influence of place and time on matters of legislation?"<sup>73</sup> The question of difference due to time is only of small interest to Bentham. His attention is focused on the differences due to place, and he elaborates those differences by reference to the various categories of offence: self-regarding offences, private offences, semi-public and public offences.<sup>74</sup> Of particular importance are private offences, offences against the individual, and he considers the four ways in which an individual might be harmed: in one's person, property, reputation, or condition in life.

- 29 With regard to offences against one's person, he thinks there are few, if any, reasons for "modifications on account of the difference of place". His grounding assumption is the universality of human nature. Humans all experience the same kinds of physical pain and pleasure, and "corporal sensibility...is in specie much the same all the world over".<sup>75</sup> Basic prohibitions against corporal injury will be the same everywhere, not only at the genus level, but at the level of species. Any difference here will be due not to "the pains and pleasures themselves", but to "the things that are, or are liable to be, their causes".<sup>76</sup> He gives the following example: "Stripping a man stark naked might be death in Siberia in circumstances in which it would be only play in the East Indies".<sup>77</sup> Similar facts are pertinent to semi-public and public offences. He discusses natural phenomena such as avalanches, earthquakes, and coastal erosion, and events such as plagues and famines,<sup>78</sup> and notes that the differences in environmental dangers ought to be reflected in the laws, especially concerning the regulation of land use, and building standards.<sup>79</sup> Despite obvious differences in the laws that will be required in different climates and territories, they will all be subsumed under the same genera of offences, retaining a superficial appearance of uniformity.
- 30 More important sources of legislative diversity arise with regard to offences against reputation and property. These are not strictly due to differences of geography; rather the difference in place correlates with some other difference, a difference in culture or religion. Whereas the sources of physical pain are known, uniform, and stable, there is much room for diversity and change in the source of mental pains. For Bentham, this kind of difference most often "turns upon the point of religion". He has long passages going into detail and giving examples of all the ways in which religions and cultures establish unique codes of moral propriety, social mores, and taboos, which together present a variety of occasions for pain, in the form of injuries to one's sense of propriety, injuries of defamation, and offences against reputation.
- 31 Bentham respects this diversity, rejecting a uniform approach to imposing cultural norms, and instead accommodating diverse practices as long as they are not in themselves manifestly evil. He mocks the ignorant Christian colonialist who is indifferent to cultural diversity, demanding only that his Bible be provided, and the "business" of framing laws "is done at once", without regard to existing customs:
- The laws they have been used to, no matter what they are: mine will supersede them: manners, they shall have mine, which are the best in nature: religion, they shall have mine too, which is all of it true, and the only one that is so.<sup>80</sup>
- 32 In contrast, Bentham is attentive to the emotional pain experienced during the forced and sudden change of deeply imbedded cultural norms, which would completely outweigh any small gain in happiness from a new arrangement. He is persuaded that the "changing of a custom repugnant to our own manners and sentiments, for no other reason than such repugnancy, is not to be reputed as a benefit".<sup>81</sup> Rather, the imperialistic imposition of norms is to be replaced with a deep "salutary doubt"<sup>82</sup> regarding the usefulness of even utilitarian-inspired modifications. His conviction is that no "law should be changed, no prevailing usage should be abolished, without special reason: without some specific assignable benefit which can be shown as likely to be the result of such a change".<sup>83</sup>
- 33 In a remarkable passage, he goes on to concretely apply this conviction by arguing for the permissibility of suttee, the custom in which a "Hindoo woman every now and then takes it into her head to burn herself upon the death of her husband". Instead of

prohibiting the practice, Bentham sees “no reason why she should not be indulged”, as long as the act is “voluntary”, and “her consent were indubitably ascertained.”<sup>84</sup> Whether we agree with Bentham on this point or not, his concession to cultural pluralism is notable for someone of that time, and an indication of his persistent scepticism about the propriety of European norms which he realised were highly contingent.

- 34 Just as there is a wide variety of harms arising from the violation of cultural norms, so it is with offences against property, which “are liable to infinite diversity”.<sup>85</sup> The conditions for granting title, and norms regarding possession and use, are historically contingent social conventions, and subject to much variation. He does not discuss these issues at length, and it is disappointing that at this crucial point he avoids the difficulty. We know, however, from other writings, that the preservation of existing expectations was of paramount importance for Bentham. “The legislator”, he wrote, is “not the master of the dispositions of the human heart: he is only their interpreter and their servant. The goodness of his laws depends upon their conformity to the general expectation.”<sup>86</sup> The task of censorial jurisprudence seen in this light, would involve taking Bentham's supplied universal categories of offence and security for property, and filling in the details regarding what counted as title to property according to existing conventions.
- 35 One might say that for all Bentham's emphasis on universality, to allow great differences here, in the definition of property and modes of legitimate exchange, would practically be to give up on universality all together. The devil, as they say, is in the detail, and laws would only be the ‘same’ in the most irrelevant sense of form and structure if they widely diverged in the crucial details. Bentham is aware of this problem. In his critique of theological natural law, with its appeal to “eternal and immutable laws”, he considers also whether his own system can supply universal laws. He thinks there are plausible candidates for universal laws--prohibitions, for example, against such acts as “murder, theft, adultery, perjury and the like.” However, to serve practically as laws, prohibitions against these acts must clearly define the relevant circumstances and conditions which would make someone guilty, and these “qualifying provisions”, Bentham notes, will in fact be different in different countries. The prohibition against theft will command that “no man take that which is not his own”. But of course the “description of what is and is not each man's own” will vary from place to place, and for Bentham there is little prospect of universal uniformity in all the relevant details.<sup>87</sup> It is therefore unlikely that there ever will be universal laws, if by universal we mean *exactly* the same.
- 36 This does not deter Bentham from his ambitious global project. He insists there is still something genuinely universal about his system of legislative science, and he wants to “lay claim to the attributes of universality and eternity for the rectitude of his doctrines”. Universality, however, cannot be hoped for in the exact detail of civil or penal provisions. Instead, he attributed universality to “certain grounds of law” rather than to “the laws themselves”:<sup>88</sup>

