THREE ESSAYS ON BENTHAM

By

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A dissertation submitted to the Graduate Faculty in Philosophy in partial fulfillment of the Requirements for the degree of Doctor of Philosophy, The City University of New York

2009

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This manuscript has been read and accepted for the
Graduate Faculty in Philosophy in satisfaction of the
dissertation requirement for the degree of Doctor of Philosophy.

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Abstract

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The dissertation was written in the three essay format. In Essay One I discuss the elements of Bentham's philosophical method, both as described by Bentham and as exemplified by a variety of Bentham's texts. It will show that Bentham's principles of morals and legislation, though intended to have practical (political) effect, have also methodological significance, as they are grounded in grammatical and semantic constructs (constructs that affect 'method' – the form of one's enquiry).

In Essay Two I describe the elements of Bentham's conception of justice, based on Halevi, Sidgwick, and as they appear in Bentham's work. Bentham's approach to 'justice' hinges on his theory of fictions, primarily because 'justice' is, according to Bentham, a 'fictitious entity' – not having a superior genus. It is for this reason that Bentham introduces a new kind of definition – paraphrasis, and I hope to show that this is where a distinction made in Bentham between 'adjective' and 'substantive' terms helps explain the necessity of this new kind of definition and also helps us define 'justice' in itself. One of the conclusions of the second essay will be that there is a great similarity between the terms defining Justice in Bentham and the terms defining Method. In other words, 'doing the right thing' and 'having chosen the right method' seem to amount to the same thing. This also demonstrates the way Bentham employs the term 'right' – primarily in its 'adjectival' form.

In Essay Three I discuss the conception of 'right' in Bentham in the context of the French and American declarations of rights, and we see how Bentham presents the notion of 'political rights' in stead of 'natural rights'. Benthams' idea of 'political rights' derives its validity from the 'principle of the artificial identity of the interests of governors and the governed', or in other words, from the logical and semantic relationship between 'governors' and 'the governed'. In the second part of Essay Three I show how, contrary to some critics, Bentham's theory of justice and rights does provide adequate individuation of persons.

The dissertation as a whole, I hope, shows the continuity between what traditionally belongs to the 'content' of political theories and what belongs to their 'form' or method. This is being achieved primarily by offering to replace the traditional 'content/form' (or 'substance/method')

distinction with the distinction between ‘substantive’ and ‘adjective’ terms, which also allows us to see the similarity between the definitions of ‘method’ and ‘justice’ and the proper employment of the term ‘right’. Both ‘method’ and ’justice’ are highly abstracted entities, and as such cannot be defined in themselves by the traditional terms and formulas of definition (definition by genus and difference). It is the emphasis on ‘adjectival’ terms, which are compatible with the new kind of definition – paraphrasis – that allows us to arrive at a partial definition of ‘method’ and ‘justice’. And since with ‘paraphrasis’ the ‘adjectival’ terms are being employed in a new way, their meaning changes. This change of the meaning of the terms employed to define ‘method’ and ‘justice’ helps us see that ‘justice’ is a transformative entity. The initiation of the study of ‘justice’ causes a transformation of the terms of the enquiry, its mode (method), and the person of the one conducting it.

CONTENTS

INTRODUCTION:

C. K. Ogden quotes Bentham as saying: "A power is not a – any thing; neither is a right a – any thing: the case is, they have neither of them any superior genus … being of the number of those fictitious entities of which the import can by no other means be illustrated than by showing the relation which they bear to real ones."[1]

Bentham's new definition of 'definition' – paraphrasis – seems to follow the same plan:

> "…for the explanation of a fictitious entity, or rather the name of a fictitious entity, two perfectly distinct species of operations – call them *paraphrasis* and *archetypation* – will, in every case, require to be performed; and the corresponding sorts of propositions, which are their respective results, formed; viz. the *paraphrasis*, performing the function of a *definition*, but in its *form* not coinciding with any proposition to which that name is commonly attached. The *paraphrasis* consists in taking the word that requires to be expounded – viz. the name of a fictitious entity – and, after making it up into a phrase, applying it to another phrase, which, being of the same import, shall have for its principal and characteristic word the name of the corresponding real entity. In a *definition*, a phrase is employed for the exposition of a single word: in *paraphrasis*, a phrase is employed for the exposition of an entire phrase, of which the word, proposed to be expounded, is made to constitute the principal or characteristic word."[2]

In defining the relation of what Bentham's calls 'fictitious entities' to our real life (this relation properly described or defined constituting a theory of justice[3]) we must use a new form of 'definition'. The terms 'right' and 'justice' cannot be properly defined using the existing method of definition, since defining a term by means of 'genus and difference' would require that the term defined have a superior genus, which the terms 'right' and 'justice' do not have.

In essay one I try to define, first, the 'kind' of method Bentham's method is – a theory of meaning (not a metaphysics or even an epistemology - Quine calls it a 'conceptual' doctrine) - and then collect all the relevant items concerning method from the text. In essay two I present the various elements of Bentham's theory of justice (morals and legislation) with an emphasis on the continuity, often existing within the same principle, between the juridical and the methodological aspect. It turns

[1] C. K. Ogden, Bentham's Theory of Fictions, p. xxv.
[2] Ibid. p. 138.
[3] By the 'relation of Justice to life' I mean 'the way the abstracted conception of justice is applied systematically in a theory of justice'.

out that in Bentham the method and the conception of justice are almost identical ('doing the right thing' and 'choosing the best method' turns out to be the same thing).

Only after completing writing the three essays, I was able, in retrospect to put together a flow chart of sorts, describing in summary the continuity within Bentham's theory between the various methodological and juridical terms, distinctions and principles, and putting them in some dialectical and logical order (a 'necessary' order). It turns out that the linchpin of this theory is the new definition of 'definition' – definition by paraphrasis.

The transition from a metaphysics to a theory of meaning is in fact demonstrated by the shift from the traditional method of definition to 'paraphrasis' (and this helps define what kind of theory Bentham's is). Bentham says (*Bentham's Theory of Fictions*, p. 138): "In a *definition*, a phrase is employed for the exposition of a single word: in *paraphrasis*, a phrase is employed for the exposition of an entire phrase, of which the word, proposed to be expounded, is made to constitute the principal or characteristic word." Instead of 'defining' an object in the traditional (essentialist) manner, when it comes to the definition of highly abstracted objects such as 'justice' (a fictitious entity', according to Bentham) we find ourselves at a loss, and we retreat to the second best method, which arrives at the desired definition not by means of a reduction of 'essential' properties to a single word, but by keeping a 'principal word' as the focal point of a whole sentence, constituting the definition. The difference between the traditional form of definition and the new one manifests itself in a transition from the employment of 'essential' or 'substantive' terms to the employment (in 'paraphrasis') of 'adejctival' (traditionally 'non-essential') terms. I suggest this because clearly 'substantive' terms tend to 'stand alone', while 'adjectival' terms rely on the context of a whole sentence (by definition, 'substantive' terms function grammatically as 'subject', while 'adjectival' terms function as contributory terms). I am led to believe, then, that the shift from 'a definition by genus and difference' to 'a definition by paraphrasis' corresponds to a shift in the employment of the terms, from 'substantive' to 'adjectival'. And it is the 'contributory' nature of 'adjectival' terms that sets the tone for 'paraphrasis' as the new form of definition, thereby emphasizing further, in Bentham's method, the role of an 'adjectival' terminology: dispositional, modal, and otherwise 'accidental' terms. And this makes sense, because once you change the definition of 'definition' in such a profound manner, you are bound to end up with a new definition of 'method' (and 'justice') as well. And, it is the unique and abstracted nature of the subject to be defined – 'justice' – that initiated this methodological change (a change of 'definition' and of 'method').

Paraphrasing, allows us to incorporate the adjectival terms in their new function as 'constructive' terms – the terms contributing to a real definition [in this case the definition of a 'fictitious' (highly abstracted) entity]. The shift to 'paraphrasing', as the method of definition, would also mark the transition of the normally 'trivial', contributive, or modal terms of the enquiry from an 'instrumental' deployment to a 'constructive' one. The 'constructive' role of the normally

'instrumental' terms is then unavoidably a characteristic of Bentham's method, precisely because the definition of justice requires the shift to 'paraphrasis' as the form of definition. We can see evidence of this tendency also in his emphasis on a scrutiny of Blackstone's style and manner of writing in the Preface to the *Fragment on Government*, a critique pertaining primarily to the 'adjectival' terms – the terms of style and manner – in Blackstone's Commentaries (a critique also employing 'adjectival', 'modal' and 'dispositional' terms). In this sense, Bentham's first great feat of constructive criticism, or 'system building', is, in itself a feat of 'construction' by means of newly transformed 'adjectival' and 'modal' terms and properties, - now the building blocks of a new system (method) or theory of morals and legislation.

Following this line of thought, the challenge of defining 'justice' ('principles of morals and legislation') produces in Bentham a new definition of 'definition' - paraphrasis, and since this new kind of definition necessarily makes use of 'adjectival' terms as the terms constructing a definition (as distinguished from 'substantive' or traditionally 'essential' terms), the role of 'system building' and 'construction' of theory even in the substantive sense now shifts to the contributory 'adjectival' terms.

And it is for these reasons that the 'content' or 'substance' of Bentham theory – the desired definition of justice – can no longer be considered as distinct or separate from the 'form' of the enquiry – from its method: the adjectival, contributory, formal, instrumental terms have now acquired a new 'substantive' role as the terms essential for the definition of 'justice'. What has previously been 'instrumental' or 'formal' has now become 'essential' and in this sense 'substantive' – and it is this transition, or better said, transformation, that produces a definition of Justice as a 'transformative' conception – an entity (a fictitious entity, according to Bentham) defined by the movement from 'instrumental' to 'constructive'. In other words, the seemingly trivial command 'do the right thing' becomes a transforming difference. Justice is defined in purely operational, modal and dispositional terms, and is, in itself, a transformation – a transformative entity. And since Justice is all about (is defined by) 'how you do things', the definition of Justice and 'the best method' become identical. Doing the right thing and choosing the best method amount to the same.

The new method of definition, by bringing to the fore the 'adjectival' terms as the terms of construction (definition), also requires that that we change our habit of separating 'content' (substance) from 'form' (method) in our own enquiry, since the 'content/form' distinction would assume a definition of the object of our enquiry by means of genus and difference. Bentham's choice would probably be to replace the 'content/form' ('substance/method') distinction with the 'substantive/adjectival' ('primary/contributive') distinction. The distinction between 'substantive' and 'adjectival' terms can be understood as the difference between 'the terms of method that are now the content of this enquiry' and 'the terms of method employed in conducting the enquiry' (this occurs because the 'content' of this enquiry are the terms of method themselves).

The first essay deals with Bentham's Method, the second with his definition of Justice, and the third with his conception of Right. And it is only after we have seen how, in essay two and three, the attention to Justice and Right as subject-matter requires a new definition of 'definition ('justice' and 'right' cannot be defined by means of 'genus and differences' since they have no superior genus), - it is only then that we can see (in retrospect) how the choice of subject-matter (Justice and Right) has necessarily produced a new method of definition and with it a new or different kind of Method all around. The catch here is that only after surveying the elements of Method in essay one and the elements of Justice in essay two, are we in a position to understand the necessary process by means of which Bentham's method takes shape (based on the new form of definition and its emphasis on the role of the contributory – adjectival – terms).

My use of the expressions 'adjectival terms' and 'substantive terms' needs a further explanation: Bentham writes[4]: "To give execution and effect throughout to the main, or substantive, branch of the body of the law, is, or ought to be, the main positive end or object of the other branch, viz. the adjective, or that which regulates the system of judicial procedure."[5] The editor (Dumont) directs the reader to page 5 of the text (*Rational of Judicial Evidence*): "The exclusive rules relative to evidence belong to the adjective branch of the law: the effect of them is to frustrate and disappoint the expectations raised by the substantive branch. The maintenance of them has this effect perpetually: the abolition of them, even though by the judicial power, would have no such effect, but the contrary." And Dumont adds (in a footnote on the same page):

> "The terms, *adjective* and *substantive*, applied to law, are intended to mark an important distinction, first pointed out to notice by this author; viz. the distinction between the commands which refer directly to the ultimate ends of the legislator, and the commands which refer to objects which are only the means to those ends. The former are as it were the laws themselves; the latter are the prescriptions for carrying the former into execution[6]. They are, in short, the rules of procedure. The former Mr. Bentham calls the substantive law, the latter the adjective. - E*ditor*."[7]

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[4] In Bentham, *Rational of Judicial Evidence*, Published by Hunt & Clark, London, with a preface by J.S. Mill and edited by Dumont, in *Evidence*, Book I, Ch. I, (*On Evidence in General*).

[5] Ibid.

6 This comment about 'adjective laws' being 'prescriptions' can raise the question whether 'adjective laws' are in themselves 'prescriptive' ('prescriptive' in the 'censorial' sense of 'what ought to be'). I believe that the property 'prescriptive' can be attached to 'adjective law' only in a very limiting sense, - referring to the role of adjective laws as prescribing the manner in which substantive laws are to be executed. Adjective laws cannot be considered as 'prescriptive' otherwise, since they carry no 'prescriptive' power as concerning 'what ought to be executed'. Thence the prescriptive power of 'adjective laws' is limited to their secondary role as to the aims of substantive laws.

[7] Ibid., p. 5.

In the introduction to *Principles of Judicial Procedure*[8] Bentham writes:

> "Laws prescribing the course of procedure have on a former occasion been characterized by the term *adjective* laws, in contradistinction to those other laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, *substantive* laws."

