The Theory of Legislation

by

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With an Introduction by

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INTRODUCTION

I. Introduction

The *Theory of Legislation* and *Introduction to the Principles of Morals and Legislation* are companion works, articulating some of the fundamental ideas of Bentham's message. The *Theory*, like the *Principles*, has generally been viewed as enunciating Bentham's moral and legal philosophy: namely, utilitarianism. But the *Theory* and *Principles* also provide a manual of instructions to a conscientious legislator. In addition, and, perhaps more importantly too, the *Theory* and *Principles* are suffused with insights relevant, and often central, to the sociology of law.

Of these three aspects, it is usual to emphasise only the first one. Utilitarianism as foundation of moral and legal philosophy has engaged more scholarly attention than have the practical or sociological aspects of Bentham's work. In this brief essay, we seek to reverse the emphasis. We do not mean thereby to belittle the significance of Bentham's principle of utility or the singlemindedness with which students of Bentham have variously defended, destroyed and resurrected the principle.[1] Nor do we wish to suggest that the three aspects of Bentham's work are not in constant interplay. Our aim, however, is to emphasize the actual and potential sociological contributions, both in approach and substance, which the *Theory* presages.[2] We shall leave out an evaluation of the principle of utility,[3] and concern ourselves in the main part of the essay with two questions: How feasible and adequate is the *Theory* (read with the *Principles*) as an instrument of instructions to the conscientious legislator? In what senses can we regard Bentham's preoccupations in these works as being distinctively sociological? These questions are interrelated but also somewhat distinct.

1. See the literature cited in Julius Stone, *Human Law and Human Justice* (1965) 105-46. Also see Mary P. Mack, *Jeremy Bentham: An Odessey of Ideas,* 1748-1792 (1962) 151-261; *Jeremy Bentham* (C. W. Everett ed., 1966); *Bentham and Legal Theory* (M. H. James ed., 1973). Professor Milne has provocatively argued in the latter collection that the principle of utility offers no defensible basis either for moral or legal philosophy and whatever is sound in Bentham's legal theory is so despite, rather than because of, the principle of utility. And see the equally provocative evaluation of "utilitarian culture" in Alvin W. Gouldner, *The Coming Crisis of Western Sociology* (1970) 61-88.

2. Professor L. T. Hobhouse was among the very few students of utilitarianism to have clearly grasped that the utilitarian "principle has at least the merit of providing a basis for an applied sociology." See his *The Elements of Social Justice* (1922) 16.

3. Such an exclusion may seem strange, and ill-justified, in any discussion of Bentham. But the *Theory,* almost an epitome of commonsense, does not elucidate at any length the principle of utility. Nor does it appear that Bentham was himself much perturbed about the adequacy or plausibility of the principle of utility. He wrote, for example

> But is it never, then, from any other considerations than those of utility, that we derive our notions of right and wrong? *I do not know; I do not care.* Whether a moral sentiment can be originally conceived from any other source than a view of utility is one question; whether upon examination and reflection it can, in point of fact, be actually persisted in and justified on any other ground, by a person reflecting within himself is another. Whether in point of right it can properly be justified on any other ground by a person addressing himself to the community, is a third. The two first are *questions of speculation; it matters not, comparatively speaking, how they are decided.* The last is a question of practice; the decision of it is of as much importance as that of any can be.

J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1970) 28*n.* (J. H. Burns & H. L. A. Hart ed.) (Emphasis added).

II. 'Theory' as Sociology of Law

The *Theory* can justly be regarded as a classic in the sociology of law–a field of enquiry which matured as a discipline only in late ninteenth cen tury at the hands of Emile Durkheim, Karl Marx, Max Weber, Eugen Ehrlic and was later more specifically nurtured by Karl Llewellyn, Roscoe Pound Georges Gurvitch, Julius Stone among others. A classic genuinely anticipate themes, issues of, and even conclusions for, future enquiry, thus facilitatin the cumulative growth of knowledge.[4] The *Theory* adequately meets this tes There is another related reason for regarding *Theory* as a classic. Robe Merton has rightly stressed the fact that grounding in classical formulation plays a very distinctive role in the development sociological theory. Thoug "the physicist *qua* physicist has no need to steep into Newton's *Principia* o the biologist *qua* biologist to read and re-read Darwin's *Origin of Species*' the sociologist "*qua* sociologist, rather than as a historian of sociology, ha ample reasons" to turn to the founding fathers like Weber, Marx, Durkhei or Simmel.[5] Even when some may not find Bentham's obsolescence in som respects in itself fascinating, a study of *Theory, Principles* and other work of Bentham holds promise for new beginnings and for the discovery of th roots of many ideas and attitudes which have become theoretical commor places in sociology of law. Indeed, much of the development of contemporar sociological jurisprudence owes a good deal to Bentham.[6]

Bentham brought the central tenet of sociology of law sharply into focu by his insistence that the object of governments and of laws ought to be "th greatest happiness of the community" or the "happiness of society". Wha ever be the perplexities surrounding the notion of societal happiness, Ben tham's steady emphasis on this principle reminds us of the *relatedness* of la and society—now almost a platitudinous commonplace of juristic though but in the milieu of Bentham, certainly a path-breaking insight.[7] The *Theor* is a long elaboration on the simple truth that law is both an instrument o social stability and an agent of social change; that law, even as it affects so cial orderings, is in turn deeply affected by them.