The rules concerning the cases that are respectively meet and unmeet for punishment and for reward--the rules concerning the proportion proper to be observed between offences and punishments...the rules concerning the properties to be wished for in a lot of punishment or reward--the principle in which the division of offences has its foundation...all these, if they are just and proper now, would at any time have been so, and will be so every where and to the end of time.<sup>89</sup>

- 37 He did not think domestic justice could be achieved everywhere by the imposition of a naïve and rigid universal uniformity of laws. The strict imposition of a system exactly alike in all details would be likely to produce more suffering than happiness, because it would be blind to cultural differences and local civil conventions. The concession he made to the preservation of existing expectations was not an admission of the failure of his universal project, but only a prudent aversion to dramatic change. His allowance of great difference at the level of detail was not to enforce a meaningless uniformity of structure and form at the expense of substance. Rather, Bentham thought that the negative impact of substantive local variations would be minimal, as long as the production of the laws conformed to his principles of universal censorial jurisprudence: if they served the universal ends of the greatest happiness, and of subsistence, abundance, security, and equality; if only those offences finding a place in the natural arrangement were prohibited; if the principles of proportional punishment were adhered to; and if the distribution of rights and the forms of procedure were constrained by the axioms of mental pathology.

### 3. Universal Expository Jurisprudence

- 38 While allowing 'universal jurisprudence' in its unqualified form to be wide-ranging, Bentham continued to insist that in its expository mode, it remained quite narrow. The reason for the narrowness is that the question universal expository jurisprudence tries to answer is: "in relation to law what is then that is common to all nations?"<sup>90</sup> The background assumption, which for Bentham provides a provisional answer to that question, is this: "That which is Law, is, in different countries, widely different".<sup>91</sup> In fact, the differences must be assumed to be so wide that for all intents and purposes there are *no* common laws.

Now of the infinite variety of nations there are upon the earth, there are no two which agree exactly in their laws; certainly not in the whole; perhaps not even in a single article; and let them agree to-day, they would disagree to-morrow.<sup>92</sup>

- 39 This assumption of thoroughgoing difference led Bentham to the belief that if there was no similarity in the content and substance of laws, the only candidates for being universal legal objects were the basic legal concepts and language used to compose those laws. For that reason, Bentham claimed that this mode of universal jurisprudence operates within "very narrow limits": "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".<sup>93</sup>
- 40 This narrow confinement is what I would like to reconsider. I readily concede that Bentham himself defines universal expository jurisprudence in this narrow sense, and it is understandable that commentators have followed him. Schofield refers to the above passage when noting that expository jurisprudence had "very narrow limits", and Twining follows him in echoing the point that universal expository jurisprudence was "very limited in scope".<sup>94</sup> I wish to claim that the scope of expository jurisprudence is broader than defining basic concepts, and extends to an examination of the substance of law. I base my claim on the distinction between what Bentham *tells* us expository jurisprudence does, and what he *shows* us it is used for. If universal jurisprudence is divided into its expository and censorial modes, the first simply defining terminology, and the second proposing the detailed content of law, then

neither of those addresses the project of explaining substantive bodies of law in such a way that would enable the task of comparison, exchange, and transmission of law in the vision Bentham had for global legislative progress. This descriptive task, which is the preliminary to comparison and exchange, should be recognised to be under the remit of universal expository jurisprudence.

- 41 There seem to be three central doctrines in Bentham's expository philosophy of law: the theory of fictions, the logic of the will, and the natural arrangement, and I will now examine them in that order. I hope not only to show the wider applicability of universal expository jurisprudence, but in the course of my discussion to bring attention to the cosmopolitan qualities of that task.

### 3.1 Theory of Fictions

- 42 Bentham had learned from Locke that the first step in the process of legal reform and improvement would be to clarify the meaning of words: "nothing ever can be done on the subject of Law that deserves the name of Science, till that universal precept of Locke...be steadily pursued, 'Define your words'."<sup>95</sup> The urgent task for definition was to establish the meaning of fundamental legal concepts. If those concepts were confused, the whole law would be confused, and so Bentham was adamant that before anything else, "universal jurisprudence" must establish the meaning of basic terms such as "obligation, right, power, possession, title, exemption".<sup>96</sup> The first step in defining these terms was to appreciate their ontological status, and Bentham repeatedly makes clear that "right, prohibition, property, security, liberty, duty, obligation, burthen, immunity...and a multitude of others that might be names are so many fictitious entities".<sup>97</sup> As fictitious entities, their definition required recourse to the theory of fictions.<sup>98</sup>
- 43 The central claim at work in his philosophy of language is that "all words which are employed in the character of *names*" refer either to "real entities" or "fictitious entities".<sup>99</sup> Real entities were ones to which "existence is really meant to be ascribed",<sup>100</sup> and consisted of either physical bodies, or mental ideas and impressions including pleasure and pain.<sup>101</sup> Fictitious entities were those spoken of as if they existed, yet to which "in truth and reality existence was not meant to be ascribed". That did not mean that fictitious entities were falsehoods to be discarded. They were absolutely necessary for discourse, a "contrivance" without which "language...could not have existence".<sup>102</sup> The name of a fictitious entity was a noun that served its purpose by standing in as shorthand for a longer and more complex phrase referring to real entities. Though the 'thing' referred to directly by the fictitious name was not real, the name still had a meaning if it could be re-phrased (by 'paraphrasis') in a sentence using the names of real entities: "Every fictitious entity bears some relation to some real entity: and can no otherwise be understood than in so far as that relation is perceived".<sup>103</sup>
- 44 Bentham's analysis of the useful legal fictions refers principally to the real entity of pain. Pain is something humans by nature generally want to avoid, and the prospect of pain gives a person a motive to act in a way that avoids it. This motive operates as a 'sanction' because it constrains behaviour. Because of this constraining effect, being liable to sanctions means one can be said to be under an 'obligation'. Bentham puts it this way: "An obligation...is incumbent on a man...in so far as, in the event of his failing to conduct himself in that manner, pain, or loss of pleasure, is considered as about to be

experienced by him.”<sup>104</sup> This analysis is in turn the basis for all others. “*Obligation* is the root out of which all these other [legal] fictitious entities spring.”<sup>105</sup> To have a right is for another to be under an obligation, to have an immunity is to be exempt from an obligation, and so on. Once obligation is defined in terms of the prospect of pain, all the other fictions defined by reference to obligation receive, in turn, their ultimate reference back to pleasure and pain.

