

# Bentham, Law and Marriage

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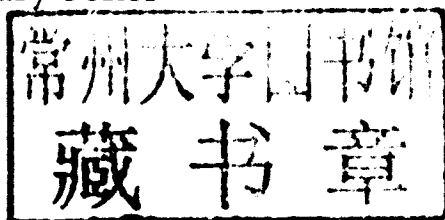
*A Utilitarian Code of Law in  
Historical Contexts*

Mary Sokol

# Bentham, Law and Marriage:

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*With thanks to Jerry Sokol for 'mutuall society, helpe and comfourte'*

## Acknowledgements

Some years ago, when reading Bentham's manuscripts on property law in the Special Collections Library at University College, London, I came across a reference to something Bentham described as a 'marriage code'. I was intrigued but other commitments forced a delay before I could begin to search for this code among the manuscripts, by then temporarily housed on the Hampstead Road in a chilly disused warehouse filled with strange cranking noises from the automatic car wash next door. But the manuscripts, and the helpful archivists, were unchanged and my curiosity led me into ever greater excavations. This book, the first look at Bentham's writing on the law of marriage, is the result.

I owe much to others who have encouraged and helped me at every stage. These include William Twining who first interested me in Bentham, those who attended the Bentham Seminars at University College and the British Legal History Conference held at University College in 2005. I am also grateful to the organizers and participants at the London Legal History Seminars, where I read two parts of my work.

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## *Abbreviations and Manuscript References*

All references to English law reports use standard abbreviations.

Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*. Intro. F. Rosen. Oxford: Clarendon Press, 1996, from *The Collected Works of Jeremy Bentham*, is referred to as *IPML*.

Jeremy Bentham, *Traites de Legislation Civile et Penale*. Ed. Etienne Dumont. Paris, 1802 and Jeremy Bentham, *The Theory of Legislation*. Ed. C. K. Ogden, trans. from the French of Etienne Dumont by Richard Hildreth. New York: Kegan Paul Trench, Trubner and Co. Ltd., 1931, are referred to as the *Traites*.

Jeremy Bentham, *Works*. Ed. John Bowring. 11 vols. Edinburgh: William Tait, 1838–43, is referred to as ‘Bowring’.

Bentham Manuscripts in University College Library Special Collections are referred to, for example, as UC xi 66, which means box 11, folio 66; the ancient form of Roman numerals (not the modern ‘subtractive style’) used in the Bentham collection for box numbers, for example, lxxxx for 90, have been retained.

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## *Introduction: Contemporary Contexts*

Bentham's writings on the law of marriage are firmly based on the principle of utility, the 'greatest happiness' principle, which recognizes that all human actions are motivated by a wish to avoid pain and gain pleasure. 'Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne.'<sup>1</sup> An act is good, or not, according to its certain or probable consequences. Accordingly, Bentham made extensive examination of the various kinds of harm, or 'mischief', that can result from an act.<sup>2</sup>

Bentham's writings on marriage placed sexual pleasure as an important source of pleasure for mankind, and reflect a proposition that men and women, equally subject to pleasure and pain, are equal. Many of Bentham's specific proposals would have been controversial in his time, and indeed some, fixed-term marriages, for example, might be found surprising today.

Bentham responded to Enlightenment debates on the secularization of marriage, natural law, and distinctions between nature and culture. He drew on the writings of the *philosophes* of the French Enlightenment, and the English and Scottish political thinkers Locke, Hume and Paley.<sup>3</sup> But Bentham's writings on marriage were not intended to constitute a philosophical essay, but rather he proposed a framework for a utilitarian code of law. Here he made a practical application of the principle utility to the problems of reforming the law of marriage, or in his words gave the 'forme' of the law its 'matière'.<sup>4</sup> The conjunction between Bentham's ideas on marriage which responded to a wider European intellectual context, and his unique project for a utilitarian code of law, made his writings on marriage remarkable in eighteenth-century England, and in many ways they are remarkable still.