Not merely in substantive domain but in method, Bentham's works ap proximate well to those of a sociologist. Bentham is concerned primarily wit social *facts* and with analytical frameworks and taxonomies with which t organise social facts for scientific studies. The elaborate, and often wearisom division of pains and pleasures (pp. 12-18), sensibilities (pp. 19-26), enc of law (pp. 58-70) offences (pp. 144-53), punishments (pp. 199-220), and "indirect means" of preventing offences (pp. 221-72) in the *Theory* refle analytical concerns of a lawyer as much as those of a theoretical sociologis

Bentham's concern for social facts is manifested in several different way in the *Theory*. It is manifested, for example, in his rather harsh attacks upo the notions of natural law and natural rights (pp. 49-52) and upon fictio (pp. 42-44). The fundamental social facts of Bentham's universe are plea ures and pains, motives, sensibilities, dispositions, and expectations. The ente prise of law must be founded on these; or else it is of no avail. Emphas upon, and concern for, facts also leads Bentham to great circumspection

4. Robert K. Merton, *Social Theory and Social Structure* (1968 Enlarged Edr 8-34.

5. *Id.*, 35.

6. Roscoe Pound was most heavily indebted to Bentham; and most of us w have followed Bentham are equally indebted to Pound. Benthamite ideas and analys have become part of the common stock of knowledge of all tillers of the field, whetl consciously or otherwise.

7. See e.g. J. Stone, *supra* note 1, esp. 139-42.

his employment of the principle of utility as a matrix for policy prescriptions. This is somewhat strikingly revealed in the differences between Bentham and Dumont on the institution of imprisonment. Applying Bentham's own qualities of "good punishment", Dumont concludes in an editorial footnote (p. 213) that imprisonment possesses all the desirable qualities of a good punishment. Dumont feels "constrained" by Bentham's own formulations to counsel, "imprisonment is the only punishment the legislator need apply" (p. 213). Bentham, however, himself does not feel so constrained! This is due chiefly to his regard for facts and circumspection generated thereby. He observes: "As to imprisonment, it is impossible to give any opinion... until all that concerns the structure and the internal governments of prisons has been determined with the greatest exactitude" (p. 217).

Bentham also stressed the comparative method, though it must be said emphatically that he himself did not or could not employ it rigorously, at least in the *Theory*. He, however, summed up precisely the major virtues of comparative method in morals and legislation thus: "It is a kind of mental travelling. In the course of such an exercise, we are able to disengage ourselves from local and national prejudices by passing in review the usages of other communities" (p. 241). In relation to English law, Bentham can be said to have exemplified the cosmopolitan approach of a comparativist.

Among the principal contributions of Bentham to sociology of law through the *Theory* are his theory of sanctions, analysis of the necessary conditions for a good law, analysis of punishment, and finally (without being exhaustive) the study of indirect means of preventing offences. We deal briefly with some of these in the following sections.

III. Analysis of Sanctions

Bentham offers a classification of sanctions, which by itself may not be original; indeed, it may well be regarded as highly derivative. But his analysis of correlation among the different types of sanctions, and policy guidance arising from this, is highly original, deserving close examination.

The notion of sanction itself poses no analytical problem to Bentham—such is the power of the principle of utility. "The pain or pleasure" he says, "which is attached to a law form what is called a sanction". Implicit in this definition is an answer to the question whether rewards can be properly regarded as sanctions. Nor does Bentham, rightly, find it compelling, as so many have done, to distinguish between "positive" and "negative" sanctions, the one corresponding, roughly, to reward and the other to punishment, deprivation, etc.

Since pleasures and pains may be distinguished into four classes—physical, moral, political, religious—the sanctions also subdivide themselves accordingly. Pleasures and pains "which may be expected in the ordinary course of nature, without human intervention, compose the natural or physical sanction" (p. 17). The term "without human intervention" makes this distinctive definition somewhat problematic as Bentham's own example illustrates. If a man's house is destroyed by fire as a "consequence of his imprudence", Bentham would call it a "pain of natural sanction". But imprudence is not to be found in the "ordinary course of nature" and does definitely constitute "human intervention". What does then Bentham really mean by "natural sanction?" The answer must be that it is pain or pleasure arising directly out of an event or an occurrence, regardless of the factors which might have caused or contributed to the occurrence or the event. In this sense, the destruction of the house by fire is painful; it is an event, with its consequences

(fire, therefore, destruction) which arise out of the ordinary course of nature Human intervention (firefighting) may operate as a source of pleasure; bu once again the actual pleasure will be derived not so much from the act o fire-extinguishment but from the fact that the fire is extinguished or contro led. For Bentham, this too would be an instance of a natural sanction.