- 45 What makes this exercise in definition part of *universal* jurisprudence, is that Bentham thinks these words, or at least the ideas behind these words, are universally shared and as such are common features of all legal systems. Among legal terms, “there are some that in all languages are pretty exactly correspondent to one another”, and such are the terms “*power, right, obligation, liberty*, and many others.”<sup>106</sup> There appears to be a problem here. For Bentham, universal expository jurisprudence involves *describing* a set of words that have a globally shared meaning, but the claim that these concepts have the same meaning everywhere is at first difficult to reconcile with much of Bentham’s writing that is concerned with making clear that people are using words like right and obligation in the *wrong* ways. He knows that in fact there are widely differing meanings in use for legal terms, which is why they are in need of definition; but the existence of such variety calls into question the assumption that there is any universally shared meaning for the idea of, say, ‘a right’.
- 46 Bentham’s response is to make clear that he is not undertaking a purely empirical description of present use. He makes the point in *PannomialFragments* that regarding these basic terms his “exposition upon this occasion is not so much to teach as to fix their import”.<sup>107</sup> The problem is that if Bentham is fixing the meaning, such meaning will be particular to his own usage, and thus not universal. There seem to be two possible resolutions of this problem. One is to give up the claim to universality, and undertake a series of distinct descriptive tasks that are irreducibly particular, having only local legal systems and languages as objects of study, and treating them as *sui generis*. The other is to retain the universalist ambition, but abandon the pretension of a strictly descriptive exercise and admit that definition is irreducibly normative, with the consequence that expository jurisprudence would then collapse into censorial jurisprudence.
- 47 The theory of fictions shows a possible way out of the dilemma of descriptive accuracy versus universality, by directing our attention to the sources of human pleasure and pain and the social practices that are organised around avoiding pain and seeking pleasure. For Bentham, the kinds of pains and pleasure humans experience are more or less universal. He asks rhetorically, “have different countries different catalogues of pleasures and of pains?” The answer must of course be ‘no’, and “in this point at least human nature may be pronounced to be every where the same”.<sup>108</sup> The basic interests that men and women have in enjoying pleasure and avoiding pain depend upon the fulfilment of a fundamental set of basic needs, which are the same everywhere. In order to meet those needs, Bentham thinks a set of social conventions will have developed everywhere for securing to each the future enjoyment of necessary possessions, for harmonising expectations, organising cooperative endeavours, and providing for voluntary exchange. To facilitate the functioning of these conventions, Bentham thinks a legal language that is substantially the same will have arisen everywhere to convey the ideas necessary for a social ordering of these interests and exchange relations:



“common wants”, he says “have given a certain uniformity, a certain correspondence to the laws of all people, at least in their essential features.”<sup>109</sup>

- 48 Generic human interests form, for Bentham, the basis of a stable set of “regulations which, from the fundamental principles of human nature, we know must have been as necessary at one time as at another”.<sup>110</sup> Indeed, human relations cannot subsist for a long time without these kinds of basic legal concepts emerging, and so wherever humans have the same needs, they will have the same basic concepts.

A mass of the matter of language expressive of law might be found, of which the equivalent cannot be wanting, in any country, among any assemblage of human beings, in the presence of each other, for any considerable length of time. This may be styled the language of universal law.<sup>111</sup>

- 49 The content of this language will be universal, because the descriptions have reference, ultimately, to shared experiences of pleasure and pain. Bentham is, of course, aware that present usage of these terms is different, but those differences are for him corruptions. “*Right*, the substantive *right*, is the child of law”, but the original meaning has been corrupted by “poets” and “rhetoricians” who “give the child a spurious parentage” and “lay it at Nature’s door.”<sup>112</sup> The notion of a natural right is nonsense, and has no meaning because it does not refer back to real entities—but the idea of right at work in that notion is a derivative corruption which at least can be corrected by attention to the real source of the concept of ‘having a right’. It is for this reason that Bentham is not content *merely* to describe current usage, which would be just to perpetuate a series of corruptions; he wants to ‘fix’ the import of words by means of a critical re-description, pointing to an original meaning that emerged to serve universal social needs and which can be explained via his theory of fictions with final reference to real entities. In this manner, Bentham holds on to both the claim to universality and the claim to be more or less describing legal phenomena. This is process by which expository jurisprudence finds “clear ideas to annex to the expressions of men whose ideas were not clear”.<sup>113</sup>

### 3.2 Logic of the Will

- 50 One of the central concepts Bentham wants to define is ‘law’, and such a definition “given of the word *law*, may be considered as matter belonging to the head of universal jurisprudence”.<sup>114</sup> Once again, as with fixing the concepts of right and obligation, Bentham’s intention is “not to remind the reader what *is* meant by a Law, for no one certain thing is as yet meant by a Law: but to declare what *shall* be meant by a Law”.<sup>115</sup> Whereas many other legal terms can be explained just by paraphrasis with reference to pleasures and pains, the definition of the word law required further insight. His now well-known definition of law runs as follows:

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.<sup>116</sup>

- 51 The notion of sovereignty he explained in terms of the habit of obedience,<sup>117</sup> and the question of signs he dealt with briefly in a triplet of acted signs, spoken signs, and written signs.<sup>118</sup> The notion of volition, however, proved a more difficult matter. Bentham complained of Aristotelian scholasticism that it had confined itself to analysing “sentences of the assertive kind”.<sup>119</sup> They had been concerned with the logic



of propositions and ignored the logic of volition, and to remedy this lack, and supply the required understanding for his definition of law, Bentham set out to “exhibit the several forms of *imperation*”. He claimed that such a ‘logic of the will’ was “a leaf which seems to be yet wanting in the book of science”,<sup>120</sup> and H.L.A. Hart agreed that Bentham’s deontic logic was one of his genuinely original philosophical inventions.<sup>121</sup>