At first, Bentham planned to create a digest, or compendium, of law which would include a law of marriage,<sup>5</sup> but he soon embarked on a more ambitious plan to write a vast, all-encompassing series of utilitarian codes of law, and the regulation of marriage was to take its place within this scheme. He began work

on marriage in 1780s, returning to these papers during the 1790s and again in the early nineteenth century. Very few of these manuscripts have been published. At the end of this Introduction there will be an extended discussion of their complex provenance.

The fraction of Bentham's manuscripts on marriage that were published in French in 1802 were translated into English later in the nineteenth century. Not only did they represent just a limited number of manuscripts, but also their editors chose to suppress Bentham's discussions of some subjects. As a result, 'recovering the historical Bentham' by reading Bentham's own manuscripts on love and marriage, rather than the published recensions, must be the basis of any comment on Bentham's law of marriage.<sup>6</sup>

Recovering the historical Bentham means understanding Bentham as a historical figure: a man who was born, lived and died in a certain period of history, who was subject to the trials and tribulations of his time, and who lived a private life too. From this viewpoint Bentham's work is not seen as timeless, *sub specie aeternitatis*, as it may be viewed by philosophers. Therefore, I must ask: what can be added to our understanding of Bentham's work on marriage by looking at Bentham himself as a historical figure? It has sometimes been said that Bentham personally knew little about English law, and even less about the realities of marriage; that he had only a limited experience of practising as a lawyer, and none at all of married life. In this introductory chapter I will address and correct such views by looking first at Bentham's legal education and then, briefly, at his several failed attempts to marry. Next, I will consider Bentham in his contemporary context by examining his work in relation to eighteenth-century literary treatments of marriage. Finally, I will describe the manuscript sources and explain their relation to Bentham's published work on marriage.

## BENTHAM'S LEGAL EDUCATION

As a result of his father's careful planning, Bentham's legal education accorded with the most advanced ideas on the subject current in eighteenth-century England. His education, and particularly William Blackstone's part in it, was an important factor in determining what kind of a lawyer the young Bentham would become. In 1760, at the age of 12, he left Westminster School for Queen's College, Oxford. There, as an undergraduate in 1763 he attended Blackstone's celebrated lectures on the common law.

Blackstone aimed to present 'a broadly humane, liberal, and scientific' overview of the law rather than 'inchoate technicalities' and the 'mystic dark discordant lore' of traditional common law education.<sup>7</sup> Bentham's undergraduate notebook, containing his notes on Blackstone's lectures, is extant. But it contains notes only on the first ten lectures, and not on the later ones which would have included the law of husband and wife, under the heading of 'Private Rights'.<sup>8</sup> Yet it is likely that Bentham heard these, for he later told John Bowring that he had attended the lectures with two other students both of whom took copious notes, 'which I attempted to do, but could not continue it, as my thoughts were occupied in reflecting on what I heard'.<sup>9</sup>

William Blackstone, who was then a fellow of All Souls and a member of the Bar, began to give students a series of private lectures on the common law in 1753. This was significant because at that time the common law was not taught at the universities which offered instruction only in the civil law. In 1758, Blackstone was elected to the Vinerian Chair of Common Law at Oxford and his formerly private lectures continued as the Vinerian lectures on the common law. In 1765 to great acclaim he published these lectures as the *Commentaries on the Laws of England*.<sup>10</sup>