Moral sanctions are pains and pleasures "expected from the action of ou fellow-men" in terms of their "spontaneous dispositions towards us", whethe the latter be of "friendship or hatred", "esteem or contempt". Bentham de signates this sanction as *popular* sanction or the sanction of *public opinio* or the sanction of *honour* or the sanction of *sympathy*. More commonly, h later simply refers to popular sanctions. It must not be assumed carelessl that Bentham necessarily equates morality with public opinion or honou or sympathy. Popular sanctions may indeed often be most profoundly in moral from a specific ethical standpoint, *e.g.* ostracism for not observin segregation between the whites and blacks or for violating social distanc based on the axis of pollution and purity, between a high-caste Hindu and a "untouchable". Our opinions, sympathies, dispositions, images of honou may be highly moral; or they may be otherwise. All that Bentham seems t mean is that popular sanctions may often be accompanied by high mor force. When they are not so accompanied, they are just popular sanction The key aspect here is simply not the labelling of the sanction. Rather, th key notion here is expectations the actor has of his fellowmen, both in tern of disposition and of social action. In saying all this, Bentham is really sayin that social interactions can be painful or pleasurable; and insofar as pai being evil, is to be shunned or minimized at the motivational level, the awar of pleasure by social approval and infliction of pain by social disapprov creates a distinctive kind of social control.

Legal sanctions are more simply defined as pleasures and pains whic can be "expected from the action of the magistrate in virtue of the laws Bentham describes them alternately as "political sanctions", thus seizing th vital fact that legislative decisions are also products of political processes- a connexion so obvious as to be readily forgotten in any analysis of leg sanctions. The definition of legal sanctions is highly specific; the action of magistrate need not consist merely of punishment in the strict sense. It ma cover diverse activities—such as upholding a transaction, declaring a w valid or void, providing matrimonial relief, etc. And the word "magistrate really is intended to cover the entire range of the court-system. Bentha deliberately restricts the meaning of legal sanctions thus with a view to clea ly distinguish them from other type of sanctions.

Religious sanctions are distinctive from social or moral sanctions in th sense that the orientation of the actor is not towards another social actor such but towards some supernatural entity, even when made manifest throu a human being. Pleasures and pains arising from the religious orientation a described by Bentham as constituting religious sanctions.

Whatever may be said about the notions of pleasures and pains, and th indeterminacies of the principle of utility, Bentham's insistence that pleasur and pains in themselves *constitute* sanctions has provided an enduring wa of talking about sanctions in general. Later definitions of Austin in terms probability of imposition of suffering or of Kelsen in terms of "deprivatio of life, liberty or other goods appear to be merely refinements of the Be thamite idea. They provide greater sophistication to the analysis of legal san tions; by the same token, these refinements tend to obscure the simple tru that the sanctioning process consists in distribution of pleasures and pain

that sanction *is* either the surplus of pleasures over pain or *vice versa*. Analytical refinements of sanction in terms primarily of imposition of "suffering" or "deprivation" also generate problems as to whether "rewards" gratifications are sanctions.[8] Such problems, as noted earlier, just do not arise on Benthamite analysis.

Bentham's analysis is truly interactional in the sense that he highlights legal sanction only as one *type* of sanctions, of necessity in close interplay with *other* types of sanctions. Through the awareness of this interaction, Bentham was easily able to plead for what is now known as "decriminalization" of certain behaviours. His grounds for this pleading were not ideas about limits of state power in relation to enforcement of morality or the defense of cultural pluralism as a value. Rather, his advocacy for decriminalizing certain behaviours was grounded in the fact that certain other *types* of sanctions were more apposite to the behaviour under regulation than the legal sanction.

Thus, Bentham comes closer to some modern criminologists when he calls for abolition of laws making prostitution a crime. He agrees with the common and now hackneyed ground for decriminalizing prostitution. "Prostitution, thus nominally forbidden, is as common as if there were no law against it, and much more mischievous" (pp. 239-40). But he goes beyond the ineffectivity of law enforcement. He maintains that there is a powerful "natural" sanction operative already; legislative interference does not really augment this sanction but merely "exasperates injustice", the law indeed becoming an "instrument of tyranny" because of its wayward, selectively harsh, and in the net result only marginally effective (in terms of its purposes) operations. Indeed, Bentham argues, rightly, that the "infamy of prostitution is not solely the work of law" and that even if "the political sanction remained neuter" there will always be "a degree of shame attached to that condition". Moreover, "this is perhaps the only employment publicly despised by the very persons who publicly profess it" (p. 240). The more prostitution is socially regarded as contemptible, "the less it is necessary for the law to brand it" (p. 240). The moral sanction is quite powerful, since the entire profession is generally stigmatized.

Similarly, Bentham devotes considerable attention to the popular sanc-

8. Austin was aware that Bentham's analysis of sanction included rewards. But despite his "habitual veneration" of Bentham, he felt that the "extension of the term is pregnant with confusion and perplexity." His principal objections against treating rewards as sanctions were two: *One*, rewards were more appropriately regarded as "motives" (which may induce action) rather than imperative commands and *second*, to treat rewards as sanctions is to "engage in a toilsome struggle with the current of ordinary speech". John Austin, *The Province of Jurisprudence Determined* (1832, 1954: H. L. A. Hart ed.) 16-17. Hans Kelsen similarly maintained that sanction consists in coercive character of a legal prescription which must be distinguished from the "psychic coercion" implied in "motivation." See his *Pure Theory of Law* (1970: Max Knight *trs.*) 35. However, it seems now well appreciated that the distinctive nature of legal sanction is not really grasped by the focus on physical coercion. At any rate, it does not really help us "distinguish law from other norms"; see Jerome Hall, *Foundations of Jurisprudence* (1973) 112-115.