- 52 Since volition was a constitutive element of a law, Bentham’s freshly coined “logic of the will” found its most important employment in “the art of legislation”.<sup>122</sup> In his early critique of common law, Bentham made the narrow claim that a law was a command, but later Bentham comes to develop a more sophisticated account by saying only that a law must be a volition of the sovereign.<sup>123</sup> An awareness of the modes of volition and their relations is an essential requirement for the correct analysis of a law. Here he identifies the four possible modes of volition: command, prohibition, non-command, and permission.<sup>124</sup>
- 53 These four aspects can be related to each other in “either of two ways: in the way of simple *contradiction*: or in the way of *contrariety*”.<sup>125</sup> The example Bentham uses is exporting corn. An act may be positively commanded as follows: ‘every one must export corn’. To *contradict* a command is just to negate the obligative aspect: ‘no one is obliged to export corn’. This is a non-command, which leaves the act free to be done or left undone. The *contrary* of a command is a prohibition: ‘no one may export corn’. To contradict a prohibitory imperative is, again, to negate its mandatory aspect, resulting in a permission: ‘any one may export corn’. As he puts it, contradiction is “revocative” and contrariety is “reversive”.<sup>126</sup> Between the imperatives of “command on the one hand and prohibition on the other, inactivity lies midway”.<sup>127</sup> What is important to note is that these four modes of volition are *exhaustive*. Between them they cover the entire field of possible aspects of the will.
- 54 Once the aspects of will have been enumerated, Bentham makes a crucial addition to this analysis. He says that commands and prohibitions, as the fundamental modes of imperation, may be conditional or unconditional. An unconditional imperative is absolute, while any conditions attached to an imperative will act as limitations or exceptions.<sup>128</sup> So, for example, the prohibition on exporting corn may take such conditions as: ‘no one may export corn *in winter*’, ‘no one may export corn *below price X*’, ‘any person of *type Y* may export corn’, and so on. Such exceptions created a qualified permission for those matching the conditions, and thus the conditions modulate the aspect of volition from an absolute command or prohibition, to a selective permission. What is important is not so much which words are used—‘may’ or ‘may not’. What is important is what relation the “species of act” bears to the “logical...whole”<sup>129</sup> of possible modes of will. He creates a logical map of volitional ‘space’, and shows how various object-acts are constructed and located within that space depending on the particular way in which commands, prohibitions, and permissions are combined in any instance with exceptions and limitations.
- 55 This suite of concepts is, for Bentham, universal, and transcends differences of language and culture. The deontic logic is exhaustive, and fully sufficient for articulating the volitional mode that any sovereign has toward any particular act. Covering all possible modes of volition, it can in theory be matched with a list of all possible acts, producing a complete and exhaustive grid of act-will combinations: “Under the single term *acts* are included all the possible modifications of human conduct: add the several possible aspects of phases of the will, and you have the whole

assemblage of laws".<sup>130</sup> In this brief and suggestive combination of the complete volitional grid with an exhaustive act list, Bentham brings into view the hypothetical possibility of a list of *all possible* laws anywhere, at any time. This is indeed an hypothesis of cosmopolitan ambition and scope.

- 56 Further, for any *actual* law that may happen to exist, it must be the concrete realisation of one of the idealised possible laws. Since all hypothetically possible laws are able to be conceptualised in terms of his deontic logic, all existing laws, as actualisations of possible laws, must also be able to be conceptualised in the same terms. Thus, his logic of the will could be used to re-conceptualise and articulate any law currently existing, but in Bentham's own terms. This logic of the will, then, is a feature of universal expository jurisprudence insofar as it is required for the definition of 'law'. But the logic of will does not just define 'law'; rather, as a theoretical tool it can be applied to substantive laws as objects of analysis. It is a feature of Bentham's descriptive science of law that has cosmopolitan ambition, because it is a universal logic by which the idiosyncratic language of any legal imperative in any country can be analysed and then re-phrased with his universally applicable concepts of volition.

### 3.3 Natural Arrangement

- 57 The method of natural arrangement actually performed a double duty, and Bentham indicated that a "synopsis" of the natural arrangement would serve both as "a compendium of *expository* and of *ensorial* jurisprudence".<sup>131</sup> I have already given a brief description of the natural arrangement in its censorial use, and here I focus on its expository use. Bentham opposed his idea of a natural arrangement of laws to the technical arrangement of Blackstone. The process of arrangement was part of the larger task of demonstration—to show "the Law in the state it is in". Where the law is clear, simple narration is all that is required to describe it; where it is obscure, the expositor must make some attempt at interpretation. But the legal material itself must be first gathered and organized before it can be systematically explained. It was the task of arrangement to gather dispersed legal institutions together "for the purpose of a general survey", to "determine the *order*" in which to present those institutions, and to "find for each of them a *name*."<sup>132</sup>
- 58 There is a clear relationship in Bentham's system between order and denomination. Bentham was convinced that Blackstone was hampered by the "technical nomenclature"<sup>133</sup> of the English law, with its "prerogative...misprisions, contempts, felonies, praemunires".<sup>134</sup> These concepts are part of a judicial system ordered around *ad hoc* forms of legal action deployed for practical effect. There is no systematic coherence between them, and no uniform mode of reason grounding and connecting them. This means there is no obvious way in which the expositor should arrange and relate the elements of a body of law, and no sense in which different parts of the law can be understood in mutually enlightening ways. The procedures of legal contestation in such a system must be carried out by wielding "*technical* reasons; reasons peculiar to the *art*, peculiar to the profession".<sup>135</sup> The practical consequence of an arcane technical system of this sort, is that the legal process is completely obscure to those for whom knowledge of the law matters the most—the women and men who seek protection and redress by the application of the law.