It is hard to exaggerate the success of that book; it has been claimed that Blackstone's *Commentaries* 'would become the most celebrated, widely circulated, and influential law book ever published in the English language'.<sup>11</sup> Blackstone's fame spread far beyond England. More editions of Blackstone's *Commentaries* were published in French than in English. It was translated into Chinese and Japanese,<sup>12</sup> Catherine the Great of Russia ordered a translation, and King George III is said to have much admired the book.<sup>13</sup> Blackstone's greatest and possibly most lasting influence was in the United States.<sup>14</sup> 'Blackstone', as reading matter suitable for educated people, was considered sufficiently important for an abridgement of the *Commentaries* made especially for the use of women to be published in 1822. This was written as a series of letters from a father to his daughter, the author writing that he did not want his daughter to be a 'learned pedant in petticoats', but rather a 'cheerful companion' and an 'accomplished woman'.<sup>15</sup> We know that Bentham owned a first edition of Blackstone's *Commentaries*, and some of Bentham's work has been said to echo Blackstone's phraseology and arrangement,<sup>16</sup> making Blackstone 'a pervasive factor in Bentham's early thought'.<sup>17</sup>

If Bentham had been an undergraduate at Queen's College since 1760, and if Blackstone had been giving his lectures on the common law since 1753, why did Bentham wait until 1763 to hear them? One answer may be that

in 1760 he simply could not afford to pay the six-guinea fee that Blackstone charged students attending his private lectures. But it is not completely certain that Blackstone did in fact continue to charge students a fee after 1758, for once appointed as the first Vinerian professor of Common Law he was in receipt of a salary of £200 per annum. However it seems likely that he did.<sup>18</sup>

So perhaps Bentham simply could not afford to attend the lectures. Although his father, Jeremiah Bentham, was a successful attorney,<sup>19</sup> he was far from liberal in his provision for his son at Oxford. John Bowring, Bentham's literary executor, records Bentham's recollections of hard times and comments that 'the narrow allowance which Bentham got from his father did not allow him to live without incurring debt at Oxford; and miserable he was when he was obliged to confess the fact to his father.'<sup>20</sup>

Another possibility is that until Bentham had decided to become a lawyer, he saw no need to attend Blackstone's lectures. Surprisingly, it is not at all clear just when Bentham made this important decision. Bowring records that at the age of 20 Bentham first discovered that he might have a 'genius' – in the sense of a characteristic disposition; inclination; bent, turn or temper of mind – for legislation.<sup>21</sup> Bentham had asked himself: 'Have I a genius for anything? What can I produce? What of all earthly pursuits is the most important? Legislation was the answer Helvetius gave.'<sup>22</sup>

But by the age of 20 Bentham was already studying at the Inns of Court. So we have no record of what motivated his earlier decision to become a barrister. Most probably, his father, like many another eighteenth-century father, made that decision for him. In any event he recorded no dissent from his father's choice of career for him. But he did recall the mortification and misery caused by his father's manoeuvres to force him to cultivate the powerful friends who would assist him professionally.<sup>23</sup> Bowring records Bentham's memories of trying to attract the attention of Sir Thomas Sewell, Master of the Rolls, whose son had been a fellow pupil at Westminster School. Jeremiah Bentham had often boasted to his son that as students he and Sir Thomas had been close friends, and that Jeremiah had once helped the financially embarrassed Sir Thomas to paper his chambers. But then they had gone their separate ways, Sir Thomas to the Bar and Jeremiah to practise as an attorney. Despite Bentham's obedient attempts, Sir Thomas took no notice of him at all and 'issued no invitation.'<sup>24</sup>

If we assume that it was indeed Jeremiah Bentham's decision that his son should become a barrister, and who decided on the form of his legal education, then it seems that Bentham senior chose to make arrangements for that legal education exactly as Blackstone had instructed in his inaugural lecture after his appointment to the Vinerian Chair in 1758. In this lecture, which he called 'A

Discourse on the Study of Law', Blackstone described the dire consequences of defective legal education for the nation as a whole. This, he claimed, was because failures in legal education were an integral part of the larger problem of failures in the administration of legal institutions.<sup>25</sup> The radical solution that Blackstone proposed was that the common law should be taught in the universities.<sup>26</sup>

Blackstone's stringent criticism of contemporary legal education, together with his great achievement in lecturing on the common law at Oxford, quickly attracted public attention and acclaim. These efforts were an essential part of his plans to reform the common law.<sup>27</sup> His lectures on the common law were given at a time that has been described as 'the nadir of the eighteenth century administration and institutional life of the law'. David Lemmings in particular describes the decline in civil litigation which reached a low point in 1750 when the Courts of King's Bench and Common Pleas heard about one-sixth of the number of suits they had heard in 1650. At the same time the great and unprecedented increase in parliamentary legislation had made an incursion into the common law courts' traditional territory.