My own use of the expressions 'adjectival terms' and 'substantive terms' and of the relation between them (the 'adjective/substantive' distinction) has evolved during the writing of these three essays. At one point (see above) Bentham draws the analogy between the 'adjective law/substantive law' distinction and the grammatical 'adjective noun/substantive noun' distinction: "For in jurisprudence, the laws termed adjective, can no more exist without the laws termed substantive, than in grammar a noun termed adjective, can present a distinct idea without the help of a noun of the substantive class, conjoined with it."[9] Bentham's use of the distinction inspired me to interpret the 'adjective/substantive' distinction as defining the relation (within one field) between a contributory art or system and a substantive art or system – between a secondary-contributive system and a primary system. For example, in architecture, the building to be built is the 'primary' system and the scaffolding is the 'contributive' or 'secondary' system. This generalized version of the distinction, which preserves its grammatical form, will help us see, throughout the three essays, how with our pursuit of a definition for 'method' and 'justice', the terms traditionally used in definitions - the 'substantive' terms - are of little use. And supported by the new definition of 'definition' – paraphrasis – it is the 'adjectival' terms, when understood as 'contributory', that form the desired definitions. It would seem that it is the highly abstracted nature of conceptions such as 'method' and 'justice' that encourages the emphasis on the 'adjectival' or 'contributory' terms in 'definition', especially with paraphrasis available. One could argue that it is the mere making of the distinction between a 'contributory' and a 'primary' system within one art or field, that initiates both the new definition of 'definition' and the transformation of the traditionally 'non-essential' 'adjectival' or 'contributory' terms into terms of construction – the terms essential for a definition. Merely making the distinction within the abstracted field of conceptions such as 'justice' or 'method' (or 'architecture', for that matter) initiates the transformation of the terms (the transformation from their previous 'instrumentality' to 'constructiveness'). The distinction between 'adjectival' and 'substantive' terms will also help us move away from the metaphysical mind-set with its distinction between 'method' (form) and 'substance' (content), to a mode of enquiry better suited for studying 'method' and 'justice' in themselves – a mode of enquiry benefiting from the distinction between 'adjectival' and 'substantive' terms. The closer we stay, in Bentham, to the grammatical sources of

[8] In *The Works of Jeremy Bentham*, Part VII, p. 6.
[9] P. 6, *The Works of Jeremy Bentham*, (edited by Bowring), Edinburgh: William Tait, 1837

the distinctions he defines and employs, the easier it will get to understand the principles of morals and legislation he presents.

The works of Bentham cited in this paper are: *Fragment on Government, Introduction to the Principles of Morals and Legislation, Critique of the Doctrine of Inalienable, Natural Rights, Truth versus Ashurst, Bentham's Theory of Legislation, Deontology Together with the Table of the Springs of Action, Principles of the Civil Code, Principles of Judicial Procedure, Rational of Reward, Rational of judicial Evidence,* and passages from Bentham's work quoted in C.K. Ogden's *Bentham's Theory of Fictions*.

ESSAY ONE: BENTHAM'S METHOD

WHY THE READER MIGHT BENEFIT FROM REPLACING THE TRADITIONAL 'SUBSTANCE / METHOD' DISTINCTION WITH THE 'SUBSTANTIVE / ADJECTIVE' DISTINCTION[10] IN APPROACHING BENTHAM'S THEORY OF JUSTICE (or, 'to what extent are the considerations substantive to the theory also of methodological significance' is not an easy question to answer. It becomes, in a sense, the subject of the present essay).

What distinguishes the 'substance' of a theory from its 'method'? (and what happens when, as is the case here, 'method' becomes the subject-matter; how 'substantive' can 'method' be?). The distinction between 'form' and 'content' is always a complex one, especially when it comes to theories of justice, in which the terms used to define 'justice' are peculiarly similar to the formal or methodological terms of the theory. Matters become exponentially more complex as we seek to define 'method' in itself, by positing it as our object of enquiry – as our 'content' of choice. It is not bad enough that 'justice' is a conception governed by the category of 'relation' (making it difficult to apply terms of 'substantivity' to it), but when we study method' in itself, the distinction between 'method as the form of the enquiry' and 'method as the subject of our enquiry' becomes often blurred and we seem to lose our grip of what the substance of our enquiry might be.

I would therefore suggest that when trying to define our own method here we replace the traditional distinction between 'substantive' and 'methodological' considerations, with the distinction which Bentham employs, - the distinction between 'substantive' and 'adjectival' terms. Once we don't have to perceive of things pertaining to the theory as either part of its content (substantive) or part of its form (methodological) and can view all terms engaged in the theory as either 'substantive' or

10 The 'substance/method' distinction refers to the content of a theory as distinguished from its form. The 'substantive/adjectival' distinction refers to the nature of the terms used to talk about such 'content'. By making the transition from the former distinction to the latter, the reader moves from the realm of 'the thing in itself' to 'how it is being talked about', and to 'how the thing in itself might be related to the terms employed in discussing it'. A full description of the distinction is available on page 105 of the present paper.

'adjectival', we gain a more direct access to the grammatical level of theory-formation. Not all great philosophers practice this approach, but Bentham does, and his theory of justice is our subject here. We can substitute the 'substantive/adjective' distinction for the 'substantive/methodological' distinction because it seems that most methodological terms are 'adjectival' terms – terms linked to adjectival nouns, referring to 'the way we do things'. And 'the way we do things' is just another term for 'method'. This 'substitution' or 'shift' from traditional philosophy has of course to do with the shift occurring in Bentham from the traditional 'definition by differentia and genus' to 'paraphrasis'. And if we look closely at the substitution I have just suggested, we can see that 'the way we do things' is the paraphrastic version of 'method'. And this direction of enquiry leads us also to the recognition (as is the case in Bentham) that 'method' and 'justice' are terms that have no superior genus, and could not have been defined by differentia and genus to begin with.

This compatibility between the subject of the enquiry and its terms and method is a characteristic of Bentham's theory. And we can see that fields of law to which Bentham dedicates much of his work are Procedure Law and Evidence Law, which fall both within the category of ‘adjectival law’ (as distinguished from ‘substantive law’). It would therefore be arbitrary to force the 'form/content' distinction upon such a study of 'adjectival law', where most of the terms to be defined (and the terms employed) are adjectival terms and as such lend themselves to methodological considerations (and can be employed *as* methodological terms). This means that we can get used to employing the term 'substance' in its adjectival form ('doing things in this way would be substantive', or as in 'substantive law') instead of using it in its 'substantive' form (as in '*a* substance' or 'the substance of the theory'). The distinction between 'substantive' and 'methodological' considerations evokes the 'substantive' use of the term 'substance': the term 'substance' used as '*a* substance' or 'this pertains to *the substance* of the theory', while the distinction between 'substantive' and 'adjectival' terms evokes the 'adjectival' employment of the term 'substance': 'substance' is now used only in its adjectival form (as in 'substantive') and when so used, is meant to convey the difference between the primary art and the secondary art, between 'substantive law' and 'adjectival law' ('substantive law' meant as the primary law supported by 'adjective law' in the same way the meaning of a substantive noun is supported by the meaning of an adjective noun). The 'form/content' distinction which works better for solid objects, gives way to a distinction between 'substantive' and 'adjective' nouns, between a 'primary' and a 'secondary' or 'contributory' art, which allows us better access to the definitions of both 'justice' and 'method' (and to the modal and dispositional terms defining them). It also becomes clear how this ties into the new definition of ‘definition’ ('paraphrasis'), which in itself is a shift from a 'substantive' use of the term 'substance' to the 'adjectival' use of the term 'substance'.

The constant transition from the substantive use of terms to their adjective use is characteristic of Bentham's work as a whole, and it (this shift, which is a categorial shift) is linked directly to the nature of the 'objects' of his enquiry, or its 'subject'. What is 'substantive' to his work

(the object of his enquiry) is perceived from the beginning (and by definition) as a relation between the adjective nature of the 'substances' discussed (the content of the theory) and the terms and mode employed to discuss them (the form or method). This relation of strict logical and semantic compatibility renders any so-called 'substantive' principle of the theory also a principle of method, and more importantly perhaps, it makes any methodological consideration a 'substantive' contribution to the content of the theory. In some theories 'substance' and 'method' can be perhaps viewed as terms of contradiction (an either/or proposition). With Bentham, the relation between substance and method morphs into a relation of contrariety (and continuity) between 'substantive' terms and 'adjective' terms, allowing us to properly define both 'method' and 'justice'.

Aristotle's syllogistic is a good example of a principle which makes for the 'substance' of Aristotle's theory and at the same time is a principle of 'method' and is employed in many other philosophical theories as a principle of method (a basic formula of inference). The syllogistic is a principle *of* Aristotle's theory – a 'substantive' principle – but at the same time it also obviously is a principle of method. Similarly, Bentham's principle of utility is the substance of his theory of justice, but at the same time, it is a principle of method (and we can see by the end of Essay One the structural resemblance between the syllogism and the principle of utility). And so are the distinction between Adjective and Substantive Law and the 'principle of the artificial identity of interests'. The substance of Bentham's theory is, in this sense, method. And we can add to this the fact that 'Bentham's method' has become the object of our present enquiry, which makes 'method' the substance of our enquiry into Bentham.

BENTHAM'S METHOD

The thesis of the first essay concerns the definition of 'method' in itself, - a definition comprised of what Bentham says about method, and for the most part of what is exemplified in Bentham's work as 'method' (the actual mode or method employed by him and the methodological value of the various principles defined). My thesis also concerns the 'kind' of method, insofar as it is, in my view, an understanding of the 'kind of method' that would help us understand Bentham's definition of 'method' (I assume that any definition of a particular method must pertain to the 'kind' of method. In some strange way philosophical methods in themselves, as 'particular' methods, differ from one another 'categorially' – perform under altogether different categories). My thesis is that Bentham's method (mode of inquiry) cannot be properly understood or defined in terms of metaphysics or epistemology, and that the 'kind' of method still has to be named. It would be good of course if I were able to properly name the method or 'kind' of method employed by Bentham at the outset of this paper on method. The term 'theory of meaning' comes to mind. But I thought it would be best to let Bentham's various methodological terms and distinctions speak for themselves, especially since most of these distinctions are presented by him as legislative and moral distinctions first, the actual

methodological significance only implied, not stated. Employing the expression 'theory of meaning' here might have been counter-productive since the expression when used to describe the 'kind' of a theory has had a history of connotations attached to it which might not be helpful here.

The difficulty in applying the terms of the 'realism/nominalism' distinction to Bentham's theory, might be an indication that a different category is at work here. The distinction between 'realism' and 'nominalism' is perhaps not a purely methodological distinction but it goes to the 'kind of theory' (sometimes unbeknownst to the person using it), as it is a valid distinction only within a 'metaphysical' mode of enquiry – it refers to the range of possibilities on a scale used to measure the objects of philosophical discourse in terms of their 'being' or 'existence' (metaphysical terms). As I will try to show, the terms which are used effectively in Bentham's theory, and can be used effectively in my analysis of that theory would be terms pertaining to the meaning of the objects and terms of the theory. And this approach can be justified by the fact that the primary objects of Bentham's theory are, the highly abstracted conception of justice and other abstracted terms pertaining to morals and legislation, - terms and principles which by definition 'exist' in the realm of 'speech' and 'thinking', and as such cannot be dealt with within a 'metaphysical' or even an 'epistemological' frame of mind (mode of enquiry).

Only a few scholars have attempted to define Bentham's philosophical method in terms of 'kind of method'. Quine says (in *Epistemology Naturalized*): "the conceptual studies are concerned with meaning, the doctrinal with truth."[11] And, "on the conceptual side …Bentham's step was the recognition of contextual definition, or what he called paraphrasis …that to explain a term …we need only show, by whatever means, how to translate all the whole sentences in which the term is to be used."[12]. This shows how closely related are in Bentham the nature or kind of method ('conceptual') and the pursuit of new forms of 'definition' ('paraphrasis').

C.K. Ogden (in *Bentham's Theory of Fictions*) argues that Bentham's theory should be understood as a theory of meaning, not a 'metaphysics', adding that the terminology of 'realism' versus 'nominalism' does not apply well to Bentham's theory. Gerald Postema advises us that Bentham's view of 'natural rights' is not merely a critique of natural rights but a critique of the *rhetoric* of natural rights. Emmanuelle De Champs describes several elements of Bentham's mode of inquiry: the method of classification, its basis in the re-arrangement of the categories as presented in

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[11] Quine, *Epistemology Naturalized*, p. 292, in Kim & Sosa's *Epistemology,* Blackwell 2000.
12 (Ibid. p. 292-293) In *On What There Is* Quine elaborates on the distinction between kinds of methods when he writes: "The three main medieval points of view regarding universals are designated by historians as realism, conceptualism, and nominalism." (p. 9, in Kim & Sosa's *Metaphysics*). We have already seen in the above that Quine associated Bentham's work with the conceptual mode of inquiry, which here is distinguished from both 'realism' and 'nominalism', leading to the conclusion that Bentham's method should not be associated with either 'realism' or 'nominalism'. But many do, such as De Champs for example. 'Conceptualism' appears to be another name for 'theory of meaning', since Quine himself says "the conceptual studies are concerned with meaning, the doctrinal with truth."

the theory of fictions, and the basis of the theory in grammatical and linguistic constructs. In De Champs we also find one of the clearest descriptions of Bentham's method of paraphrasis. But not one comprehensive study of Bentham's method exists in the literature (not to be confused with studies of utilitarianism). Adding to the difficulty is the scarcity of direct mentions of 'method' in Bentham's work. One of the problems seems to be the questionable categorization of Bentham's method as concerns the 'kind of method' it is. Quine, for example, while discerning in Bentham's method a unique character, sees Bentham's theory as a kind of epistemology ["this was the conceptual side of epistemology; what of the doctrinal?"[13]]. I will be asking in the present paper: is Bentham's method served well by being considered a method employed by a kind of epistemological theory, or is Bentham's theory (and the method affiliated with it) not an 'epistemology' at all?[14]

This (the question concerning the 'kind' of theory) has to do with the question whether logic is generally founded on mathematics or on grammar, to put it crudely. Bentham clearly belongs to the latter view, as De Champs so clearly states. Quine struggles with the question as well. And this debate reflects on the relationship between Russell and Wittgenstein in the 1930's at Cambridge (Wittgenstein returned to Cambridge in 1929). Not surprising, perhaps, Ogden's *Bentham's Theory of Fictions* was published in London in 1932.