- 59 In the place of an idiosyncratic technical arrangement, Bentham advocates the employment of a natural arrangement, which as has already been noted, is 'natural' because it organizes its material by attention to what men and women are most naturally interested in: pleasure and pain. By attending to acts which tend to diminish the happiness of people, it produces a "systematical enumeration of the several possible modifications of delinquency".<sup>136</sup> Recall from above the suggestion that by matching the list of all possible acts with the several modes of volition, one could hypothetically generate a list of all possible laws. The natural arrangement, then, would identify a subset of that list of all possible laws, consisting of all the laws based on offences that are legitimately liable to be prohibited. Because it orders laws in terms of offences, and by reference to pleasures and pains, the rationale behind these legal conventions, and their connection to each other, can be understood by anyone.
- 60 Once the order was established, what would be the procedure for denomination? Bentham concedes that if his ideal natural arrangement was the "only guide", then the "new language, which it would have been necessary to invent, would have been uncouth, and in a manner unintelligible".<sup>137</sup> But to have taken the opposite path, and "adhered exclusively to the current language" would have been equally problematic, for to begin with the technical nomenclature would have afforded no systematic view of the laws, and the "catalogue of offences" thus produced would have been "altogether broken and uncomplete". To reconcile the opposing needs of familiarity of terms and systematic rigor, the process of connecting language in use with the abstract arrangement must proceed from the top down. One should begin with the "logical whole" of "possible offences", which must then be "bisected in as many different directions as were necessary", "down to that stage at which the particular ideas thus divided found names in current use in readiness to receive them."<sup>138</sup> When the order and rationality of a division of offences had been established, the offences in an actually existing body of laws could be matched to their location in the ideal map of offences. So matched, the name already in use could now be given a fixed and clear definition, and expounded as an offence in the universally understandable terms of being a source of harm.
- 61 Offences themselves, however, were not complete laws, and Bentham insists that it is the completeness of a law that the expositor seeks to demonstrate. To give a correct description of a law requires attention to all its parts: the 'directive' part which points out the conduct to be observed, together with the 'predictive' part, which prescribes a sanction to motivate compliance.<sup>139</sup> Of importance to the precise determination of the content of the directive part were the relevant conditions, limitations, and exemptions, and it was a virtue of the logic of the will that it could give an exact account of the sovereign's volition toward an act by its attention to these conditions. Unfortunately, the totality of the law is not always obvious in its textual or oratorical presentation. "[O]pen what code you will," Bentham suggested, and "pitch upon what law you will, the parts of it lie scatter'd up and down at random, some under one head, some under another, with little or no notice taken of their mutual relations and dependencies".<sup>140</sup> In order to identify a complete law, there must be a procedure for discovering the various parts of laws scattered in that system, and displaying them in an ordered fashion which clearly identifies individual laws, and the relations between laws. This is precisely the task that Bentham thinks his natural arrangement can facilitate.

- 62 For Bentham, the apparent existence of non-imperative laws, in the form of civil and property law, is a misleading surface appearance, produced by the manner in which the civil law is described and elaborated separately, with its own maxims and precedents.<sup>141</sup> All civil 'laws' regarding contract conditions, title, trust, and so forth, are in fact just parts of a law;<sup>142</sup> as Hart put it, they are "in the last analysis simply conditions or exceptions which limit the scope of the basic prohibitory law against 'meddling'."<sup>143</sup> The natural arrangement's virtue is that it gives priority to the identification of an offence, and then directs the expositor to seek, find, and connect the qualifying conditions to that fundamental imperative. Those conditions might be hidden elsewhere as apparently unrelated civil laws, and to show the proper relation, "shapeless laws" must be "taken to pieces, and put together again after the manner of the model".<sup>144</sup> On one occasion, Bentham literally meant to take a code 'to pieces'. He announced to his friend Richard Clark that he had formed a plan for "the Digesting of any System of Laws, according to a natural method equally applicable to all". To demonstrate his plan, he asked that Clark send him two copies of the "Gentoo Code". His intention was to "cut to pieces and paste the paragraphs into a Blank-paper-book according to the method I have planned".<sup>145</sup> This cut-and-paste job was a somewhat crude material representation of what he did more or less hope could be performed intellectually. If the natural arrangement were followed, it could facilitate the rational reconstruction and re-description of an entire body of law.
- 63 I have given an account of three different expository tools--the theory of fictions, the logic of the will, and the natural arrangement. The arrangement begins with a comprehensive classification of offences, the various branches of which are universal. The priority of the basic imperative, in the shape of an offence, draws the expositor's attention to any relevant qualifying conditions, and so brings dispersed parts of the law together. The logic of the will can then be applied to analyse the specific mode of volition presented by the imperative and its conditions, and give a clear statement of the law as it is. The theory of fictions explains the constituent legal concepts in terms of the real entities of pleasure and pain, and the entire law has been made clear, systematic, and comprehensible. The natural arrangement would produce in the abstract "a map, and that an universal one, of Jurisprudence as it is",<sup>146</sup> but it was not Bentham's intent that this task was carried out only in the abstract. The natural arrangement provided a framework according to which existing bodies of law could be re-arranged, and made comprehensible, so allowing for their critical improvement.
- 64 If these tools of expository jurisprudence were applied to one country's law, what mode of jurisprudence would that be? According to the original definition given, it would seem to be local jurisprudence, because it dealt with a local body of law. But that is not consistent with how Bentham characterised the exercise elsewhere. Local jurisprudence was the explanation of local law in *local language*, and would be intelligible only to those within the local legal system. "A Treatise on English Law written in terms of English Law is intelligible to none but English lawyers."<sup>147</sup> However, a treatment of English law in *universal* terms would not be a treatise of local but rather universal jurisprudence.
- An Expository Treatise on Universal Law applied to the State of England will be an expression of such rights, powers, duties and restraints as subsist in the State of England, but given in such terms as would serve equally well to expound the system of rights, powers, duties and restraints that subsist in any other state. It is an

exposition of the peculiar Jurisprudence of this state, given in terms of Universal Jurisprudence.<sup>148</sup>

65 Understood in this way, it seems that a treatise on local law, given in terms of universal jurisprudence, and employing all the tools of expository jurisprudence, would do more than just define basic legal concepts—it would analyse and re-articulate the substance of laws as well. I admit, of course, that Bentham explicitly says that universal expository jurisprudence has “very narrow limits”, and strictly speaking, deals only with terminology.<sup>149</sup> But I hope the above account shows that in practice, there is a broader, and more fruitful, scope for applying that mode of legal philosophy than Bentham at times allows for.