Lawyers were much blamed for court delays and for the expense of litigation. Much of the public criticism centred on the work of attorneys and the high fees they charged which were seen as contributing to the decline of the work of the courts.<sup>28</sup> Jeremiah Bentham was just such an attorney with great professional ambitions for his clever son, whom he saw as a future Lord Chancellor. It is apparent that Jeremiah was well aware that the route to judicial office began by becoming a barrister, but that a barrister's legal education was problematic. As we have noted, the universities did not teach the common law but only civil law, and the Inns of Court had long since ceased to provide education in the common law. Officially, in order to qualify as a barrister it was necessary only to attend an Inn of Court and to eat a certain number of dinners in hall, which was called 'eating commons'. Following this, after a certain number of years the student was called to the Bar and admitted. Eighteenth-century students who wanted to practise in the common law courts pursued a usually solitary course of practical instruction, making their own empirical study of the decisions and pleadings in the legal literature, and sitting in court and observing procedure.<sup>29</sup>

Most barristers no longer followed the earlier practice of first attending one of the Chancery Inns, which had by then become the preserve of the attorneys. Another custom, which ended in the 1750s, was to apprentice Bar students to attorneys in the early stages of their training, after which they would attend one of the four 'noble Inns' of Court.<sup>30</sup> Many lawyers, including Lord Hardwick,

had taken this route to qualification, but it was much out of favour by the time Bentham began his own legal training.<sup>31</sup> Blackstone particularly criticized the apprenticeship of barristers to attorneys, which he said produced a merely mechanical understanding of law, with no knowledge of the principles on which practice is founded. 'In subservience to attorneys [the student] will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be not instructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him.'<sup>32</sup>

So, in accordance with Blackstone's strictures, Jeremiah Bentham arranged for his son first to attend the university and then to seek admission at one of the Inns of Court, as Blackstone himself had done.<sup>33</sup> In 1763, Jeremiah Bentham took his son away from Oxford and back to London, where he was admitted to Lincoln's Inn. In Bentham's day, many gentleman undergraduates would leave university without a degree after only a few terms' residence, and aspiring lawyers who did go there stayed at university on average somewhat longer than other undergraduates.<sup>34</sup> After 1762 there was a greater incentive for lawyers to remain on at university and take degrees, because in that year the Inns of Court formally reduced the time required for call to the bar to five years, and gave university graduates a two-year dispensation.<sup>35</sup>

Bentham had not graduated in November 1763 when his father took him from Oxford to Lincoln's Inn. Once admitted to the Inn he began to keep commons, eating his set number of dinners, and as a result the time he needed to serve before qualification began to run. Then, because there was no residence requirement for membership of Lincoln's Inn, in December 1763 he left London and returned to Oxford. He graduated as a Bachelor of Arts the next year, in December 1764, and then as a Master of Arts in 1767. In 1769, at the age of 21, Bentham was called to the Bar.