Bentham's work is often discussed in the context of the possible influences on the young Bentham's work. But most of the time these studies pertain to the political or juridical content of Bentham's work, and not to the 'kind of theory it is' or to the 'kind of method' it employs. A case in point would be the influence of the work of Adam Smith on the young Bentham. But while scholars in the field of political philosophy would normally study Smith's *Lectures on Jurisprudence* for that purpose, it might be beneficial to our purpose here to study Smith's *Lectures on Rhetoric*, since the distinctions and terms which Bentham employs can be found more readily, in my view, in the latter. And the same goes for Hobbes's influence on Bentham: the efforts to compare the two philosophers 'content-wise' – in terms of their political ideas, tend to get complicated, while the study of the similarities of 'the way' they conduct their respective inquiries provides ample data. Both Hobbes

[13] Ibid. p.294

[14] Any philosopher approaching Bentham's theory brings his or her own 'way of doing philosophy'. It is unavoidable, and as long as the method (way of doing philosophy) they employ is of the same kind as the method employed in the theory they study, all is well. The problem we encounter with Bentham's work is that since his methodological apparatus and his way of doing philosophy is governed by terms of meaning and categories of modality and relation typical of theories of meaning, neither the metaphysical approach nor the purely epistemological approach (way of doing philosophy) are compatible with his work and cannot be properly used as ways of studying his work. Emmanuelle de Champ, for example, performs a great service to the study of Bentham's work in highlighting its foundation in grammatical terms and constructs. But she comes from an epistemological tradition in philosophy which assumes Bentham's work to be another epistemological theory. This, in my view interfers with her ability to study Bentham's theory for what it is, a theory of meaning. In Quine, the same problem arises, since even when associating Bentham's work with a 'conceptual' doctrine, or with a theory of meaning, that attribution is still performed by Quine within what he sees as the study of another primarily epistemological theory.

and Bentham dedicate the great part of their texts to the defining of the terms of their respective inquiries. A quick comparison of *Leviathan* to the *Introduction to the Principles of Morals and Legislation* will support this claim. Both Bentham and Hobbes share what seems to be a critique of Aristotle, on the backdrop of 'traditional philosophy', and not necessarily reflecting Aristotle's actual work. And both Bentham and Hobbes seemed to have been obsessed with ghosts, apparitions, linguistic fictions, and the intricacies of naming things.

As much as it might be easier perhaps to study Bentham's work from a 'history of philosophy' point of view, we might not have this privilege, since his theory of justice is based in methodological issues far beyond the immediate history of legal reasoning, and in fact prior to it (methodological issues seem to precede historical considerations).

G. J. Postema writes that Bentham comments on natural rights are not so much a critique of natural rights as they are a critique of the *rhetoric* of natural rights. Some of the contemporary work on Bentham's theory, especially the work of Emmanuelle de Champs, whose work has been made available by the Bentham Project at UCL, approaches the work of Bentham from a historical point of view, yet incorporates the careful study of Bentham's method. The recent republication of Bentham's *Deontology* seems to have generated new interest in his work in ethics, which he himself described as a Logic. And clearly not a metaphysical logic, but one grounded in grammar.

De Champs writes: "Bentham did not challenge the framework of Aristotelian logic, but by identifying names of categories with names of fictitious entities, he called for a radical reconsideration of its workings. As the fragment to d'Alembert shows, the discovery of the existence of fictitious entities in language was triggered by the need for a philosophical basis for his system of classification of human actions: 'les choses ainsi distribuées, je fais une distribution qui y soit analogue des mots qui servent à les exprimer. Ce travail donne lieu à une esquisse de la métaphysique de la grammaire.' This sentence hints towards a reversal of the customary link between logic and grammar: logic is not seen as a tool to make sense of grammar, but it is grammar itself that appears to be the necessary foundation of logic."[15]

This is quite amazing, considering the lines of the future philosophical battle-field, the opposition between Russell and the later Wittgenstein, had not been drawn yet. Or perhaps they had been [Wittgenstein attacking Russell for assuming that mathematics can be a foundation of logic when Wittgenstein seemed to have already arrived, at that time (1930), at the conclusion that logic is grounded in grammar]. In this sense, what Bentham was doing by example, by exemplification, if you will, with his work as a whole, was to create or exemplify a mode or method of philosophizing,

[15] De Champs, Emmanuelle, *The Place of Jeremy Bentham's Theory of Fictions in Eighteenth-century Linguistic Thought*, The Bentham Project at UCL, London.

which projected its influence into the twentieth century (via Ogden as well, but in my view, primarily via Wittgenstein).

It is in this sense - of Bentham's theory of justice being grounded not merely in a 'theory of fictions' but in grammatical and logico-semantic constructs - that both Bentham's view of justice, and his method, are relevant to our work today in philosophy. But the obstacles of misinterpretation have first to be removed for us to gain access to the logical workings of Bentham's theory. Because if, as de Champs suggests, a radical reconsideration of the traditional categories in logic is driving Bentham's method, it would make sense to look at Bentham's method, not merely as part of the 'content' of his writings ('internally'), but also as part of the 'form' – the 'way' he himself philosophizes – his actual mode of inquiry ('externally'). ['Method' must be treated here not as merely 'instrumental', but as 'constructive' (constructive of the 'content' of the theory)].

I would also suggest that the meaning of the term 'method' in Bentham is closely related to 'what justice means', and that for this reason alone a definition of 'justice' would not be possible without having an understanding of the nature of Bentham's method.

SUMMARY OF METHODOLOGICAL ISSUES PERTAINING TO 'KIND' OF METHOD AND 'ELEMENTS' OF METHOD.

1) The distinction between 'what Bentham says about method' and 'the method he actually employs' – his actual mode of inquiry.
2) The general difficulty in discussing 'method in itself', due to the double role of the term 'method' in such an inquiry: (a) 'method as the mode of the inquiry', (b) 'method as the object of the inquiry'.
3) As suggested by Postema, Bentham's critique of natural rights is in effect *a critique of the rhetoric of natural rights,* suggesting perhaps that the methodology of Bentham's theory as a whole might follow the lines of a study of the rhetoric of legislation and morals (as distinguished from a metaphysical study of morals and legislation – not a study of 'what they are' but of 'how can they be conveyed meaningfully').
4) Ogden's effort to define Bentham's theory as a theory of meaning to which the terms of the 'realism/nominalism' distinction do not apply.
5) Bentham as a classifier of offenses, motives, pains and pleasures, etc., and how this systematic classification works within a theory of meaning. Or as Ogden puts it: "This 'entirely new system of logic', with its linguistic orientation arising out of the analysis and classification of Fictions, was Bentham's chief concern (apart from Codification as such) during the last twenty years of his life."[16] Out of the classification arises an entirely new

[16] p. lxiv in *Bentham's Theory of Fictions*, Ogden, C. K., Littlefield, Adams & Co., 1959 (first published in

system of logic.

6) Generally, language as the medium of logical and political change; particularly, the use of names in methodization: ”Of methodization, in so far as performed by denomination, the subjects, the immediate subjects are names and nothing more. Things? Yes; but no otherwise than through the medium of their names.”[17] We will see later in the present paper how the division of the principle of utility (“principles of utility two”) into the expository and the censorial modes makes 'naming' and 'names' and the definition of the principle of utility possible.

7) Bentham, by perceiving of ‘language’ not as merely ‘instrumental’ but, in fact, as ‘constitutive’ of thinking, and therefore as a foundation for logic, radically changes the traditional logical method – he initiates a categorial change (a change pertaining to the ‘form of inference’), even if Bentham himself had not fully articulated the consequences of such a change. Bentham successfully links the principle of utility to this new founding of ‘logic’ in ‘grammar’ (in fact the latter is compatible with all the various principles defined by Bentham). Bentham points out that “the common method of defining – the method *per genus et differentiam*, as logicians call it, will, in many cases, not at all answer the purpose.”[18]

Bentham’s theory produces a complete change in method: a change in method as concerns the foundations of logic, and a change of method as concerns ‘definition’ itself. In fact it seems that more often than not Bentham found himself in need of a radical change in the methodization of the systems he was constructing, - to be compatible with the terms he had just named or redefined for the purposes of those systems.

8) Horne Tooke[19] and Bentham. Emmanuelle De Champs writes:

“Apart from the method of etymological analysis itself, which was already present in Locke, it is the scientific aspect of Tooke's work that appealed most to Bentham: since it had been proven that language worked along scientific rules, it was possible to study it with an experimental method and find some kind of truth and consistency in it. Moreover, within a utilitarian system where the only valid system of reference was pain and pleasure, relating all words to sense-impressions was the only way to make sense of

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1932)

[17] p. xxxiv, Ogden, *Bentham’s Theory of Fictions*, Littlefield, Adams & Co., 1959.

[18] p. 495, Bentham, *Fragment on Government,* T. Payne, London, 1776.

[19] Leslie Stephen (in *The English Utilitarians*, Volume One) brings Horne Tooke’s work as an example of the ‘kind’ of theory which inspired Bentham: “Tooke held, and surely with reason, that an investigation of language, the great instrument of thought, may help to throw light upon the process of thinking….This doctrine gives a short cut to the abolition of metaphysics. The word 'metaphysics,' says Tooke, is nonsense. All metaphysical controversies are 'founded on the grossest ignorance of words and the nature of speech’.” But Leslie describes Tooke’s approach as ‘nominalist’, but (in my view) just like in Bentham, Tooke’s insistence that ‘thinking’ is based in ‘forms of speech’ does not lead to ‘nominalism’ but to a theory of meaning (and the reliance on grammatical and predicational constructs). The’nominalist/realist’ distinction is, in itself, a ‘metaphysical’ distinction.

them."[20]

Tooke and Bentham had both realized that reform in politics was inseparable from reform in the way language is used. [The radical nature attributed to Bentham's theory of justice has to do with this implied requirement – the need to turn around the inquiry as a whole, by using the same terms differently (different use = different meaning). The two parallels to this requirement in the history of philosophy are Plato and Wittgenstein, each declaring the need to turn the enquiry around as a whole by means of using the terms of the enquiry differently].

9) [Also in De Champs:] "The main discovery Bentham has received credit for, in linguistic analysis, has been the claim that no meaning was to be found outside a proposition. Indeed, in the 'Essay on Language,' he based his demonstration on the fact that even words spoken on their own were understood as complete sentences. Thus, calling out the name 'John' meant either 'John, come here' or 'John, listen'."[21]

10) Bentham's theory as a theory of prevention, a theory promoting 'health' [the methodology of prevention is categorically different from the methodology of the treatment of symptoms, as we well know from contemporary medicine]: in *'Propositions of Pathology on which the advantage of Equality is founded'*[22] Bentham explains: "Pathology is a term used in medicine. It has not hitherto been employed in morals, but it is equally necessary there. When thus applied, moral *pathology* would consist in the knowledge of the feelings, affections, and passions, and their effects upon happiness. Legislation, which has hitherto been founded principally upon the quicksands of instinct and prejudice, ought at length to be placed upon the immoveable base of feelings and experience… Medicine is founded upon the axioms of physical 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."[23]

The relation between 'equality' and 'security' as part of a theory of 'prevention' is further elaborated in *Principles of the Civil Code*, Jeremy Bentham, Part 1, *Objects of the Civil Law*. Chapter 11. *Security and Equality---Their Opposition*.

11) Bentham's interest in the subject of 'universal grammar'. The little studied possible

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[20] Emmanuelle de Champs, *The Place of Jeremy Bentham's Theory of Fictions in Eighteenth-century Linguistic Thought,*
http://www.ucl.ac.uk/Bentham-Project/

[21] Ibid.

[22] Part 1, Chapter 6 of *Principles of the Civil Code*, http://www.laits.utexas.edu/poltheory/bentham/pcc/index.html, (This text was digitized from volume 1 of the 1843 Bowring edition of Bentham's works).

[23] Ibid.

> influence of Adam Smith's *Lectures in Rhetoric* on Bentham's methodology. Smith seeks the support for a universal rational system of grammar; that system considered a system of Logic; that system also considered as the best history of thinking. The point is, that once the subject matter of Smith's and Bentham's respective inquiries is 'a universal rational system of grammar', what we normally call 'content' and 'form' ('object' or 'mode' of inquiry) become almost indistinguishable (see items '1' and '2' on this list).
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> [from Adam Smith's letter to Baird, in the *Lectures on Rhetoric*[24]]
>
> "I approve greatly of his plan for a Rational Grammar, and I am convinced that a work of this kind, executed with his abilities and industry, may prove not only the best system of grammar, but the best system of logic in any language, as well as the best history of the natural progress of the human mind in forming the most important abstractions upon which all reasoning depends."