66 This ‘thick’ conception of universal expository jurisprudence is important for another reason. It is the necessary basis for the cosmopolitan task of critical comparison and the global transplantation of laws. An “expository treatise on the Laws of England written in terms of universal jurisprudence (couched in untechnical universal language)” would not only explain the laws of England, but also serve as “a Key to the Laws of any other country.”<sup>150</sup> When different bodies of local jurisprudence were given exposition in universal language they became transparent and comparable to one another. Bentham imagined a “set of tables” being formed out of the laws of “the several governments of the world”, in which his “natural syllabus” would serve to provide a “comparative view of the several systems of legislation confronted together in their correspondent parts and digested into one work”.<sup>151</sup> Once they were made comparable in this way, their relative “excellencies and defects” would become apparent, and

what is excellent in one system may be transferred into every other, that improvements in the most important art of all, the art of legislation, may like other art make the tour of the globe, and that each legislator may add to his own wisdom, the wisdom of his neighbours and co-temporaries.<sup>152</sup>

67 Bentham's cosmopolitan vision anticipated a world-wide community of legislative scientists analysing, comparing, and sharing laws, in a global diffusion of legal codes guided by his utilitarian principles. This vision required that the mutual incommensurability of technical local jurisprudence be transcended by a universal language for describing law. That was made possible by the tools of universal expository jurisprudence, based on the definition of fundamental legal concepts, but also employing the natural arrangement and logic of the will to order laws, display their logical unity, and give their substance a clear and rational description.

## 4. Conclusion

68 The aim of this essay has been to provide an account of some of the detail of Bentham's legal cosmopolitanism. It assumes that the singular attention of historians of cosmopolitanism to Bentham's international law must be corrected by giving attention to Bentham's universal jurisprudence. I have argued that his universal jurisprudence is a form of legal cosmopolitan in two ways: first, Bentham's censorial jurisprudence is cosmopolitan insofar as it proposes the method, outline and detail, for a legal regime that he believes all countries ought to adopt. In my discussion of local circumstances which affect the implementation of laws, I argued that for Bentham, the laws regarding physical injuries are those most susceptible of being the same everywhere. Where he

sees the possibility of variation is in mental injuries, and offences against reputation and condition in life which are highly determined by religious and cultural factors. Civil laws are also liable to much diversity, being based as they are on contingent social conventions. His response to such diversity is to locate the ground for universal uniformity in the principles for identifying offences, for proportionality of punishment, procedural rules for arbitrating civil disputes, and the constraints imposed by axioms of mental pathology which provide a standard for a universal idea of justice. Second, Bentham's expository jurisprudence is able to analyse and articulate elements of law that are universally shared in all legal systems, and his theory of fictions allows him to define such basic concepts as right and obligation in such a way that those terms are made comprehensible to all people in terms of pleasure and pain. Further, I have suggested that his philosophical discovery of the logic of the will, combined with his natural arrangement of offences, allows his expository jurisprudence to embrace more than just terminological inquiries, and incorporate the substance of laws as proper objects within its analytical task. In both its normative and descriptive modes, Bentham's universal jurisprudence presents a comprehensive set of philosophical theories that are concerned with the form and substance of legal systems in all countries of the world, and as such, his universal jurisprudence is a genuinely cosmopolitan legal theory.

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## NOTES

1. Pauline Kleingeld and Eric Brown, 'Cosmopolitanism', *The Stanford Encyclopedia of Philosophy* (2013), ed. Edward N. Zalta; Eduardo Mendieta, 'Interspecies Cosmopolitanism', in *Routledge Handbook of Cosmopolitanism Studies* (London: Routledge, 2012), pp. 276–88.
2. For example Derek Heater, *World citizenship and government: cosmopolitan ideas in the history of Western political thought* (Basingstoke: Macmillan, 1996), pp. 81–2; Georg Cavallar, *Imperfect Cosmopolis: studies in the history of international legal theory and cosmopolitan ideas* (Cardiff: University of Wales Press, 2011), pp. 49–52.
3. See Gunhild Hoogensen, *International Relations, Security and Jeremy Bentham* (London: Routledge, 2005), pp. 94–100; Peter Niesen, 'The "West divided"? Bentham and Kant on law and ethics in foreign policy', in *Rethinking ethical foreign policy: pitfalls, possibilities and paradoxes*, eds. David Chandler & Volker Heins (London: Routledge, 2007) pp. 93–115; David Armitage, 'Globalizing Jeremy Bentham', *History of Political Thought*, 32:1 (2011), pp. 63–82.
4. See Gerald Postema, *Bentham and the Common Law Tradition*, (Oxford: Clarendon Press, 1986), pp. 147–336; David Lieberman, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1989), pp. 219–290; Michael Lobban, *The Common Law and English Jurisprudence 1760–1850*, (Oxford: Clarendon Press, 1991) pp. 116–184; Philip Schofield, 'Jeremy Bentham and nineteenth-century English jurisprudence', *The Journal of Legal History*, 12:1 (1991), pp. 58–88.
5. William Twining, *Globalisation and Legal Theory* (Cambridge: Cambridge University Press, 2000); and *General Jurisprudence: understanding law from a global perspective* (Cambridge: Cambridge University Press, 2009).
6. Lieberman, *Province of Jurisprudence*, p. 241; also David Lieberman, 'Bentham on Codification', in *Selected Writings: Jeremy Bentham*, ed. Stephen Engelmann (New Haven: Yale University Press,