So Bentham must have attended Blackstone's lectures at Oxford soon after his return from Lincoln's Inn. To facilitate just such arrangements as Jeremiah Bentham had made for his son, Blackstone gave his Vinerian lectures in the common law during the Law Vacations. This timetabling policy enabled serious students like Bentham to hear lectures in the common law at University, and also attend the courts at Westminster Hall during the Law Terms.<sup>36</sup> Bentham's father had arranged what was at the time undoubtedly the best possible legal education for his son – one that dovetailed a university and legal education yielding maximum benefit to his son with the least expense to himself. In this light, it seems likely that Jeremiah Bentham paid for Bentham's attendance at Blackstone's lectures in 1763, just as he paid for his son's reserved

seat at Westminster Hall to hear Lord Mansfield in court in the same year, no doubt considering these outlays a worthwhile investment.<sup>37</sup>

## BENTHAM'S MARRIAGE PROPOSALS

In 1931, C. K. Ogden suggested that in 1776 Bentham anonymously published *A Fragment on Government*, his critique of Blackstone's *Commentaries*,<sup>38</sup> because he wanted to marry a girl named Mary Dunkley and hoped to support himself and his wife from the proceeds of his writing.<sup>39</sup> Bentham was 26 years old when he met the seventeen-year-old Mary Dunkley, whom he addressed as Polly, in 1774. Polly was the orphaned daughter of Thomas Dunkley, a surgeon in Essex, who had died in 1767 leaving his five children to be brought up by a relative (his wife having predeceased him).<sup>40</sup> His death had left his children penniless and so Polly had no fortune of her own to bring to a marriage. Bentham's hopes of marriage, however, were thwarted by his father who was 'implacably hostile to their marrying', and who threatened to disinherit him if he did so.<sup>41</sup>

Jeremiah Bentham was a successful City attorney who had accumulated considerable wealth from a successful legal practice and from dealing in property. His wealth and social position enabled him to live in the West End of London, and to send his son Jeremy to Westminster School rather than Charterhouse. Jeremiah opposed his son's desired marriage on the grounds that it could bring him neither fortune nor social advantage.<sup>42</sup> His behaviour was not unusually avaricious for the age, although he was less indulgent than many other fathers who would give in to emotional appeals from their children.<sup>43</sup> Propertied men in the eighteenth century commonly arranged marriages for their children in accordance with dynastic and financial concerns. But using coercion or force to compel a child to marry was not considered acceptable, and neither was ignoring a child's own preference. However, as Bentham found out, financial pressure and the threat of to disinheritance gave his father a powerful weapon.<sup>44</sup> Bentham, deeply upset, wrote bitterly to his brother Samuel that, despite indications to the contrary, his father most probably did love him, or at least loved him 'next to his money'.<sup>45</sup>

It is an irony that in 1745 Bentham's father, Jeremiah Bentham, had completely disregarded his own parents' objections to his marriage to Alice Whitehorn, then a young widow without fortune.<sup>46</sup> Having opposed Bentham's own fortuneless marriage, Jeremiah criticized the marriage of one of Bentham's friends, the successful attorney Richard Clarke. According to Jeremiah, Clarke

had chosen his wife for her fortune alone. Jeremiah pronounced this to be a mistake because although 'Fortune is absolutely necessary to the Comfort of Life in any Station . . . there shod. be something engaging as well as agreeable in the mind and manner' of a wife. Jeremiah hoped neither of his sons, when they married, would make 'so great a Sacrifice,' otherwise a 'man must be a Stoic even With a Fortune to be able to make a good Husband'.<sup>47</sup> By 1774, Bentham was a barrister living in Chambers at Lincoln's Inn, but there is little evidence that he practised law. Instead he supported himself from his writing and from an allowance of £103 per annum settled on him by his father in 1766. This was made up in part from an inheritance from his mother's marriage settlement and in part from rental monies from property, which Jeremiah arranged to be paid to his son directly.<sup>48</sup> Bentham thought this income inadequate to support a family, but refused to abandon his wish to marry Polly. We can gauge the accuracy of his opinion by comparing it with Mary Wollstonecraft's conviction in 1773 that £300 per annum was 'a great fortune' and that 'a woman of any oeconomy may live very genteelly on £150 a year', or with Jane Austen's belief in the 1790s that an income of £300 per annum was 'sufficient to make Edward Ferrars comfortable as a bachelor but keep him too poor to marry'.<sup>49</sup>