Adam Smith is also responsible for the principle central to Bentham's political theory and even to his purely utilitarian theory – the principle of the identity of interests: Bentham takes Adam Smith's 'principle of the natural identity of interests' and 'upgrades it to the 'principle of the artificial identity of interests', thus initiating the transformation from the 'natural' – the 'man-made' to the 'artificial' – a transformation which becomes one of the main attributes of Bentham's theory.

Certain distinctions, terms and principles, usually considered by scholars to be part of the content of Bentham's juridical theory[25] (what we normally call 'political' or 'legislative' principles), have much to do with Bentham's method, and can help shed light on the nature of Bentham's method (they are actually principles and distinctions of method):

12) The distinction between the 'expository' mode and the 'censorial' mode of enquiry.

13) The distinction between 'adjective' and 'substantive' terms.

14) The 'principle of the artificial identity of interests of governors and governed'.

15) The employment of the terms 'natural' and 'artificial' in Bentham's theory (such as the distinction between the 'natural' and the 'technical' systems of law, or the distinction between the 'principle of the natural identity of interests' and the 'principle of the artificial identity of interests'.

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[24] Adam Smith, *Lectures On Rhetoric and Belles Lettres*, ed. J. C. Bryce, vol. IV of the Glasgow Edition of the *Works and Correspondence of Adam Smith* (Indianapolis: Liberty Fund, 1985).

[25] We are in the habit of dealing with political principles as prescriptions for action (do this, don't do that, act in this way, don't act in that way), but with Bentham, most of the distinctions and principles have a direct correspondence to (or origin in) semantic or grammatic constructs. So much so that they can be regarded as principles of method (relating to the Form of the enquiry). The distinction between 'prescriptive' and 'non-prescriptive' terms can better explain how a 'political' principle (legislative or moral) can be manifest in a theory as a non-prescriptive principle – a principle of method. The same principle or distinction when used prescriptively in discourse would appear to be a political principle, and when used in a non-prescriptive manner would appear to be a principle of method.

16) Paraphrasis – an old-new method of 'definition'. Bentham writes[26]:

> "Paraphrasis is that mode of exposition which is the only instructive mode where the thing expressed, being the name of a fictitious entity, has not any superior in the scale of logical subalteration …By the word *paraphrasis* may be designated that sort of exposition which may be afforded by transmuting into a proposition, having for its subject some real entity, a proposition which has not for its subject any other than a fictitious entity."

In another place Bentham writes[27]:

> "…for the explanation of a fictitious entity, or rather the name of a fictitious entity, two perfectly distinct species of operations – call them *paraphrasis* and *archetypation* – will, in every case, require to be performed; and the corresponding sorts of propositions, which are their respective results, formed; viz. the *paraphrasis*, performing the function of a *definition*, but in its *form* not coinciding with any proposition to which that name is commonly attached. The *paraphrasis* consists in taking the word that requires to be expounded – viz. the name of a fictitious entity – and, after making it up into a phrase, applying it to another phrase, which, being of the same import, shall have for its principal and characteristic word the name of the corresponding real entity. In a *definition*, a phrase is employed for the exposition of a single word: in *paraphrasis*, a phrase is employed for the exposition of an entire phrase, of which the word, proposed to be expounded, is made to constitute the principal or characteristic word."

Ogden writes: "To cope with fiction, therefore, a different technique is required, and for this purpose Definition proper must be treated as a part of the wider problem of Exposition."[28] And he quotes Bentham:

> "The nature of the case affords but one resource; and that is the finding some class of real entities, which is more or less clearly in view as often as, to the name of a class of fictitious entities, any clear idea stands annexed – and thereupon framing two propositions; one, in which the name of the fictitious entity is the leading term; the other, in which the name of a corresponding class, either of real entities, or of *operations* or other *motions* of real entities, is the leading term: - this last so ordered, that, by being seen to express the same import, it shall explain and make clear the import of the first. This mode of exposition has been termed *paraphrasis – paraphrase*: giving *phrase* for *phrase*."[29]

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[26] In Ogden's *Bentham's Theory of Fictions*, p. 86 (originally in *Works*, Vol. VIII, pp. 242-253).
[27] In *Bentham's Theory of Fictions*, p. 138 (originally in *Works*, Vol. VIII, pp. 126-7).
[28] Bentham's Theory of Fictions, p. lxxvii.
[29] In Odgen, p. lxxviii.

The purpose of this first essay, then, is to show how the elements of Bentham's method, such as 'classification' (classification by means of division), the new definition of 'definition' – paraphrasis, the foundational role of grammar, the principle of utility and the principle of the artificial identity of interests, are linked systematically (organically integrated if you will) and how they work together within one approach and method. I found a great source for the 'how' of Bentham's philosophy – its actual method – in the texts gathered in volume VII of the Bowring edition of the Works of Jeremy Bentham. And I believe that by the time we have looked at the *Principles of Judicial Procedure*, *Procedure Code*, the *Rational of Reward*, and *Constitutional Code*, a much clearer picture of Bentham's method (and the connection between 'classification', 'definition' and the 'principle of utility') will emerge.

The main insight concerning Bentham's method seems to be the discovery (if I may use this term here) that the distinction between the 'expository' and the 'censorial' modes, runs through the whole of Bentham's theory, and that even the principle of utility is defined by having two senses – "principles of utility two", as Bentham puts it in *A Table of the Springs of Action.* And it is not simply a 'static' or 'stationary' distinction, but a dynamic one, since in all its manifestations it causes a movement, a transition or a transformation from the expository, non-prescriptive, mode of enquiry to the censorial, prescriptive, mode of enquiry. And it is this transformational character that makes the theory radical, since the transformation of the expository 'what is' into the censorial 'what ought to be' moves along the same lines as any personal transformation – transformation of 'self'.

BENTHAM'S USE OF THE GRAMMATICAL TERMS IS NOT MERELY INSTRUMENTAL BUT CONSTRUCTIVE. HOW DOES THIS RELATE TO HIS CONCEPTION OF 'NATURAL' VERSUS 'ARTIFICIAL'.

Since Bentham approaches the terms of his enquiry from a linguistic perspective (in relation to forms of speech) all methodological terms and distinctions in his system whether in Jurisprudence or in Ethics can be reduced to grammatical or linguistic terms. For example, in his theory of Jurisprudence Bentham makes the distinction between Adjective Law and Substantive Law. From this distinction Bentham draws at one point the analogy to the grammatical distinction between Adjective Nouns and Substantive Nouns. Beside Bentham using 'analogy' as part of method-construction on this occasion, having drawn this analogy between a Legislative distinction and a grammatical distinction suggests that Bentham's theory of Jurisprudence is grounded in grammar.

The normal response to this kind of claim is usually: 'well, this is not a big deal since everything we say is grounded in grammar'. But this response misses the main point concerning Bentham's work: for Bentham the grammatical terms cease being 'instrumental' or 'trivial' – they

become, on many occasions, ‘constructive’ – building blocks of a newly constructed ‘artifice’ – a theory of morals and legislation constructed *of* grammatically founded terms, distinctions, and principles.

The difference between the ‘instrumental’ use of grammar (and the ‘trivial’ presence of grammatical terms and constructs in everyday language) and the ‘constructive’ use of grammar also marks the difference between the so-called ‘natural’ principles of justice and the ‘artificial’ principles of justice. There are certain constructs typical of the use of language that can be considered a natural part of language and speech. For example, in speech situations there are always a ‘speaker’ and a ‘listener’, just as there always is a semantic difference between ‘talking’ and ‘being talked about’, - these are natural to language, whether we employ them trivially or not. But Bentham chooses to employ such semantic or grammatical constructs in a ‘non-trivial’ manner, as part of the construction of his many-faceted theory. He thus speaks of Legislation as an ‘artifice’ – a man-made construct. We can see this exemplified when Bentham distinguishes between ‘the principle of the *artificial* identity of interests of governors and governed’ and ‘the principle of the *natural* identity of interests of governors and governed’ (Adam Smith's version).

The natural principles embedded in speech, action and belief are part of ‘how language works naturally’. These principles go to the nature of language and speech. But the grammatical part of language has, by definition, an ‘artifice’ at its center: the necessarily ‘man-made’ combination of ‘predicate’ and ‘subject’. This ‘artifice’ (predication) is both part of the nature of speech and its most celebrated artifice. Bentham's work implies that this ‘natural’ construct must be used in legislation as an ‘artifice’ – as ‘something to be constructed’, not merely ‘something instrumental’ (not merely as a means to an end and not merely as a ‘natural’ part of the way we communicate).

This distinction between the ‘natural’ aspects of discourse and it being an artifice – a field filled with ‘man-made’ contraptions – relates to another distinction Bentham makes, the distinction between the roles of the ‘expositor’ and the ‘censor’ (also in matters of legislation) – the expositor treating of ‘what there is’, and the censor, of ‘what ought to be’. The natural constructs of language and speech seem to line up (correspond) with ‘what is’ or ‘what is given’, and the ‘artificial’ aspect of discourse lines up (corresponds) with ‘what ought to be’ or ‘how it ought to be’.

THE DISTINCTION BETWEEN THE EXPOSITORY AND THE CENSORIAL MODES BRINGS ABOUT THE TRANSFORMATION OF THE MEANING OF THE TERMS OF THE ENQUIRY (AND POSSIBLY A TRANSFORMATION OF 'SELF' (OF THE ONE CONDUCTING THE ENQUIRY).

The discovery, not explicit in Bentham, but implied, is that the difference between the ‘natural’ and the ‘artificial’ aspects of discourse can be exploited to achieve progress in respect of legislation, - as a new method for legislating ‘what ought to be’ using the terms of ‘what is’ (or more precisely, *since*

the terms defining 'what is' and 'what ought to be' are the same terms of discourse, the transition from 'what is' to 'what ought to be' or to 'how it ought to be' must be brought about by a transformation in the meaning of the terms themselves. We stay with the same array of terms, for the most part, but acquire a new use for them – a new meaning). The prerequisite for legislation then must be it being grounded in discursive constructs, otherwise the link between 'how and who we are' and 'how and who we ought to be' would be severed. This also pushes to the fore the definition of 'person' or soul' as a dynamic, non-substantive entity – a 'text' of sorts to be re-written over and over again. The 'substantive' terms usually employed in philosophical metaphysics (or even in epistemology) are useless here. For example, when we look at the principle of the natural identity of the interests of governor and governed, we can see that the identity between the interests of the governors and the interests of the governed, especially since it is not a 'legislated' identity but a natural one, simply reflects the fact that on any occasion of 'governing' or 'government' the 'governors' and the 'governed' are the 'agent' and 'patient' linked together by a semantic relation, - whenever we use the term 'government' we also necessarily have a relation between 'governors' and 'governed'. This construct is a (natural) construct of language, and we can also see how the interests of 'governors' and 'governed' are not the same in essence, but the same in meaning (they both respond to the name 'government'). Again we can see how the constructs derived from language form identities in respect 'meaning', not in respect of 'essence'. The fact that language itself provides naturally the constructs linking 'governor' and 'governed', the 'acting' and 'the acted upon', shows that the cooperation or relation between 'governor' and 'governed' is not founded in the 'essence' or nature of the interests of governor and governed, but in their 'meaning' – in their equal response to the name 'government' [in both governor and governed finding the term 'government' to have the same meaning]. Bentham aims at 'harnessing' the energy of this natural construct to make it an artifice in the service of legislation. He aims at making this 'meeting of the minds' in respect of the meaning of the terms 'governor' and 'governed' into a legislative or political commodity, and in order to accomplish that he has to raise the general awareness of all involved to the nature of this and similar semantic and discursive constructs (by 'meeting of the minds' I mean the naturally occurring semantic identity of what 'government' means for both 'governor' and 'governed' – or as Bentham and Smith have perceived of it: the natural identity of interests[30]). The raising of this awareness, in

30 The identity between 'governor' and 'governed' is, when perceived of semantically, an identity in respect of 'meaning'. But Both Smith and Bentham beef this construct up by adding to a logico-semantic identity the term 'interest'. By making this identity and identity of 'meanings' into an identity of 'interests', already a step in the transition from purely semantic or grammatical constructs to political or 'intersubjective' constructs has been made. Therefore Smith's 'principle of the natural identity of interests' already marks the founding of a political principle on a grammatical or discursive one (the natural identity of 'acting' and 'acted upon'). The shift from an identity of meanings to an identity of interests, imbues the original semantic construct with a term of human intention ('interest'). Not that 'meanings' are in themselves devoid of human interest – what things mean to us represents our interests as well – language can never be seen as completely neutral in respect of human

itself contributes to the transformation of the terms in question into the 'terms of construction', whereas prior to conducting this enquiry such terms were present merely in their instrumental capacity. By turning the terms of speech (and the basic grammatical constructs) into the objects of Bentham's enquiry, into 'subject-matter', much of the terminology has ceased being instrumental.

Bentham, in his search for a philosophy of the will, takes this discursive construct of the identity of 'speaker' and 'listener', or 'governor' and 'governed' and adds to it [as did Adam Smith before him] the adjective 'interest' – making it into the 'principle of the natural identity of interests of governors and governed' (and later replacing 'natural' with 'artificial'). And in this sense he is 'piggy-backing' his theory of legislation on the natural constructs of discourse.