Bentham's entire analysis is however based on *motives* described as "expectations of so many lots of pain and pleasure" and he defined the *force* of the law solely in terms of "motives it relies upon to produce the effects it aims at." The legislator appeals to *understanding* as well as to *will*. Bentham emphasises that by reward alone, it is most certain that no material part "of the business of government" could ever be carried on for half an hour. But he almost simultaneously reminds us that punishment alone cannot be effectively utilized for the whole business of government. What is needed is a "mixture" of punishment and reward. Bentham, *Of Laws in General* (1970) 133-37 (H. L. A. Hart *ed.*).

tion, especially public opinion, in relation to legal sanction. The legislator must provide for the necessary conditions for articulation, and moulding, of public opinion. Bentham counts freedom of press and pubilicity of legal, and administrative, actions as two related crucial pre-conditions for the formation of strong public opinion. Freedom of speech and press stands justified in Bentham's analysis in three ways. *First,* to curb freedom of the press is to foster ignorance, rumours, superstitions; insofar as ignorance is spread the citizen is more "inclined to separate his private interest from the interest of his fellows" (p. 227). In this sense, censorship, wherever employed, produces "brutalization of mankind" (p. 225) for, it is "impossible" to tell where the evils of censorship end (p. 228). *Second,* any restrictions on the articulation of public opinion, through free press, already aggravate the difficulties in employing the "motive of honour as a means to aid the enforcement of the laws" (p. 266). Moreover, *third,* "the art of guiding public opinion, *without the public suspecting how it is led*" consists in "arranging things so that the act which you wish to prevent cannot be performed without first doing something else, which popular opinion condemns already" (p. 265; emphasis added).

Legal sanction and popular sanction are thus closely related. Unless law protects freedom of press, public opinion cannot grow. Enlightened public opinion may generate popular sanctions which may aid effective implementation of laws. If public opinion, as partly generated by free press, is indifferent or hostile to a law, the legislator has to follow the "art of guiding public opinion" without appearing to do so. Bentham grasps, thus, that public opinion is an important supportive structure both for the legitimacy of law (as well as a legal system) and for its effective implementation.

There may, of course, be several objections to a purely utilitarian justification of freedom of the press. With these we are not here concerned except to note that strictly utilitarian reasoning could also equally persuasively justify censorship. Thus, for example, can one not argue that a censored press can be more effective than a free press in heightening popular sanction—of shame and honour, of contempt and esteem? Certainly, the question is not worthy of dismissal *in limine* from a strict utilitarian standpoint as Bentham's own analysis seems to suggest.

Be that as it may, Bentham's formulations in this regard are analytically inadequate—a predicament befalling most attempts to relate law and public opinion. In what sense can public opinion afford a popular sanction? There is no simple answer to such a question unless the levels of generalization are carefully fixed. While at the highest level of generalization one may speak of *the* public, it should be clear that at lesser, and functionally specific, levels we must speak of "publics" rather than "public". Publics can be local, regional, national; highly specific or diffuse; relatively open or closed. There may be as many publics as there are issues or problems. Publics may or may not overlap. So also the notion of "opinion" is, as many have noted, problematic. "Opinion" may be casual or considered; it may be a momentary response or a product of incipient or strongly rooted attitudes. Opinion may also be a learned response to certain situations in certain sub-cultures. Opinions may be based on information or sentiment or both. Opinions may be inconsistent. On the same issue, Bentham himself seems to recognize some of these matters when he seeks to define the "force" of public opinion in terms of the "compound ratio of its extent and intensity" (p. 265) but this point is not systematically developed.

Bentham relates law to public opinion in yet another context. He ends

his analysis of choice of punishments by insisting, as a matter of "high importance", that "the legislator, in the choice of punishments, ought carefully to avoid such as shock established prejudices" (p. 209). What Bentham means here, despite his initial use of the word "prejudice" rather than "opinion", is that the legislator should pay heed to the public "sentiment" or disposition (particularly of "aversion") to certain types of punishments. In his inimitable style, Bentham proceeds to identify the evils of unpopular punishment.

> *The legislator, by despising public sentiment, imperceptibly turns it against himself.* He loses the voluntary assistance which individuals lend to the execution of the law when they are content with it; the people, instead of being his assistants, are his *enemies.* Some endeavour to facilitate the escape of the guilty; others feel a scruple at denouncing them; witnesses hesitate to testify; there is formed insensibly a fatal prejudice, which attaches a kind of shame and reproach to the service of law (p. 209, emphasis added).

Bentham goes further to add that the discontent may bring about resistance; any successful resistance has its adverse impact on the symbolism and efficacy of law itself, and also on the viability of law-makers, and enforcers.