- 2011), p. 470. Cf. David B. Goldman, *Globalization and the Western Legal Tradition* (Cambridge: Cambridge University Press, 2007), p. 192.
7. See Philip Schofield, 'Jeremy Bentham: Legislator of the World', *Current Legal Problems* 51 (1998), pp. 115–47.
  8. Twining, *General Jurisprudence*, p. 8.
  9. M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 8<sup>th</sup> ed. (London: Thomson Reuters, 2008), p. 1, n.1 and p. 3.
  10. *Chrestomathia*, eds. M.J. Smith & W.H. Burston (Oxford: Clarendon Press, 1983), pp. 205–6.
  11. *A Comment on the Commentaries and A Fragment on Government*, eds. J.H. Burns & H.L.A. Hart (London: Athlone Press, 1977), p. 262.
  12. Freeman, *Lloyd's Introduction to Jurisprudence*, p. 3.
  13. Bentham Papers, University College London, box lxix, folio 195 [hereafter as UC lxix. 195].
  14. *An Introduction to the Principles of Morals and Legislation* [hereafter *IPML*], eds. J.H. Burns & H.L.A. Hart, intro. F. Rosen (Oxford: Clarendon Press, 1996), p. 294.
  15. Guillaume Tusseau draws attention to a difficulty here. Expository jurisprudence seems to be about the law, whereas authoritative speech acts make the law. As Bentham puts it, when the legislator represents the “state of the law to be so and so” he “causeth it so to be” (*IPML*, p. 294). But exposition is descriptive while legislation is prescriptive, and the two do “not belong to the same linguistic level”. Guillaume Tusseau, 'Positivist Jurisprudents Confronted: Jeremy Bentham and John Austin on the Concept of a Legal Power', *Revue d'études benthamiennes*, 2 (2007), §14.
  16. *IPML*, p. 6.
  17. Schofield, 'Bentham and nineteenth-century English jurisprudence', pp. 70–75.
  18. Schofield, 'Bentham and nineteenth-century English jurisprudence', p. 61.
  19. *IPML*, p. 296.
  20. Postema, *Bentham and the Common Law Tradition*, p. 306.
  21. *The Works of Jeremy Bentham, published under the superintendence of his executor, John Bowring*, 11 vols. (Edinburgh: William Tait, 1838–43), vol. xi. p. 72. [hereafter as Bowring xi. 72].
  22. 'Codification Proposal', *Legislator of the World: writings on codification, law, and education* [hereafter *LW*], eds. P. Schofield & J. Harris (Oxford: Clarendon Press, 1998), p. 245.
  23. *Fragment*, p. 419.
  24. UC xxvii. 8.
  25. *The Correspondence of Jeremy Bentham. Volume 9: 1817–20*, ed. S. Conway (Oxford: OUP, 1989), p. 309 [hereafter as *Corres.* ix. 309].
  26. *Fragment*, p. 397–8.
  27. *IPML*, p. 295.
  28. J.S. Mill, 'Bentham', *The Collected Works of John Stuart Mill*, ed. J.M. Robson (Toronto: University of Toronto Press, 1969), vol. X, p. 104. I was alerted to this quote by Stephen Engelmann & Jennifer Pitts, 'Bentham's 'Place and Time'', *The Tocqueville Review/La Revue Tocqueville*, Vol. 32, n. 1 (2011), p. 45.
  29. *IPML*, p. 295.
  30. For a good summary, see Philip Schofield, *Utility & Democracy: the political thought of Jeremy Bentham* (Oxford: Oxford University Press, 2006), pp. 28–40.
  31. 'Codification Proposal', *LW*, p. 256.
  32. *IPML*, pp. 12–13.
  33. *IPML*, p. 13.
  34. 'Codification Proposal', *LW*, p. 291–2.
  35. Bentham's detailed discussions of the natural arrangement appear in *IPML*, pp. 271ff. and *Fragment*, pp. 414ff. For previous discussion of the natural arrangement, see Lieberman, *Province of Jurisprudence*, pp. 257–66; Lobban, *The Common Law and English Jurisprudence*, pp. 124–7; Xiabo



Zhai 'Bentham's Natural Arrangement Versus Hart's Morally Neutral Description', *Revue d'études benthamiennes*, 10 (2012), §2.

36. *IPML*, p. 272.

37. *IPML*, p. 11.

38. *Fragment*, p. 417.

39. The division of offences appears in *IPML*, pp. 187–280.

40. *IPML*, pp. 188–9.

41. *IPML*, p. 191.

42. *IPML*, p. 192–3.

43. *IPML*, p. 193.

44. *IPML*, 274.

45. *IPML*, p. 274.

46. *IPML*, p. 272.

47. *IPML*, p. 285

48. *Of the Limits of the Penal Branch of Jurisprudence* [hereafter *Limits*], ed. P. Schofield (Oxford: Clarendon Press, 2010), p. 76.

49. 'Codification and Public Instruction', *LW*, p. 140.

50. For the full analysis of "cases unmeet for punishment", see *IPML*, pp. 158–64.

51. 'Codification and Public Instruction', *LW*, p. 143.

52. On the proportionality of punishment, see *IPML*, p. 165–74.

53. *IPML*, p. 290.

54. *IPML*, p. 3.

55. 'Principles of the Civil Code', Bowring, i. 304.

56. *IPML*, p. 3.

57. 'Pannomial Fragments', Bowring, iii. 212.

58. 'Principles of the Civil Code', Bowring i. 304–5.

59. 'Pannomial Fragments', Bowring, iii. 224.

60. 'Pannomial Fragments', Bowring, iii. 212.

61. *IPML*, p. 3.

62. 'Pannomial Fragments', Bowring iii. 229.

63. 'Of the Levelling System', Bowring, i. 358–64.

64. *IPML*, p. 3.

65. Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974), p. 28–33.

66. Nozick, *Anarchy*, p. 29.

67. Paul Kelly, *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law* (Oxford: Clarendon Press, 1990), p. 16.

68. 'Codification Proposal', *LW*, p. 291. See Schofield, 'Bentham: Legislator of the World', p. 133; Twining, *General Jurisprudence*, pp. 142–3.

69. 'Codification Proposal', *LW*, p. 292.

70. 'Of the Influence of Time and Place in Matters of Legislation,' Bowring, i. 169–94.

71. Engelmann and Pitts, 'Bentham's 'Place and Time'', pp. 50–51.

72. 'Place and Time', pp. 152–219.

73. 'Place and Time', p. 153.

74. 'Place and Time', p. 157–66.

75. 'Place and Time', p. 157.

76. 'Place and Time', p. 155.