Bentham decided to marry without his father's help. He planned to raise money by renting out his chambers in Lincoln's Inn and moving into his friend John Lind's house in Holborn, where Polly would join him. There he would support his wife from his writing.<sup>50</sup> Bentham's scheme followed the example of many impecunious eighteenth-century intellectuals who made a sometimes precarious living by writing.<sup>51</sup> In accordance with this plan Bentham did move house. He had already translated Voltaire's *The White Bull* into English anonymously in 1774, and he planned further similar work.<sup>52</sup> But what Bentham called his 'marriage Scheme'<sup>53</sup> came to nothing, and at some point in time he abandoned his hopes of marrying Polly. It used to be thought that his relationship with her ended sometime in 1776, but there is some evidence that Bentham continued to see her long afterwards.<sup>54</sup> All that is known for certain is that on 13 April 1790 Polly Dunkley, now aged 32, married one John Rudd at St Peter's Church in Colchester, Essex.

Whatever the truth about the length of Bentham's relationship with Polly, his father urged a reluctant but eventually compliant Bentham to attempt to make a financially beneficial and socially prestigious marriage instead. Jeremiah selected an heiress, Sarah Stratton of Ripley, as a suitable wife who would add to his son's fortune and smooth his path to becoming Lord Chancellor. In



letters to his brother Samuel, to whom he had earlier revealed his anguish about Polly, Bentham described his father's instructions and his pursuit of Sarah. But despite his endeavours Sarah Stratton chose to marry someone else, and Bentham did not seem unduly heartbroken at his failure.<sup>55</sup>

His next recorded attempt at marriage took place 13 years later, in 1789, when he was 41 years of age. He had known Caroline Fox since 1781 when he had met her, then a girl of 13, at the house of her uncle, William Petty, second Earl of Shelburne and first Marquis of Lansdowne (1737–1805). Lord Lansdowne, who surrounded himself with a circle of intellectuals, had visited Bentham's chambers in Lincoln's Inn in 1781 in order to make his acquaintance, and for the next decade Bentham was a frequent visitor at Lansdowne's town house in Berkley Square, and at his country house at Bowood in Wiltshire.<sup>56</sup> In 1789, when Caroline was 21, Bentham gave serious thought to marriage, but Dinwiddie writes in 1792 'his attentions seem to have become unwelcome and relations were broken off'.<sup>57</sup>

A letter from Elizabeth Vernon to Lord Lansdowne dated 11 November 1790 may explain why Bentham's attentions became unwelcome.<sup>58</sup> Elizabeth Vernon, Lansdowne's 'sister' (as she called herself), wrote to him in great indignation that they, Elizabeth Vernon and Caroline Fox, were returning to him a packet of papers, written by Mr Bentham, forwarded to them by Lansdowne's secretary. Elizabeth expressed her 'surprise at his [Bentham's] writing in such a stile to us . . . You will perhaps think us too great prudes but I know you agree with us that women cannot be too delicate in their manners, conversation & ideas'.

It is impossible to discover its exact details, but the outlines of the affair are clear. The packet of papers sent to the young women included a sixteen-page 'Prospectus' titled *Établissement National pour faciliter les Mariages*, which was written in French and purported to have come from France.<sup>59</sup> This explained the damage that celibacy caused to individuals and the state. For example, celibacy depressed the growth in population needed to increase the prosperity of French agriculture, commerce and culture. The causes of celibacy differed between countries and climates, but its results were the same: many people had no option but to live a celibate life. Large numbers of men and women took religious orders in France, and large numbers were employed as domestic servants, all of whom were expected to remain celibate. Many parents prevented their sons and daughters from marrying because of lack of money, although mothers and fathers really wanted the best for their children and the sons and daughters themselves, in accordance with nature, all wanted to marry. The prospectus concluded by proposing a solution to the problem: to