Again we can see how he takes what seem to be trivial or 'instrumental' semantic constructs of discourse, and treats them in a 'constructive' manner, - using them to make the transition from 'what is' to 'what ought to be'. Surprisingly perhaps, this strategy seems to be working, since the identity of the interests of the 'governors' and the 'governed' is valid only in respect of 'meaning' – in respect of both parties responding to the same 'name' – 'government'. This also explains why Bentham's theory can be best described as a theory of meaning. Method-wise this means that the distinction between Adjectival and Substantive terms is necessary for the theory to be consistent logically. It also means that the form of inference employed relies heavily on 'analogy' (not employing simple 'deduction' or 'induction').

Upon proceeding, I tried to better understand, and possibly link to one another, the most generalized conceptions of method in Bentham: classification, universality, definition, nature, art, artifice, prevention and judgement. Finding the right order in the employment of these and other terms in Bentham's theory, should lead to a definition of his system and the method actually employed.

CLASSIFICATION AND THE UNIVERSALITY OF LAW (OR 'UNIVERSAL ACCURACY'

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intention. But introducing the term 'interest here' is a bit like multiplying both side of an algebraic equation by the same factor on both sides. And in this sense, the addition of the term 'interest' on both sides of the semantic identity, demonstrates how the addition of an 'adjectival' term such as 'interest' combines with the terms of an identity (the 'equation'). In other words, adding a term such as 'interest' to an identity of meanings, or substituting, as might be the case here, the term 'meaning' with the term 'interest' seems to put additional stress on the validity of the formula (the identity). And when Bentham also adds the term 'artificial' as an adjective describing the identity based principle as a whole, it would seem he has taken it as far as one could. While Bentham goes to great lengths to remove the linguistic obstacles standing in the way of a much more neutral vocabulary of legislative and moral theory (see the discussion of 'eulogistic' and 'dyslogistic' terms), here, with the principle of identity of interests itself he seems to have done just the opposite: he seems to have kidnapped the naturally occurring semantic construct (the identity of 'acting' and 'acted upon' or 'action' and the 'acted upon') and 'brainwashed' in captivity, turning it into 'identity of *interests*' (Adam Smith is the perpetrator here), and further turning it into the 'principle of the *artificial* identity of *interests*. It were as if Bentham had taken the naturally occurring assets of language and by 'bringing them in' as horses into a coral, now plans to tame them so they can serve at the will of humans. There is a bit of eighteenth century – the-beginnings-of-modern-science-type – vanity here, no doubt: harnessing the forces of nature (the nature of language in this case) for the benefit of mankind.

AND 'INFINITE DETAIL')

[From *On the Influence of Time and Place in Matters of Legislation*[31], by Jeremy Bentham]:

> "The laws which I would propose are established in this my country; and they are, of course, according to my conception of them, the best that can be devised. In this magnificent and presumptuous dream I indulge myself without controul; and in it, for the purpose of the argument, I must be allowed to indulge myself. The problem, as it stands present, is: the best possible laws for England being established in England; required, the variations which would be necessary to make in those of any other given country, in order to render them the best laws possible with reference to that other country... to Bengal, then, let us direct the principal measure of our direction; not precluding ourselves from casting, every now and then, for the sake of variety, a transient glance at other countries, according as chance may present them to our view... It is our destiny, as soon as ever we have got a glimpse of perfection, to leave it by the wayA It would be something, however, to trace, though it were ever so general an outline, of the model of perfection; and like Moses, the Jewish lawgiver, to point out, though we enter not, the Promised land. To draw up in a perfect manner a statement of the difference between the laws that would be the best for England, and the laws that would be the best for Bengal, would require three things: First, the laws which it is supposed would be the best for England, must be exhibited in terminis: next, the leading principles upon which the differences between those and the laws of Bengal appear to turn, must be displayed: lastly, those principles must be methodically applied to practice, by traveling over the several laws which would require to be altered from what they are in the one case, in order to accommodate them to the other."[32] (my emphasis)

In the above we find a description (or an exemplification) of the systematic relation between 'universality', 'classification', 'perfection', 'term', 'principle', 'method' and 'application of method':

1) "It would be something, however, to trace, though it were ever so general an outline, of the model of perfection…" Man is destined only to have glimpses of perfection, but nonetheless we can arrive at a general description of perfected things, though we are not able to properly define that perfection. This resembles the limitation we encounter in Plato concerning the perfected Forms. Man can only define his relation to the Forms, not the Forms themselves, since they are perfect and we are not (and the less-than-perfect cannot define the perfected).
2) "Complete perfection requires universal accuracy: universal accuracy requires

[31] *On the Influence of Time and Place in Matters of Legislation,* in Volume I of the 1843 Bowring edition of Bentham's Works.
[32] Ibid.

infinite detail."[33] Bentham is considered by many a 'classifier' first and a philosopher second (if at all). But here his extensive work as a classifier is explained simply as one feature of the more complex project of describing 'perfection' to the extent possible.

3)

"To draw up in a perfect manner a statement of the difference between the laws that would be the best for England, and the laws that would be the best for Bengal, would require three things: [a] First, the laws which it is supposed would be the best for England, must be exhibited in terminis; [b] next, the leading principles upon which the differences between those and the laws of Bengal appear to turn, must be displayed; [c] lastly, those principles must be methodically applied to practice, by traveling over the several laws which would require to be altered from what they are in the one case, in order to accommodate them to the other."[34]

This model of the pursuit of perfection depends primarily on our ability to find, not only, as we would normally do, the glue, the common denominator, bringing a theory or a system together as one perfected comprehensive system, but on our capacity to imagine and define the differences between the various circumstances in which such a theory or system might be applied. Again a typically Platonic concept: it is not enough to know something (wisdom), - learning to properly apply such knowledge is the hard part. The application of knowledge to various circumstances (especially as concerns a theory of justice) brings out the real scope or range of the theory. The theory as a whole is comprised of the inner cohesiveness and consistency – similarity (and its efforts at describing perfection – inspiring us in that direction) combined with the various occasions of its possible application – 'difference'. The system as a whole would thus be defined by both similarity and difference – a typical 'analogical' model. This in a way also defines the relation between the non-prescriptive and the prescriptive aspects of a theory of justice, It can only be seen as 'comprehensive' when it has both (and again this last distinction corresponds to the distinction between 'what is' – the 'expository' – and 'what ought to be' – the 'censorial'). A good friend of mine would simply say: 'universality is a bitch', since universality does not play by our metaphysical intuitions. It goes to 'how we do things (how we apply our knowledge) as much as it pertains to 'what we do' (the so-called 'content' of our political theory).

The conception of universality in Bentham (a conception implied more than pronounced) goes to the 'applicability' of the terms and ideas that make up a theory of justice. The universality of a term

[33] Ibid.
[34] Ibid.

would depend on its capacity to be applied to 'anything' (Britain *and* Bengal) and 'everything', - not on it simply denoting a universal entity of some sort. The words used as universal or universalizing terms are also used in their 'adjectival' form, not as names of universal substances (not in their 'substantive' form).

One of the characteristics of the effort to make the theory 'universal' is Bentham's idea of the possible original neutrality of the terms, and the necessary 'unteaching' of the eulogistic and dyslogistic appellations, which have grown like moss over the original meaning of the terms. Unfortunately only a handful of scholars have paid attention to this subject in Bentham's work. From where I stand, these considerations in fact make Bentham's method what it is, and they reside primarily in the study of rhetoric. Kenneth Burke's rhetorical analysis of Bentham's work is therefore unique and enlightening. In the following pages I will try to present in summary Burke's discussion of the idea of the neutrality of the terms in Bentham, its relation to the 'expository/ censorial' distinction, and the subject of 'unteaching' in Bentham.

'DEFINITION' AND THE 'NATURE/ARTIFICE' DISTINCTION

Showing the necessary connexion between the new method of definition (paraphrasis), the distinction between 'natural' and 'technical' and 'natural' and 'artificial' and the distinction between eulogistic and dyslogistic appellations.

On the distinction between Dyslogistic and Eulogistic terms [In Kenneth Burke's the *Rhetoric of Motives* (1950)] *Rhetorical Analysis in Bentham*]: "Bentham believes that originally all words for "pains, pleasures, desires, emotions, motives, affections, propensities, dispositions, and other moral entities" were "neutral". But by degrees they acquired, some of them an eulogistic, some a dyslogistic, cast. This change extended itself, as the moral sense (if so loose and delusive a term may on this occasion be employed) advanced in growth." The project of a "neutral" vocabulary midway between the two "censorious" extremes of "eulogistic" and "dyslogistic" terms presents a notable contrast with the analysis of the virtues in Aristotle's *Ethics*."[35]

In the above section from Burke, we can see: (1) The 'moral sense' is the result of language losing its original 'neutrality', bringing about the 'censorial' mode. (2) This process is somehow different from Aristotle's analysis of the virtues (in Aristotle, so Burke, the 'middle terms' are themselves 'eulogistic' – "there are no 'neutral' terms in the Benthamite sense"[36].

'UNTEACHING' AND 'UNLEARNING' ON THE WAY TO ACHIEVING THE NEUTRALITY OF THE TERMS ['Unteaching' as a principle of method].

[35] P. 92, Burke, Kenneth, *A Rhetoric of Motives*, New York, Prentice-Hall Inc., 1950
[36] Ibid.

The connexion between the 'original neutrality' of the terms of language and the 'moral sense', and thus to the 'censorial' mode of discourse, is revealing as to the source of Bentham's definition of 'virtue' (and generally his theoretical approach to 'ethics'). This seems to be a logic in which the 'dispositional' or the 'censorial' – the 'ought' in speech - is already an 'artifice', a man-made addition, forged by a person's 'will' ('intention'). 'Virtue' itself would be for Bentham a 'eulogistic' term perhaps, since the term 'virtue' always refers to our sense of how things 'ought to be'. Or is 'virtue' a 'neutral' appellation? From the point of view of 'method': How does Bentham's belief in the original neutrality of the terms of language affect his philosophical method? How does it affect his way of doing philosophy.

First, it (this belief in the original neutrality of the terms) seems to limit Bentham's grand thesis, evolved around the principle of utility, to 'neutral' appellations, such as 'self-interest'. And Kenneth Burke mentions in this context: (p. 93, Ibid.) "Usage has already so changed that the Benthamite list has somewhat lost its symmetry. Thus he is hard put to name a eulogistic expression for the "self-regarding interest" for which the subsequent spread of his own utilitarian thinking has given us "enlightened self-interest"… but the list is much more valuable "in principle" than for its particulars."[37] Thus, methodologically speaking, a practice develops of seeking the neutral terms, the non-prejudicial terminology for all philosophical purposes (for 'definition' and for 'analysis', etc.). And this practice comes hand-in-hand with the practice of 'unlearning' the 'eulogistic' and 'dyslogistic' appellations. Burke quotes from Bentham's *Book of Fallacies*: "The great difficulty is to unlearn it: in the case of this, as of so many other fallacies, by teaching it, the humble endeavour here is, to unteach it."[38] If we have earlier defined 'prevention' as a principle of method – a mode of operation which characterizes Bentham's work, we can now add 'the principle of the unteaching non-neutral appellations'.

The unteaching of dyslogistic and eulogistic appellations of words becomes part of a philosophical method, just as 'prevention' does. Both work along the lines of the hypocratic oath of 'do no harm[39]'. And while 'prevention' works generally to remove obstacles for harmony, 'unteaching' works to transform our way of using language, so as to prevent the less-than-neutral appellations from standing in the way of understanding. 'Unteaching' thus is an integral part of 'prevention'. We can thus see how the 'radicality' of Bentham's theory (and 'method', for that matter) lies, not in what we would normally think of as the 'content' of theory generally, but in its 'form'. In other words, since it seems that 'method in itself' is Bentham's object of enquiry ('prevention' and 'unteaching' pointing in that direction), and 'what he says' pertains, for the most part, to 'how we speak about the issues' (and not so much to more particularized issues),

[37] P. 93, Ibid.
[38] Ibid. (my emphasis).
[39]

'transformation' becomes a part of both the 'method of the enquiry' and 'of what the enquiry is about', - and in that lies its radicality (the transformative procedure of unlearning becomes part of the method).

So the 'eulogistic' and 'dyslogistic' appellations can be called 'censorial terms'. Which, by default might allow us to associate the terms in their 'original' and 'neutral' form with the 'expository' mode. Which would also enhance the notion that any real 'analysis' (within the expository mode) would be tainted if grounded in 'censorial' terms. Bentham here seems to separate 'definition' (as part of 'analysis' and 'exposition') from the 'censorial' terms comprising the 'moral sense'. Anything associated with the 'expository' mode has' thus to employ the 'neutral' terms, leaving 'censorial terms' (the moral sense or the prescriptive mode of writing) out. This in itself would explain the various principles in Bentham, and the principle of utility. Many misinterpretations of Bentham's principle of utility wrongly assume that at least some of the terms defining it are 'censorial' terms, which is not the case[40].

Kenneth Burke finds that "The project of a "neutral" vocabulary midway between the two "censorious" extremes of "eulogistic" and "dyslogistic" terms presents a notable contrast with the analysis of the virtues in Aristotle's *Ethics*."[41] Whether Bentham's 'unteaching' of words and the search for the 'neutrality' of the terms stands in contrast to Aristotle's analysis of the virtues, remains to be seen. Generally it seems that the mentions of Aristotelian methodology in Bentham often reflect the views of 'traditional philosophy' and do not represent accurately Aristotle's work (Bentham for example attributes to Aristotle the belief that names naturally correspond to things named, while Aristotle was known even in ancient times to have considered the connexion between names and things named to be merely conventional).