Bentham's analysis is clearly confined to unpopular punishments. Even so, it lays bare the links between law, public opinion and legitimacy of the law-maker (or political authority). Disregard of public opinion may itself sanction the political decision-makers. The popular sanction may, in varying degrees, weaken and may perhaps even nullify the legal sanction. This analysis has certain clear implications too for any general theory of interaction between legal and popular sanctions.

Further, in his discussion of law and religion, Bentham offers us some important insights into the relation between penal law and public opinion. From a law-maker's standpoint, the subjects of legislation fall into three categories: "those (persons) who are already of the same opinion as the legislator; those who reject that opinion; those who neither adopt nor reject it" (p. 267). Penal law aimed at regulation of beliefs or opinion would be relatively effective for the last mentioned category of people who may be influenced by the security offered by compliance to legislative will. On the other hand, punishment has a "rather contrary effect" on those who hold settled beliefs or opinion at variance with the legislative will. Punishment in such cases would tend to "confirm one's opinion than to shake it". Bentham so hypothesizes because, *first,* the "employment of constraint is a tacit avowal that arguments are wanting" and, *second,* "recourse to violent means produces an aversion to opinions so sustained". In the result, punishment "never can oblige a man to believe, but only to pretend that he believes" (p. 267). When law is employed as an instrument of planned social change, well in advance of favourable public opinion, Bentham's foregoing analysis assumes great relevance. It also opens up a number of lines of empirical enquiry.

It still remains true that Bentham has not worked out a careful analysis of correlations between legal sanction and the sanction of public opinion. But neither have thinkers who have followed Bentham done so. Instead, familiar truisms continue to be reiterated. We are thus told that the law must *lead,* as well as *follow,* public opinion. But the real question is: in what *contexts* may the law *effectively* lead or follow public opinion? Explication of these contexts, even at a pre-theoretical level, still remains an important item on the agenda of the sociology of law.

IV. Law and Social Control

The last part of the *Theory* dealing with indirect means of preventing offences contains seminal analysis, neglected however by those students of Bentham whose concerns are purely philosophical in nature. In talking about indirect means of preventing offences, Bentham is in fact offering beginnings, however crude, of one aspect of theory of social control through the law.

Why are such indirect means necessary? Bentham's answer to this question is memorable. "The penal system, though it may be made as perfect as possible, is defective in several respects" (p. 222). The system can come into operation only when an offence has been committed, *not* before.[9] "Every new instance of punishment", Bentham maintains, "is an additional proof that punishment lacks efficacy. . .". Moreover, punishment is itself an evil "though necessary to prevent greater evils". In a seminal observation, Bentham lays bare the anticlimax of the penal system as a means of social control:

> Penal justice, in the whole course of its operation, *can only be a series of evils*—evils arising from the threats and constraint of the law, evils arising from the prosecution of the accused before it is possible to distinguish innocence from guilt, evils arising out of judicial sentences, evils from the unavoidable consequences which result to the innocent (p. 222; emphasis added).

Finally, the penal system by its nature is limited in its operations even as regards offences or injurious actions. These latter "escape justice either by their frequency, the facility of concealing them, by the difficulty of defining them or finally by some vicious turn of public opinion by which they are favoured". The limited operation of penal law restricts its power "only to palpable acts, susceptible of manifest proofs" (p. 222).

The legislator ought not, therefore, to rely wholly on direct social control, by proscribing behaviour and punishing such behaviour. Rather, he should also rely on indirect social control by resorting to means which foster compliance without coercion. Indirect means dispose man to "obey the laws, to shield him from temptations, to govern him by his inclinations and his knowledge" (p. 222). Bentham rightly asserts that while direct means of social control through punishments has been "a long time reduced to system", the area of indirect means "has never been thoroughly examined" (p. 331). This observation, unfortunately, remains as true as when Bentham made it.

Whether the exercise of social control through the law be direct or indirect, it is necessary to apply the "influence of law" at the level of *will*, (inclination), *knowledge* and *power* in order to make behaviour consonant with the norm. In fact, Bentham goes so far as to say that will, knowledge and power—these three notions—"contain in the abstract the sum and substance of all that can be done by legislation, direct or indirect" (p. 223).

The legislator, as well as the sociologist, ought, however, to remain aware that power and knowledge are Janus-faced. "The power of doing evil is inseparable from the power of doing good. With his hands cut off, a man cannot steal, but neither can he work" (p. 224). Similarly, the more men know "the more means they have of doing evil" but it is also true that the more men know the less they may wish to do evil (pp. 226-27). In other words,

9. Of course, Bentham does not ignore the element of deterrence, as is clear from his discussion of sanctions and punishment.

the simplest of all solutions—to take away knowledge or power to indulge in anti-legal behaviour—is also the most pernicious of all. Indeed, such a solution is counter-productive from the standpoint of social development and social control.