77. 'Place and Time', p. 157–8.

78. 'Place and Time', p. 160–1.

79. 'Place and Time', p. 161.

80. 'Place and Time', p. 156n.

81. 'Place and Time', p. 174.
82. 'Place and Time', p. 169
83. 'Place and Time', p. 173.
84. 'Place and Time', p. 174.
85. 'Place and Time', p. 163.
86. 'Principles of the Civil Code', Bowring, i. 322.
87. 'Place and Time', p. 205.
88. 'Place and Time', p. 208.
89. 'Place and Time', p. 208–9.
90. UC xxxi. 56.
91. *Fragment*, p. 397.
92. *IPML*, p. 295.
93. *IPML*, p. 295
94. Schofield, 'Bentham and nineteenth-century English jurisprudence', p. 59; Twining, *Globalization and Legal Theory*, p. 18.
95. *Comment*, p. 347.
96. *IPML*, p. 6.
97. *Limits*, p. 286.
98. For the standard account of Bentham's theory of fictions, see C.K. Ogden, *Bentham's Theory of Fictions* (London: Kegan Paul, 1932); more recently, see Ross Harrison, *Bentham* (London: Routledge & Kegan Paul, 1983), pp. 47–75; and Schofield, *Utility and Democracy*, pp. 1–27. For a contemporary analytic appraisal, see Gideon Rose, 'Problems in the History of Fictionalism', in *Fictionalism in Metaphysics*, ed. M. E. Kalderon (Oxford: Clarendon Press, 2005), pp. 14–64. The discussion of Bentham is at pp. 46–56.
99. *De l'ontologie et autre textes sur les fictions*, eds. P. Schofield, J.-P. Clero, C. Laval (Paris: Éditions du Seuil, 1997), p. 84.
100. *De l'ontologie*, p. 164.
101. *De l'ontologie*, p. 172. Bentham also allowed for the category of inferential real entities but that is not important for this discussion.
102. *De l'ontologie*, p. 84.
103. *De l'ontologie*, p. 164.
104. Bowring, viii. 247.
105. *De l'ontologie*, p. 158.
106. *IPML*, p. 295.
107. 'Pannomial Fragments', Bowring, iii. 217.
108. 'Place and Time', p. 155.
109. 'General View', Bowring iii. 186.
110. 'Place and Time', p. 197.
111. 'Pannomial Fragments', Bowring, iii. 217.
112. 'Nonsense upon Stilts', *Rights, Representation, and Reform: Nonsense Upon Stilts and other writings on the French Revolution*, eds. P. Schofield, C. Pease-Watkin, & C. Blamires (Oxford: Clarendon Press, 2002), p. 400.
113. *Limits*, p. 220.
114. *IPML*, p. 295.
115. UC lxix. 86.
116. *Limits*, p. 24.
117. *Limits*, p. 42.
118. *Limits*, p. 42.
119. *IPML*, p. 300.
120. *IPML*, p. 299.

121. H.L.A Hart, *Essays on Bentham: studies in jurisprudence and political theory* (Oxford: Clarendon Press, 1982), p. 11.
122. *IPML*, p. 8.
123. Lieberman, *Province of Jurisprudence*, p. 223.
124. *Limits*, p. 116–7.
125. *Limits*, p. 119.
126. *Limits*, p. 120.
127. *Limits*, p. 120.
128. *Limits*, p. 122.
129. *Limits*, p. 125.
130. *Limits*, p. 130.
131. *Fragment*, p. 417.
132. *Fragment*, p. 414.
133. *Fragment*, p. 415.
134. *Fragment*, p. 418
135. *Fragment*, p. 417
136. *IPML*, p. 271.
137. *IPML*, p. 271.
138. *IPML*, p. 271.
139. *Limits*, p. 146.
140. *Limits*, p. 172.
141. Cf. Hart, *Essays on Bentham*, p. 119–20.
142. 'Codification and Public Instruction', *LW*, p. 122.
143. Hart, *Essays on Bentham*, p. 121.
144. *Limits*, p. 232.
145. Bentham to Richard Clark, 29 July 1777, *Corres.* ii. 62.
146. *Fragment*, p. 417.
147. UC lxix. 126.
148. UC lxix. 126.
149. *IPML*, p. 295
150. UC lxix. 127.
151. *Limits*, p. 230.
152. *Limits*, p. 220.

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## ABSTRACTS

When considering Bentham's cosmopolitanism in its legal aspect, scholars often focus on his international jurisprudence, to the neglect of his universal jurisprudence. This article contributes to a growing understanding of the role of universal jurisprudence by providing a close examination of both its expository and censorial modes, with particular attention to their cosmopolitan qualities. Section one parses the concept of jurisprudence itself. Section two describes the censorial mode of universal jurisprudence, which lays down the principles for determining what should be law in all countries. Section three then analyses the principles of expository jurisprudence, which are used to define fundamental legal concepts. I there argue

that the suite of expository tools are also useful for analysing the substance of law in any country, and that Bentham hoped such analysis would be the precursor to a global comparison and exchange of laws between all countries.

Les études consacrées aux aspects juridiques du cosmopolitisme de Bentham se sont concentrées sur ses écrits portant sur la « jurisprudence internationale », sans prendre en compte ce qu'il appelle la « jurisprudence universelle ». Comme d'autres travaux récents, cet article se penche sur la « jurisprudence universelle » comme outil analytique et critique et démontre qu'il s'agit d'un concept pertinent pour étudier le cosmopolitisme benthamien. La première partie définit ce qu'est pour Bentham la « jurisprudence », la seconde explique comment le philosophe en fait un outil permettant de fixer les principes du droit dans tout pays. Dans la troisième partie, on montre comment il permet également à Bentham de définir des concepts juridiques fondamentaux. Bentham entend donc créer des outils qui rendront possible une approche globale du droit, encourageant la comparaison et les échanges entre tous les pays.

## INDEX

**Keywords:** Cosmopolitanism, universal jurisprudence, expository, censorial, law

**Mots-clés:** cosmopolitisme, jurisprudence universelle, droit, loi, jurisprudence expositive, jurisprudence censorielle

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