THE CENSORIAL AND THE EXPOSITORY MODES IN RELATION TO THE NATURAL AND THE ARTIFICIAL

Another (methodological) aspect of this: "It neither requires nor so much as admits of being taught [the choice of censorial terms]: a man falls into it but too naturally of himself …The great difficulty is to unlearn it." (a quote from *Bentham's Book of Fallacies*, in Burke[42])

This goes to the distinction between 'natural' and 'artificial': The use of 'censorial' terms comes natural and need not be taught. The unlearning of it is difficult. This is a reversal on the

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40 The 'prescriptive' tone of some of Bentham's juridical analysis can be misleading as to its 'practical' or outrightly 'censorial' thrust. In Bentham, the 'censorial' terms refer, more often than not, to 'what ought to be' on the level of 'method' or '*how* things ought to be said and done', than on the level of 'what things ought to *be*'. This makes much of what seems 'practical' in his work, to have meaning (and the capacity to be applied as principle) on the the grammatical or semantic level first, and only secondarily in the world of 'goods'.

41 P. 92, Ibid.

42 P. 94, Ibid.

question of 'teaching'. Generally we must 'unlearn' the use of censorial words. But this unlearning has to be taught – it doesn't come naturally. The role of 'artifice' ('teaching') here assumes a purely 'negative' or 'privative' role. Perhaps this is why Burke writes: "We thus seem to see lurking behind the Benthamite triplicate vocabulary, a kind of attenuated and secularized dialectic of the *via negativa*."[43]

J. S. Mill provides us (in the text *Bentham*) with an example of how this aspect of Bentham's method was barely noticed by Mill or other contemporaries of Bentham: "Morality, consists of two parts. One of these is self-education; the training, by the human being himself, of his affections and will. That department is blank in Bentham's system."[44] But if, as we have seen, Bentham's moral principle (the principle of utility) is defined by the desire to separate one's judgment from the Censorial terminology (which is, in itself, the moral sense) – the call for the unlearning and unteaching of the use of censorial terms (eulogistic and dyslogistic), - if, this is true, then what Mill says about Bentham moral theory lacking the element of "self-education" makes little sense. It is precisely the separation from the 'moral sense' as embodied in the eulogistic and dyslogistic terms, which involves the most severe 'self-education', perhaps not in the sense Mill attributes to this term, but in the sense of 'unlearning' the use of the terms. In Bentham 'moral sense' is manifested in 'unlearning' and in 'prevention', both purely methodological terms (pertaining to 'form' and not so much to 'content'). It is not so much 'what you do', but 'how you do it' that sets the moral man apart from the immoral man. To be 'just' you have to teach yourself how to 'unlearn' the use of the most familiar terms. This is 'self-education' in its most pervasive and radical sense. Mill seems to be missing out on much in his reading of Bentham. Perhaps their personal acquaintance stands in the way. People always assume that knowing a person first-hand avails them to some insight into that person's work.

"THE CENSORIAL TERM HAS THE *FORCE* OF AN ASSUMPTION, WITHOUT ITS *FORM*" [BURKE][45]

Burke says that Bentham writes in his *Book of Fallacies*,

> "When considering the censorial terms that reflect "interest-begotten prejudice": "It neither requires nor so much as admits of being taught: a man falls into it but too naturally of himself; and the more naturally and freely, the less he finds himself under the constraint of any such sense as that of shame. The great difficulty is to unlearn: in the case of this, as of so

[43] P. 94, Ibid.
[44] Mill. J. S., *Bentham*. In *Collected Works of John Stuart Mill*, Volume X. J. M. Robson (ed). Toronto: University of Toronto Press. 77-115.

[45] P. 94, Burke, *A Rhetoric of Motives*.

many other fallacies, by teaching it, the humble endeavour here is, to unteach it."[46]

"The persuasive function of this most spontaneous and ubiquitous rhetorical practice (this use of weighted words that makes all men rhetoricians because they are all poets) is analyzed thus [again quoting from Bentham]: "Having, without the form, the force of an assumption, – and having for its object, and but too commonly for its effect, a like assumption of the hearer or reader, - the sort of allegation in question, how ill-grounded soever, is, when thus masked, apt to be more persuasive than when expressed simply and in its own proper form: Especially where, to the character of a censorial adding the quality and tendency of an impassioned allegation, it tends to propagate, as it were by contagion, the passion by which it was suggested. On this occasion it seeks and finds support in that general opinion, of the existence of which the eulogistic or dyslogistic sense, which thus, as it were by adhesion, has connected itself with the import of the appellative, operates as proof."

And as Burke comments: "this is an unlovely paragraph, and not very viable"[47]. I find it, though, to provide, a fairly good explanation of the relation between the import of the censorial terms and the 'unnaturalness' or 'artificiality' of having to unlearn what comes 'natural'.

Burke even goes as far as to ask[48]:

"Would we be excessive in glimpsing, beneath the Benthamite project, an almost mystical way of thinking? For the dialectic of mysticism aims at a systemic withdrawal from the world of appearances, a crossing into a realm that transcends everyday judgements – after which there may be a return: the Upward Way is matched by a Downward Way; or the period of exile, withdrawal, and negation terminates in a new vision, whereupon the visionary can once again resume his commerce with the world, which now exists in a new light, in terms of the vision earned during the period of exile. But in his homecoming to the world of appearances, he sees things quite differently, so that what he had formerly contemned he seeks, and what he had formerly sought, he contemns. Eulogistic and dyslogistic have changed places, with a *neutral period of transition* between them. We thus seem to see lurking behind the Benthamite triplicate vocabulary, a kind of attenuated and secularized dialectic of the *via negativa*."

From the point of view of method this again helps define Bentham's method as a method of transition, transformation, - and a radical one at that.

[46] Ibid.
[47] Ibid.
[48] P. 95, Ibid.

"PRINCIPLES OF UTILITY TWO"[49] [THE DIVISION OF THE PRINCIPLE OF UTILITY – A DIVISION BY MEANS OF WHICH IT CAN BE SEEN AS A PRINCIPLE OF TRANSFORMATION: THE TRANSFORMATION BETWEEN 'WHAT IS' AND 'WHAT OUGHT TO BE']:

[From *A Table of The Springs of Action*, by Jeremy Bentham, London, 1817]

The two senses of the principle of utility:

Interestingly enough, in the *Table of Springs of Action*, in what Bentham calls *The Marginals*, in number 49 (p. 9 of my 1817 edition), the distinction between the expositor and the censor resurfaces as an unexpected division of the principle of utility itself: "48. Principle of the general utility the only trustworthy guide, but every where opposed. 49. *Principles of utility two, or if but one it is understood in two senses – viz. the censorial and the expositive or exhibitive*. (Censorial, what. Expository, what.)"

This comes as a natural continuation of my discussion of Burke's comments, since it shows that the 'expository/censorial' distinction indeed runs through (and thus in part defines) the principle of utility as well, making it both a 'natural' principle and an 'artificial' or 'constructed' or 'constructive' one. It thus depends whether any discussion of the principle of utility takes place in the context of an 'exposition' - of what there is' - or in the context of a 'censorial' 'what ought to be' discussion. And the transition between these two modes, the 'non-prescriptive' and 'prescriptive' mode of speech, really would have had to be brought to the fore, if Bentham had intended any 'operational' consistency and 'methodological' clarity in his work. I am not sure he achieved this kind of methodological clarity, and we can see how it affects even the most basic discussions of the principle of utility itself, concerning 'what it is' and 'how it is to be employed'. And we may ask, what does it mean to address the principle of utility 'censorially' – in terms of 'what ought to be done'? [within the principle of utility itself a transition has to be initiated, from the description of the principle as a natural given construct (a law of nature of sorts), to it becoming a means of willful social construction – as a means for achieving happiness.]

It can also be said now, in light of passage 49, that the *unity* of the principle of utility is threatened by its built-in or necessary adherence to both the censorial and the expository modes. And as Bentham says in the headline of the sub-section: "Principle of Utility, the only Source of Solution", - if indeed "principles of utility two, or if but one, it is understood in two senses…" then this 'only source of solution' as here divided so grandiosely, must undergo some real expository healing (by that I mean a better explanation or definition of the relation between the two 'senses' of

[49] In Bentham, *Deontology, Together with the Table of the Springs of Action*, Oxford University Press, 1983. Or, p. 9, in *A Table of The Springs of Action*, by Jeremy Bentham, London, 1817.

this one principle). It seems that with the help of Burke's remarks on rhetorical elements in Bentham we were already on the way to a more sufficient explanation. And we also have Sidgwick's comments on the need to better define in Bentham the transition from the 'non-prescriptive' to the 'prescriptive' mode. Sidgwick writes: "thus from different points of view one might truly describe Bentham as one of the most or the least idealistic of practical philosophers. What is, immediately suggests to him what ought to be; his interest in the former is never that of pure curiousity, but always subordinated to his purpose of producing the latter."[50] Bentham, as so many other political philosophers, assumes a logical continuity to exist between 'a principle defined' and 'a principle applied'[51]. But as we have seen, his own theory suffers under this assumption, since the transition from 'definition of principle' to 'application of principle' (corresponding to the distinction between the expository and the censorial modes) seems to have necessarily become an integral part of the definition of the principle. And how can we assume that a principle defined in itself by the transition from 'what is' to 'what ought to be' (the two senses of the principle of utility) would lend itself, without difficulties, to be applied directly. How can we assume that a principle that is defined by the relation between the expository and the censorial modes could be treated as a purely censorial principle? The transition from defining the principle of utility to actually employing it as a political principle has to be properly reflected in the definition of the principle (the definition of the principle has to include the relation between the two senses of utility – the expository and the censorial).

In Postema's *Bentham's Utilitarianism*, the 'division' of the principle of utility is discussed briefly in terms of the distinction between 'is' and 'ought':

> "The principle of utility – or, as he later preferred to call it, the 'greatest happiness principle' (Bentham, 1966, p. 11 n. a) – was the fundamental axiom of Bentham's moral and political philosophy. This 'ruler and decider of all things' was to function as an evaluative principle and as a decision principle. As an *evaluative principle*, it set out the ultimate grounds of the rightness of action and offered the ultimate court of appeal for moral and political disputes. As a *decision principle*, it was meant to guide the deliberations and decisions of all moral agents, and yet Bentham's work focused almost exclusively on matters of public and institutional, rather than interpersonal, morality. This greatly shaped his understanding of the

[50] Henry Sidgwick, *Bentham and Benthamism in Politics and Ethics*, *The fortnightly Review*, 21, January-June 1877, pp. 627-652).

[51] Political philosophy is, almost by definition, 'practical' philosophy in the more Censorial sense of 'this is what we ought to be doing' – a prescriptive mode of theorizing and the unavoidable (and forseen) application of theory. Bentham, with his involvement with the day to day politics of legislation in Britain, spends years of his life pursuing the Panopticon project. On one hand, the distinction between the 'expository' (non-prescriptive) mode and the 'censorial' (prescriptive mode) is extensively used by Bentham, but then, at times, it seems as if the transition from the 'non-prescriptive' to the 'prescriptive' part of the theory is not well-defined. We seem to have the assumption present that everything in the theory can, and would be applied eventually (put into practice), but then, within the theory itself no mechanism has been developed for guiding the tansition between the purely theoretical analyses (the non-prescriptive parts) and the prescriptive parts.

principle of utility."[52]

The division of the principle of utility into an expository and a censorial sense, gives us the key to understanding the real connexion between the principle of utility and Bentham's new method of definition.

THE TWO SENSES OF THE PRINCIPLE OF UTILITY CORRESPONDING TO THE DIFFERENCE BETWEEN 'WHAT IS' AND 'WHAT OUGHT TO BE' (AND CHANGING THE DEFINITION OF 'DEFINITION').

[*This section pertains to the term 'right' (and will be included in the third essay), but as a clear exposition of the redefining of 'definition' and the division of the principle of utility, this section must also be included in the first essay, the essay on method. The division of the principle of utility into two modes, a censorial and an expository one, has foremost methodological significance. Bentham here lays out the distinction between 'what is' and 'what ought to be' and posits it in the middle of his 'one and only solution' (the principle of utility), but fails, in my view, to define it or use it constructively (as distinguished from 'instrumentally')*]

In the *Marginals*[53], passages 21 and 22, Bentham first mentions 'definition' and 'right'. In 32 he first mentions 'paraphrasis'[54], and the discussion of a possible definition of the term 'right' proceeds all the way to passage 47, leading to the mention of the principle of utility as "the only source of solution". But what is the question being asked here? The question was (in 29) "What [is] a right? Answer: a right is not *a* any thing. The genus it distinguishes has none above it."[55] It is the unavoidable presence of fictitious entities such as '*a* right' that necessarily cause the need for a different method of definition.

> "45. On the above grounds might be constructed paraphrastic expositions of 'right' and 'obligations': whereby in a form as precise as definitive, the import of 'right' and 'obligation', of 'right' through 'obligation', might be explained, viz. by indications of the connections which import of these fictitious entities has with that of the corresponding real ones, viz. 'pleasure' and 'pain'." And "At this stage the field of Ethics is exhausted, every

[52] Postema G. J. "Bentham's Utilitarianism", in *A Guide to Mill's Utilitarianism*, H. R. West, ed., London: Blackwell Publishers, 2006, pp. 26-44.
[53] In Bentham, *Deontology, Together with the Table of the Springs of Action*, Oxford University Press, 1983. Or, p. 9, in *A Table of The Springs of Action*, by Jeremy Bentham, London, 1817.
[54] "The *paraphrasis* consists in taking the word that requires to be expounded – viz. the name of a fictitious entity – and, after making it up into a phrase, applying it to another phrase, which, being of the same import, shall have for its principal and characteristic word the name of the corresponding real entity. In a *definition*, a phrase is employed for the exposition of a single word: in *paraphrasis*, a phrase is employed for the exposition of an entire phrase, of which the word, proposed to be expounded, is made to constitute the principal or characteristic word." (*Bentham's Theory of Fictions*, p. 139. See also p. 9 of the present paper)
[55] Ibid.

thing done and produced in it that can be."[56] (in *Marginals*, #45).