Bentham favours uses of law as an indirect means of social control only at the level of influencing the inclinations or will of men. There is a *logic of will*, distinct from that of *understanding;* the legislator must follow the "rules" of the logic of will. The logic of will may be in direct contradiction to that of understanding. Bentham recalls Ovid:

> I see the better and approve it; the worse I follow.[10]

The legislator should strive to put to an end "in many cases to this internal discord", to "diminish the contrariety of motives". Bentham suspects that this discord often "owes to the want of address on the part of the legislator", to an "opposition he has himself created between the natural sanction and political sanction, between the moral sanction and religious sanction" (p. 229).

Bentham discusses twelve ways through which human will can be influenced in desired directions (see pp. 229-30). Although some examples given under a specific head may strike us now as odd and faintly amusing, the twelve ways of influencing the will still provide a sort of ideal-type framework for indirect social control through the law. The legislator, thus, must avoid furnishing encouragements to crime, diminish sensibility of temptation, prevent an offence by giving to persons an immediate interest in its prevention and must direct inclinations "towards amusements conformable to the public interest". There is much in Bentham's discussion of indirect means of influencing will that is still relevant for the law-maker and the sociologist of law.

In addition to these distinct ways of influencing volition, Bentham stresses four general indirect means: (i) fostering "culture of benevolence"; (ii) fostering the "culture of honour"; (iii) employment of the "impulse of religion"; and (iv) power of instruction and of education. Incipient in this classification is the now familiar distinction between three principal social control mechanisms: law, religion, and education.

Bentham stresses the limits of coercive legal action (as noted in § III) in relation to opinion and belief, especially religious belief. Every penal means used to increase the power of religion "act as an indirect means against that essential part of morals, which consists in respect for truth, and respect for public opinion" (p. 268). In relation to religion, as well as benevolence, Bentham avers, "command and force do not avail". Rather, men must be "persuaded, enlightened, taught little by little, to distinguish the degrees of utility..." (p. 264). Education and public instruction are the best means of indirect social control.

No doubt, much of all this forms commonplaces of modern sociological thinking, though jurists have yet to be too frequently reminded that the law's centrality as a means of social control is often exaggerated. In this sense, a return to commonplaces in the *Theory* should always have some moderating

10. *Theory*, 229. Incidentally, Ovid's thought is paralleled in the Indian epic the *Mahabharata* where Duryodhana avers: "I know the Dharma but do not perform it; I know the *adharma* but cannot desist from doing it". Mary Mack has developed the idea of the "logic of will" more elaborately than any other student of Bentham. See her book cited *supra* note 1, at 151-203.

influence. Bentham's raw analysis emphasizes the problematic nature of coer cive legal regulation of belief and behaviour and truly anticipates the nee for an exploration of what Roscoe Pound has since described as the "limit of effective legal action". It also anticipates the need for a scientific study th impact of law on belief and behaviour and *vice versa*. By the same toke Bentham's incomplete analysis suggests questions about relations betwee law, education, and religion as the principal mechanisms of social contro

V. Law and Expectation

The notion of expectation plays an important role in *Theory*.[11] Benthan defines security, the paramount end of law, is terms of expectation. "Wit out law, there is no security" and without security the values of subsistence abundance, and equality cannot at all be pursued through the law. And secur ity itself consists in the maintenance of expectations. An expectation is "presentiment" which endows us with the power of "forming a general pla of conduct", which ensures that "the successive instants which compose th duration of life are not isolated and independent points, but become cont nuous parts of the whole" (p. 68). Accordingly the

> goodness of the laws depends upon their conformity to general *expecta tion*. The legislator ought to be well acquainted with the progress of th expectation, in order to act in concert with it. This should be the end.. (p. 90).

How is this end to be achieved? Ideally, laws should be "anterior to expec ations"; but this is not feasible, even in the abstract, because "the very fir laws found some expectations already formed". Since *some* expectations ar anterior to law, the legislator ought to simply follow them. But Bentha acknowledges that laws also create new expectations. There is then a diale tical relationship between law and expectations:

> The laws received their first determination from... anterior expectation they have produced new ones, and have gradually formed channels of o desires and hopes (p. 90).

At the same time, the law cannot wholly pre-determine expectations becaus the legislator, for the most part, is not "a master of dispositions of huma heart, he is only their interpreter and their minister" (p. 90). In the net resu the legislator ought to be able to ascertain the relative strength and generali of expectations in any area before he makes them subject to law, contra to "actual expectations". The conflict between established expectations a law contrary to it should be resolved by the solvent of time; Bentha counsels, "You should so arrange matters that this law will not begin to tak

11. The notion of "expectation" has called for different operationalizations in po tical science, economics and theories of justice. In empirical studies of legitimatio "the notion" has been operationalized in terms of *normative* and *actual* expectatio In economics, the ideas of optimality and planning (rational choice making) invol reference to expectation. More recently, John Rawls' elaboration of the "differen principle" entails explication of the notion of "expectation", see J. Rawls "Distrib tive Justice" in *Philosophy, Politics and Society* (Third series; P. Laslett and W. Runciman *eds.*) 80 (1967); Upendra Baxi, *"State of Gujarat V. Shantilal*: A Requie for 'Just Compensation'?" (1969) 9 *Jaipur L. J.* 29, at 75-77. See also J. Rawls, *Theory of Justice* (1971) and the critique by Brian Barry *The Liberal Theory Justice* (1973) *passim*.

effect except at a remote period"—a period which may even involve a distance of a generation (p. 90).