From the distinction between real and fictitious entities, Bentham shows the necessary transition to a different method of definition *(a radical methodological move – changing the definition of 'definition')*. And by means of the relation of a fictitious entity such as 'a right' to a real entity such as 'pain' we 'exhaust the field of Ethics'. But since we still are asking at this point, "In which [of the "opposite sanctions acting in opposite directions"] lies the rule of right?"[57] it becomes necessary to rely on the principle of utility as "the only source of solution"[58]. And as we arrive at the principle providing the only solution to our question, we find out that "principles of utility two…" It is at this point that we realize that in order to understand 'what the principle of utility is' (its definition and meaning) we must first understand the distinction that makes the principle of utility 'two' and not 'one', "or if but one… understood in two senses,"[59] – the distinction between the 'censorial' and the 'expositive' (which might be seen as corresponding to the distinction between 'how to use the principle of utility – its meaning' and 'its definition – what it is')[60]. This distinction marks a clear break from run-of-the-mill metaphysics, since it separates 'definition' from 'meaning'. As Burke has suggested, the transition from eulogistic to dyslogistic appellations produces "a neutral period of transition between them"[61], and correspondingly the transition from 'what it is' (definition') to 'what it ought to be' (meaning or use), it can be argued, produces a semblance of 'neutrality' pertaining to the principle of utility. It thus appears to be neither good nor bad in itself. But this appearance is, by definition, the result of a constant movement between the 'exposition' of 'what the principle is' and 'the censorial' mode of the principle that seeks to use it properly and thus establish its meaning. And in this sense, Bentham took the great problematic of political philosophy – the transition from 'what there is' to 'what ought to be' and posited it right in the middle of his solution (the only solution) –

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[56] In Marginals, #49, Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
60 The 'expository' aspect of the principle of utility involves 'analysis' and therefore to 'definition'. But the 'censorial' aspect of the principle, since it goes to 'how it ought to be used' (or better said 'under what circumstances its employment might prove to be beneficial') would seem to involve 'meaning', as 'use' and 'meaning' greatly overlap. This presents a challenge to a theory such as Bentham's, which is a theory of meaning, when it comes to 'definition', since 'definition' clearly belongs to the 'expository mode, while 'meaning' it seems belongs to the 'censorial' mode (at least the way Bentham's 'division' works). Paradoxically perhaps, a theory of meaning such as this must shift from the 'expository' mode to the 'censorial' mode in order to extract the full meaning of its own terms and principles. And in this sense such a theory is indeed a truly political theory, since the 'meaning' of its terms and principles seems to come to life, not under the scrutiny of 'definition' but as a 'practice' – within the employment of such terms and principles. 'Definition' in this sense, remains a problem, and Bentham then redefines 'definition' employing the terms of discursive practice instead of the metaphysical terms of genus and differentia (if the expository mode does not allow for the meaning of the terms and principles to come to light, then we must change the terms of the expository mode, and thus the terms of 'definition'.
[61] P. 92-94, Burke, Kenneth, *A Rhetoric of Motives*, New York, Prentice-Hall Inc., 1950

the principle of utility – without making any further effort at defining the transition itself properly.

The division of the principle of utility into censorial and expository aspects or modes has foremost methodological significance. In other words, Bentham here lays out the distinction between 'what is' and 'what ought to be' and posits it in the middle of his one and only 'solution', but fails, at the same time, to define it or use it constructively (as distinguished from 'instrumentally'). Strangely enough, while failing to use this division or distinction 'constructively', Bentham presents the principle of utility so divided (the division thus becoming part of the principle) as "the only source of solution" to the question concerning 'right'[62].

The need to define 'right' leads Bentham to 'paraphrasis', and 'paraphrasis' leads him to the relation of the fictitious entity 'right' to the real entities 'pain' and 'pleasure'. The latter obviously lead to the principle of utility (as "the only source of solution"). But the principle of utility 'suffers' a division between its two 'senses', the expository and the censorial, with only the 'censorial mode' allowing the principle to be 'a solution' in the first place (since the 'expository' mode of the principle pertains only to its definition, not to the way of using it 'as a solution' – the term 'solution' pertaining to 'use'). There seems to be an annoying circularity of argument creeping up here, since the new form of definition in fact relies, for properly defining 'right', on the relation of the entity to be defined ('right') on pain and pleasure as the parameters of the principle of utility, which is supposed to be the only source of solution (to the definition of 'right'), but as that source of solution the principle should be available as a whole, as any principle should be when 'used'. But here only one aspect of the principle of utility actually works in providing a source for solution to the question of the definition of 'right' since only the 'censorial' sense of the principle can be construed as a source of solution (only the censorial aspect of the principle as defined – as divided – can be used constructively, by its author's own admission). How does one use 'half a principle' to solve the problem of the definition of 'right' is left to be seen.

The problem lies in the somewhat crude definition of 'paraphrasis' in Bentham.[63] And had

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62 We will see, by the last sections of the present paper, how the principle of utility, as defined by the distinction between the expository and the censorial modes, does work as a complete form of inference (based on 'proportionate analogy' and the Syllogistic), thus providing the most generalized method (and formula) for arriving at 'solutions' or logically and grammatically founded consequences.

63 Bentham writes (in *Bentham's Theory of Fictions*, p. 86 and 138): "Paraphrasis is that mode of exposition which is the only instructive mode where the thing expressed, being the name of a fictitious entity, has not any superior in the scale of logical subalteration …By the word *paraphrasis* may be designated that sort of exposition which may be afforded by transmuting into a proposition, having for its subject some real entity, a proposition which has not for its subject any other than a fictitious entity." In another place Bentham writes: …for the explanation of a fictitious entity, or rather the name of a fictitious entity, two perfectly distinct species of operations – call them *paraphrasis* and *archetypation* – will, in every case, require to be performed; and the corresponding sorts of propositions, which are their respective results, formed; viz. the *paraphrasis*, performing the function of a *definition*, but in its *form* not coinciding with any proposition to which that name is commonly attached. The *paraphrasis* consists in taking the word that requires to be expounded – viz. the name of a fictitious entity – and, after making it up into a phrase, applying it to another phrase, which, being of the same import, shall have for its principal and characteristic word the name of the corresponding real entity.

more attention been paid to the grammatical-predicational nature of the terms involved – taking into account the difference between 'modal' or 'dispositional' properties and what traditionally have been called 'essential properties' – then the seeming unclarity of the boundaries of the 'expository' and the 'censorial' in respect of the principle of utility and the term 'right' would have been cleared. More pertinent to this discussion would be the distinction which Bentham himself makes between 'adjectival' and 'substantive' terms (in respect of both 'law' and of 'grammar'). The 'adjectival/substantive' distinction plays in the same field as the distinction between 'dispositional' (seemingly 'non-substantive') and 'real' terms, which Bentham uses loosely in the present discussion.

Peculiarly, in his discussion of 'real' and 'fictitious' entities Bentham uses a 'metaphysical' terminology, while the discussion of the distinction between 'substantive' and 'adjectival' terms is 'grammatical' in nature. And the discussion of the difference between the 'expository' and the 'censorial' modes goes both ways, since the 'expository' could be construed in metaphysical terms – 'definition' as a 'formula of essence' – 'what is', and the 'censorial', since it uses 'dispositional' terms which are by nature what we call 'modal properties' and as such 'non-substantive' traditionally, could fall on the side of a 'grammatically' founded approach. In this sense, Bentham is not clarifying the realm or mode of enquiry he is working in at any given time. Some have conveniently called it an 'epistemology' (De Champs), others (Quine) called it 'conceptual'. I find neither one of these characterizations satisfying. Adding to the problem of describing Bentham's method for the 'kind' of method it is, is, as we have just seen, is the lack of any awareness of categorial designation by the author of all of these distinctions and principles.

Bentham was faced with the real problem of not having the means to define certain terms and 'entities' represented by such terms. His 'non-grammatical' solution (if I may call it so) in the form of 'paraphrasis' and the principle of utility, seems crude at times[64], especially when it becomes

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In a *definition*, a phrase is employed for the exposition of a single word: in *paraphrasis*, a phrase is employed for the exposition of an entire phrase, of which the word, proposed to be expounded, is made to constitute the principal or characteristic word."

[64] (For a description of 'paraphrasis' in Bentham's own words, see p. 9 of the present essay) I describe Bentham's conception of 'paraphrasis' as 'crude' because, on its face, Bentham's describes (or 'defines', if you will) paraphrasis from a metaphysical point of view (in relation to the existing method of definition – the definition by means of 'genus and difference'. Bentham might have been unaware of having intorduced (with 'paraphrasis') a form of definition, which is based, not on the run-of-the-mill 'essential' terms associated with 'genus' and 'difference', but employing terms of 'meaning'. The transition (marked by paraphrasis) from a metaphysics to a theory of meaning is demonstrated by the shift from the traditional method of defnition to 'paraphrasis'. Bentham says (Bentham's Theory of Fictions, p. 138): "In a *definition*, a phrase is employed for the exposition of a single word: in *paraphrasis*, a phrase is employed for the exposition of an entire phrase, of which the word, proposed to be expounded, is made to constitute the principal or characteristic word." Instead of 'defining' an object in the traditional (essentialist) manner, we find ourselves at a loss when it comes to the definition of highly abstracted objects such as 'justice' (a fictitious entity', according to Bentham), and we retreat to the second best method, which arrives at the desired definition not by means of a reduction of 'essential' properties to a single word, but by keeping a 'principal word' as the focal point of a whole sentence, constituting the definition. My guess would be that the difference between the traditional form of definition and

clear from other parts of Bentham's work that he intuitively came up with 'grammatical' or 'predicational' distinctions that allowed for better logical consistency of his theory, and allowed future generations, to see how the modal or dispositional nature of the categories and terms (properties) actually defining 'justice', 'method' and 'right', necessarily bring about the radical systemic transformation, so desired by Bentham, almost effortlessly.

When we make the transition from 'what is' to 'what ought to be', we often (again, without recognizing it) also make the transition between two categorially different modes or methods. When a political philosopher looks at the life and realities of his times he naturally tends to perceive of the object of his enquiry as 'what is', and the mode of enquiry, since the enquiry aims at analyzing the political realities of the time and defining them as 'what they are', - the mode of enquiry would easily and naturally be construed as 'metaphysical' – a quest for the nature of that reality.

But when the scholar (the political philosopher) reaches the end of the Expository part of his enquiry he quickly moves to the 'prescriptive' part of the enquiry, the 'what we ought to do' part[65]. And despite the fact that in this second part of the enquiry we seek an answer to 'what to do' or 'what we ought to do', which still uses the term 'what', on the whole this second phase of our political-philosophical enquiry pertains not to 'what' but to 'how', since 'what we ought to do' generally pertains 'how we do things' and thus can be defined or described only by using

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the new one manifests itself in a marked transition from the employment of 'essential' or 'substantive' terms to the employment (in 'paraphrasis') of 'adejctvial' (traditionally 'non-essential') terms. I suggest this because clearly 'substantive' terms tend to 'stand alone', while 'adjectival' terms relay on the context of a whole sentence (by definition, 'substantive' terms typically function grammatically as 'subject', while 'adjectival' terms function as contributory terms. I am led to believe, then, that the shift from 'definition by genus and difference' to 'definition by paraphrasis' corresponds to a shift from the employment (in 'definition') from 'substantive' to 'adjectival' terms. And it is the 'contributory' nature of 'adjectival' terms that sets the tone for 'paraphrasis' as the new form of definition, thereby emphasizing further, in Bentham's method, the role of 'adjectival' terminology: dispositional, modal, and otherwise 'accidental' terms. And this makes sense, because once you change the definition of 'definition' in such a profound manner, you are bound to end up with a new definition of 'method' (and 'justice') as well. And, it is the unique and abstracted nature of the subject to be defined – 'justice' – that initiated this methodological change (a change of 'definition' and of 'method').

Paraphrasing, as trivial as it may sound, allows us to incorporate the adjectival terms in their new function as 'constructive' terms – the terms contributing to a real definition [in this case the definition of a 'fictitious' (highly abstracted) entity']. The shift to 'paraphrasing', as the method of definition, would also mark the transition of the normally 'trivial', contributive, or modal terms of the enquiry from an 'instrumental' deployment to a 'constructive' one. The 'constructive' role of the normally 'instrumental' terms is then unavoidably a characteristic of Bentham's method, precisely because the definition of justice requires the shift to 'paraphrasis' as the form of definition. We can see evidence of this tendency also in his emphasis on a scrutiny of Blackstone's style and manner of writing in the Preface to *Fragment on Government*, a critique pertaining primarily to the 'adjectival' terms – the terms of style and manner – in Blackstone's *Commentaries*, a critique also employing (and adequately so) 'adjectival', 'modal' and 'dispositional' terms. In this sense, Bentham's first great feat of constructive criticism, or 'system building', is, in itself a feat of 'construction' by means of newly transformed 'adjectival' and 'modal' terms and properties, - now the building blocks of a new system (method) or theory of morals and legislation.

[65] In fact, most scholars of political philosophy don't make the distinction between the prescriptive and the non-prescriptive aspects of theory – they necessarily make an 'operational' distinction between 'theory' and 'practice', between the theory itself and its application, but within the theory itself hardly any attention is given to the categorial difference between 'what is' and 'what ought to be'.