In correlating law to expectations, Bentham lays down some conditions of a good law which strikingly anticipate the requirements of what Lon Fuller enunciated as the "inner morality of law".[12] Bentham insists that the laws should be known, consistent, certain in execution, simple and literally enforced. Of course the paramount requirement is that laws ought to be grounded in the principle of utility; and once they are so grounded, each of these requirements of a good law is satisfied as a matter of course.

Certainty and simplicity are the utilitarian sentinels for good laws. If there is "good ground for supposing that law will not be executed" the law is "useless" (p. 92). For the same reason, laws ought to be literally followed, for when the law is "fixed" the citizen has a chance to know it"; the moment, however, the judge dares to "arrogate to himself the power of... substituting his will for that of the legislator,.... everything becomes arbitrary". Bentham warns us that it is not only the evil of such a "usurpation" but even the good that may ensue that we should profoundly distrust. For every usurpation of a "power above law... as regards future ought to be an object of terror". Similarly, law can only be constructively related to human expectations if it is simple, intelligible, and accessible. "Every man has his limited measure of understanding"; hence, laws must be simple in style and substance. "The more complex the law is, the more it is above the faculties of a great number". The more complex the law is the less it is known; "it has less hold upon man; it does not present itself to their minds upon necessary occasions" and what is worse it "produces false expectations".

The definition of security in terms of expectation-maintenance leads Bentham to offer a penetrating insight into the conception of property. The idea of property "consists in an established expectation; in the persuasion of being able to draw... an advantage from the thing possessed, according to the nature of the case" (p. 68). This expectation can "only be the work of the law". Hence, he concludes, "property and law are born together, and die together". Property, then, is an aspect of security. Hence, the prescription:

> As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such portion of good. The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil (p. 69).

Bentham is aware that this view, if consistently followed, may make change towards equality almost impossible. He wisely introduces a time-dimension through which the conflict between security and equality may be mediated in favour of change. Limitation of testamentary power or regulating succession in "favour of equality", for example, will not disappoint any expectation since the "new acquirers" would have formulated no expectation; and "equality may do what is best for all without disappointing any" (p. 75). Similarly, civil inequalities may be corrected *slowly;* removal of slavery must be done in a manner which would not derange the property aspect of the institution of slavery. Bentham counsels: "Men who are rendered

12. Lon Fuller, *The Morality of Law* (1964) 33-53. This is a good example of how a classic anticipates, in some detail, future themes.

free by these gradations, will be much more capable of being so than if you had taught them to tread justice under foot, for the sake of introducing a new social order" (p. 75).

Bentham's preference for security above liberty and equality and his defence of the institution of private property will evoke disagreements. But his analysis of the notion of security—as a social-psychological disposition—is as unimpeachable as it is heuristically fruitful. The very idea of security is very well operationlized by the notion of expectations.

In its endeavour to relate law to social expectations, the *Theory* highlights some sociological constraints affecting the legislative activity. Even if the legislator may wish to work on a clean slate, he is not in a position to wipe it clean. The legislator operates in a context of "multitude of expectations" which obliges him to employ a "system of conciliation and concession which constantly restrains him" (p. 90). These constraints often set limits to effective *legislative* action. It must be stressed, however, that the legislator may not need, in most cases, to depart through lawmaking from general expectations; indeed, his own expectations may be concordant with whatever he regards as a general course of expectation.

This last point is important. The idea that popular expectations may (or even should) set limits to legislative enterprises is an important one, but it should not be overemphasized. General course of expectations may also *facilitate* law-making and reinforce the legitimacy of those who make law. Prevalent expectations—some already arising from prior legislative activities —provide the matrix for laws. To the extent laws are concordant with expectations, one may hypothesize that they will be willingly complied with by a substantial number of people. The fact that laws are rooted in common expectations, thus facilitates willing compliance; the latter in turn, fosters respect for the law and law-makers. Compliance on a large scale helps legitimation of law and the authority of the law-makers.

Indeed, expectations as to what law-makers *ought* to do may by themselves provide a degree of legitimation for them; for these expectations may be apperceived as constituting the role-obligations of a legislator. The more the legislator perceives his role-obligations clearly, and acts on them, the greater is the prospect that laws will conform to general expectation. Bentham may have overemphasized the value of security but in so doing he has accurately perceived linkages between law, power and authority. His exhortation to the legislator to conform, as far as possible, to expectations created by him (as well as those anterior to his legislative activity) is a more practical way of articulating theoretical concerns about the continual process of legitimation of law and its makers.

Additionally, Bentham's analysis thus far provides some interesting insights into the question of law's relation to social stability ("integration", "persistence"). The law (here conceived as the entire legal system), aside from contributing to order in society, also contributes to social cohesion or solidarity to the extent it achieves the basic aim of security (expectation-maintenance). Bentham is constantly warning the legislator—whether in the context of punishment or in that of property—*not* to "shock" or "derange" expectations. Pains (evils) of disappointed expectations may have wide-ranging adverse impact on compliance to laws, and on the authority of law-makers. All this, at a particular point may well contribute to social discohesion. The greater the security fostered by legal order, the greater are the prospects of a stable social order.

When we, however, try to ascertain the relation of law to social change, Benthamite analysis poses substantial problems. The use of law as a technique of planned social change has as its principal object the transformation of behaviour, attitudes and values. Laws seeking to do this may, by definition, be contrary to expectations, both anterior and subsequent. If this is so, how else can the legislator proceed except by "shocking", "deranging" or "disappointing" expectations?

Bentham's answer to this sort of question is tolerably clear; whether or not it is adequate remains debatable. The legislator must be lucidly aware of the general course of expectation in regard to a particular subject-matter. Wherever expectations are clear-cut, cohesive, and compelling, the legislator ought not to disturb them by making contrary laws. This, however, does not mean or imply that he can (or should) never change the law in a direction contrary to expectations. As seen earlier, in the context of right to property, Bentham advocates slow changes, planned over a number of years. Bentham has also suggested (as noted earlier) that the legislator develop and practice the "gentle art" of guiding public opinion. In other words, Bentham is not unmindful of the need to use law as an instrument for initiating social change; he is rather concerned to alert us that such a use of law is *serious* business, not to be attempted carelessly or recklessly. Such a caution, far from being redundant at any time, needs continuing reiteration.

In Bentham's analysis not every initiation of social change through the law need upset or derange expectations. In some matters, expectations may be feeble, nascent or inchoate; in some others, expectations may themselves be undergoing some changes. Likewise, the unborn generations would have naturally no particular constellation of expectations; hence, for example, Bentham urges some reasonable restrictions on testamentary powers. Moreover, insofar as the legislator can by indirect means affect the logic of will he can very substantially affect the progress of general expectation too.

All this, however, leaves the vexed question of how a legislator should deal with undesirable (whether intrinsically or in terms of utility) course of expectation. Initiation of social change through coercive means seems to have provided the answer to generations of law-makers everywhere. But Bentham would not accept law's confrontation with expectations even in such a situation; for this would be productive of far too many evils. He would urge, as many after him have done, that legislators must

> move slowly and by indirection into areas where the community conduct tells them that they must venture, but the community's mores warns them that they must not.[13]

Given this approach, the *Theory* is simply unconcerned with the questions: Can law be used as a technique of initiating, structuring or reinforcing revolutionary social change? If it can be so employed, what will be its impact on the pre-existent expectation structure? Will the latter structure affect, and if so to what extent, such a use of legal technique? How far coercion, as a resource for law, be used to transform the very basis and range of the expectation-structure? Is coercion contrary to expectations negation of "security" in all situations? Most of these questions are still in search of answers; what is important is the fact that they are at long last being asked in the

13. Julius Stone, *Social Dimensions of Law and Justice* (1966) 314.

contemporary legal sociological literature.[14]

So far our discussion has assumed that the notion of "expectations" is itself free from analytical problems. It is not so free, however. Bentham's usage of it refers us to a "pre-sentiment" which endows us with the power to plan, to maintain a degree of continuity in our lives. "Expectation", be it recalled, "is a chain which unites our present existence to our future existence"; the "sensibility of man extends through all the links of this chain". But, at best, this is a very general statement of the meaning of "expectation". To say that men expect to live peacefully, to have what is due to them securely, to have immunity from bodily and mental harm, to have their basic needs satisfied is to state the obvious. Men thus expect a course of behaviour from their fellowmen, groups, as well as governments. But beyond a baseline of commonly shared expectations there must arise a heterogenity in what men in society expect of others, of law and government. Men may hold inconsistent and conflicting expectations. A society divided into rich and poor, free and unfree, majority and minority, divided by religion, class and colour may offer very poor guidance to a legislator, in most matters, as to the *general* course of expectations. At this level, the relevant question is *not* whether expectations should be satisfied, but *whose* expectations should be satisfied by the legislator? And *why*, and to *what* end, and *how* best the expectations of one group be satisfied by law when they conflict with others?

Sociological jurisprudence from and since Bentham has simply failed to answer these questions save through general formulaes, which leave a lot of leeway for open or disguised play of value preferences. Thus, Bentham's advice would be to satisfy as many expectations as would increase social happiness just as Roscoe Pound (who followed him very closely) counselled that the law-maker must satisfy as many *de facto* demands as he can "without least friction and waste". We must agree, without taking any sides in the emotionally explosive controversy as to whether social sciences are or should be "value-free", that the answer to questions here raised can be more aptly offered by theories of justice. The sociologist of law does his job well if by a minute analysis of socio-legal realities he offers questions of justice concretely, in their full existential contexts, as grist to the philosopher's mill.

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14. See, e.g., Gregory Massell, "Law As an Instrument of Revolutionary Social Change in a Traditional Milieu: A Case of Soviet Central Asia" (1967-68) 2 *Law & Soc. Rev.* 179; Michael Bakurn, "Law and Social Revolution: Millenarianism and the Legal System" (1971) 6 *Law & Soc. Rev.* 172.