'qualitative' or dispositional' terms – terms of intention mostly (or terms of modality – the modalities of 'action'). The metaphysical terminology of the first phase of the enquiry becomes, for the most part, useless here. And 'construction' or 'theory building' must resort in this second part to the more 'ethereal' building-blocks of the modalities of speech and action – how to do things – and to the dispositions defining self-interest, in Bentham's case. Even the dispositions of self-interest as they pertain to the principle of utility seem to be 'split' between their role in the 'expository' part and the second 'censorial' part[66].

After reading the previous paragraph I had second thoughts about its accuracy. First it occurred to me that the failure to make the distinction between 'non-prescriptive' and 'prescriptive' parts of a political theory is not easy to understand because we tend to confuse it with the distinction between 'theory' and 'practice' – the difference between the theory as a whole and its application. The distinction we need to make in order to put our theory (and method) in order would be a distinction *within* Theory, - a distinction between two different modes of enquiry taking place within any and every theory of justice – the distinction between its non-prescriptive and prescriptive parts. Bentham, who clearly makes the distinction between the Expository and the Censorial modes of philosophizing (modes corresponding to 'non-prescriptive' and 'prescriptive' respectively) stills does not make the need to apply this distinction to the theory itself as a whole, and to his own discourse, a priority.

Another issue concerning the previous representation is the alleged correspondence (alleged by me) between the 'non-prescriptive/prescriptive' distinction and the 'quantitative/qualitative' distinction. I tried to understand the transition from 'what is' to 'what ought to be' in terms of the transition from the metaphysical terms of 'being' to the more 'qualitative' terms of a theory of meaning. But this correspondence is not clear at all, since in the analysis the 'non-prescriptive' part of Theory and the 'prescriptive' part have a measure of metaphysical and semantic (pertaining to

66 The need to distinguish between the 'expository' and the 'censorial' mode, is, in itself, an 'initiation' of the transition from one philosophical method to another (governed by the categorial change resulting from the transition from the expository mode to the censorial mode). Any methodological unity or coherence thus relies on the capacity of both author and reader to grasp the theory as a whole (and its method for that matter) as a 'grand' transformation governed by two different categories or modes. And whatever we might perceive of here as 'method' would in fact be the scrutiny of 'two methods' and the transition between them. And this is probably the reason why it has always been so difficult to define this 'third' method or mode of enquiry: if we have metaphysics as the first, and 'epistemology' as the second, - the third method would be defined by the 'transition from first (metaphysics) to third (yet unnamed) method', or by the transition from second (epistemology) to third (yet unnamed) method. This third method, then, is defined in part by the transition towards it, or simply by its relation to either metaphysics or epistemology. It is in this sense, a method defined in purely relational terms (in terms of the relation between itself – as yet undefined fully – and other methods. This third method then (Bentham's) has a 'built-in' imperfection' or 'incompleteness' – a lingering aspiration for completeness, that never goes away, and makes its critics come back again and again, banging their heads against its flaws (imperfections), not understanding that some of these seeming flaws are merely expressions of its inherent imperfection and part of the definition of the method. One could generally say that as the method here represents a 'preventive' agenda, it naturally thrives on 'privation' or privative procedures, which to the naked (metaphysical) eye would appear as flaws.

meaning) terminology. And the correspondence with the 'expository/censorial' distinction is also not as clear-cut as I assumed. The transition from 'what is' to 'what ought to be' does not always correspond to the transition from 'what we do' to 'how we do it'.

AGAIN, THE NATURAL AND THE ARTIFICIAL (PITTING SMITH AGAINST BENTHAM)

Bentham writes to Adam Smith: "…I owed you every thing. Should it be my fortune to gain any advantage over you, it must be the weapons which you have taught me to wield, and with which you yourself have furnished me…"[Bentham, *In Defense of Usury*, Letter XIII.[67]]

As concerns the 'principle of the natural identity of interests:

(p. 91, Halevi[68]): "Doubtless Hutcheson and Hume had already perceived the importance of this principle [the 'division of labour'], but it was Adam Smith who saw in it a proof of the theorem of the natural identity of interests and exhibited its logical connection with the principle of utility. Unlike Hutcheson, he considered the division of labour not as a cause but as an effect of the exchange. This verifies the fundamental thesis that the general good is not the conscious object but a kind of automatic product of particular wills. For the division of labour and the general wealth which is derived from it is not the effect of a calculation on the part of human 'prudence' or 'wisdom'. 'It is the necessary, though very slow and gradual consequence of a certain propensity in human nature which has in view no such extensive utility; the propensity to truck, barter, and exchange one thing for another'. This propensity can itself be considered either as primitive, or more likely as 'the necessary consequence of the faculties of reason and speech'…"

I stayed with the above quotation for as long as I did because it provides so much information as to the division within Smith's thinking (and within Bentham's for that matter) between 'natural' and 'artificial' terms.

Smith in fact describes the 'principle of the natural identity of interests' as 'the natural consequence of the faculties of reason and speech."[69] He thus returns us to the 'natural' semantic construct defining the principle: the relation so well manifested in speech, between speaker and listener both responding to the same 'name' – 'speech'. The principle of the natural identity of interests is based on constructs occurring naturally in discourse. And in this sense, the 'principle of the natural identity of interests' treats the grammatical or semantic terms and constructs of discourse 'instrumentally' (or 'trivially').

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[67] Bentham, *In Defense of Usury*, London: Payne and Foss**,** 1818.
[68] Halevi, The Growth of Philosophical Radicalism, The Beacon Press, 1966.
[69] Ibid. (Halevi).

Bentham, by adding the distinction between the 'principle of the *natural* identity of interests' and the 'principle of the *artificial* identity of interests', marks the transition from the 'intstrumentality' of the terms of the principle to their 'constructive' employment[70]. Bentham transforms the 'natural' version of the principle into an 'artifice' – a man-made principle. This transition has the potential to solve one of the greatest problems of political philosophy: how does one go from 'what is' (the 'expository' mode) to 'what ought to be' (the 'censorial' mode). And the solution seems to be, to no longer treat the grammatical or speech-terms defining the principle as merely 'instrumental', but start employing these terms 'constructively'. Predication (the act of combining grammatical subject and predicate) can thus become the main mode or method of the new 'artificial' enterprise of theory construction. The beauty of this approach is that since the terms are natural terms by origin, once they are employed 'constructively' they contribute not only to what we normally would call 'theory building', but also to 'world-making'.

The problem has been, in my view, from the beginning, that for the transition from an 'instrumental' use of the semantic terms (the terms of 'speech') to a 'constructive' ('non-trivial') use, certain conditions must be fulfilled. What adds to the problem (and compounds it as a problem of 'method') is the fact that those conditions or pre-requisite procedures are in themselves exposed to either 'instrumental' or 'constructive' representation. Bentham does not address the question of how the transition from the 'instrumental' use of the terms to their 'constructive' usage occurs. Much about this can be 'excavated' in Plato's work, where the awareness of such prerequisite procedures is highly developed. One example: when in the *Eryxias* the term 'property' is posited as the subject of discussion and thus also naturally (and 'trivially') becomes the grammatical subject, - when this happens (as a conscious act initiated by the author), the meaning of the term 'property' starts to transform, since 'property' is the only term in our language that cannot be posited as 'grammatical subject' and still retain its original meaning as 'property' – it becomes something else. Such an unusual semantic and logical environment allows for transitions and transformations of meaning as required when we move a term from 'instrumentality' to 'construction'. In the case, in Plato, of the

70 The move from regarding the terms of the enquiry as 'instrumental' to regarding them as 'constructive' is not the same as the move from the 'natural' to the 'artificial'. While 'instrumentality' is usually associated with the trivial employment of grammatical combinations (predicate-subject combinations) and 'construction' is associated with purposeful and 'conscientious' employment of words at the grammatical level, the term 'artificial' denotes the intentional use of otherwise naturally occurring constructs. Both terms, 'construction' and 'artifice' refer to the human capacity for grammatical combination of subject and predicate at will. Obviously this ability to use language at its most intricate level comes 'natural' and normally we take grammatical combination to be a 'trivial' thing (we don't have to consciously think about it when we speak). But when we refer to a principle as 'artificial' by definition, we generally mean to attribute to it a level of *conscious* grammatical combination, or at least an awareness of the 'willful' employment of an otherwise naturally occurring construct. When I then use the term 'construction' I usually refer to an awareness of our capacity to use language, or grammatical combination, at a level which produces real things in the world – the capacity to use discourse as a 'world-making' device (the expression 'the word of God' would be a good illustration of that). Whether Bentam's theory, and his method, provide for such 'construction' (beyond the conscious 'artificiality' of some of his principles) remains to be seen.

term ‘property’, the mere positing of this particular term as ‘subject’ brings about a transformation of its meaning, making, in this unique case, the positing of a term as ‘subject’ an act of ‘construction’ not a case of ‘instrumental’ employment.

And again we see (in Halevi) how Bentham evokes the ‘artificial’ and Adam Smith the ‘natural’ in their respective theories (p.94[71]):

> “Adam Smith, then, with a view to a thorough-going evaluation of wages, has a moral arithmetic which bears some relation to Bentham’s moral arithmetic. But in Bentham’s juridical theory the calculus of pleasures and pains is the deliberate work of the legislator and of the magistrate, so that the natural proportion of the legal punishment to the crime is artificially established, while in Adam Smith’s economic theory the same calculus takes place spontaneously. Not only is it not necessary for the legislator to interfere – it is necessary that he should not interfere, if labour is to receive its due reward, and if wages are to be proportional to labour.”

It is the ‘artificial’ that sets Bentham’s method apart from Smith on every subject – the ‘man-made’ artifice of an ‘identity of interests’ that relies on the ‘natural’ identity’ but does not rest on its ‘instrumentality’. With Bentham, the implied requirement of theory and principle seems to be that the terms and principles be employed ‘constructively’ (or at least ‘purposefully’ as part of legislation).

The difference between ‘constructive’ employment of the terms of the theory, and merely ‘instrumental’ use, is ever more pertinent in distinguishing Bentham’s theory (and method) from Smith’s[72]. This also puts more weight on their relation to the role of grammar (is it ‘foundational’ or not). It must be said, in this context, that the role of grammar and semantic constructs in the respective theories of Bentham and Smith (the question whether these terms must be employed constructively or not) is being discussed indirectly, or under a thin veil of the terminology of ‘value’ and ‘exchange value’ (into which Halevi delves beginning page 99 of his volume). The discussion of

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[71] Halevi, *The Growth of Philosophical Radicalism*, The Beacon Press, 1966.

[72] Smith, and Bentham following him, employ the same principle – the ‘principle of the identity of interests – which makes the difference between these two occasions of the principle even more interesting. With Smith the principle is formulated as the ‘principle of the *natural* identity of interests of governors and the governed’. Bentham makes a seemingly small but significant change in his formulation of the principle: with him it is the ‘principle of the *artificial* identity of interests of governors and the governed’. With Smith the principle is ‘naturally’ conceived’ while in Bentham it is being conceived ‘artificially’. This difference between ‘natural’ terms and ‘artificial’ (man-made) terms in political theory, goes to the distinction on which Bentham’s theory of ‘rights’ is founded – the distinction between the ‘nonesense’ of ‘natural rights’ and the meaningfulness of ‘political (man-made) rights’. For Bentham only ‘political’ rights have meaning, while the term ‘natural rights’ amounts to ‘nonesense on stilts’. It seems therefore that what had started with Bentham taking the ‘principle of the natural identity of interests’ one step further, making it into the ‘principle of the *artificial* identity of interests’, meant in methodological terms the laying of the foundation of his theory of rights, and a whole new ‘kind of method’ at that.

the sources of value here, and earlier the analysis of 'exchange' in Smith and Bentham, really calls attention, in my view, to the fact that 'value' and 'exchange' are thinly disguised grammatical terms. And so are the terms 'having' and 'property', which define 'wealth'. So in a sense, the discussion has been a thinly disguised discussion of 'grammatical' terms all along. And the real question hanging over the respective texts (Smith's and Bentham's) is whether, or to what extent, 'constructive' ('world-making') employment of the terms is possible or beneficial.

Halevi's critique of Adam Smith's "is thus reduced, in the last resort to this: that he failed to put his theory of the formation of wages, profits and rent into a sufficiently systematic form."[73] And Bentham, by comparison, according to Halevi, tells us that "political economy…includes a *science* and an *art*; and the science must be closely subordinated to the *art*[74]." There really is no simpler way of saying that beyond the 'natural' there lies our own reading of it, which in the transition from 'exposition' to 'construction' necessarily forms the 'artifice' of human theory. As much as it can at times be desired, 'nature' cannot be the one and only element of 'theory', since the mere discourse of such 'theory of nature' is an artifice. Bentham's hightened awareness of the role of language and grammar in political and juridical theory, helps bring the 'artificial' back to 'science'.

The relation between the natural and the scientific is problematic to begin with. And Halevi asks: "Does not the principle of the natural identity of interests, interpreted in this way ["in ancient science the universal order seemed to be inevitably compromised by the sacrilegious intervention of human art"], seem to contradict the modern idea of an active and conquering science?" And as Halevi further comments, "thus, about the year 1785, Bentham found that he had succeeded in fusing the economic theories of Adam Smith with his own juridical theories."[75] Halevi points out the seeming contradiction between the 'principle of the natural identity of interests' and the "sacrilegious intervention of human art"[76].

This makes sense, since Smith's view that "It is not the function of the state directly to

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[73] Ibid., p. 103.

74 Ibid., p. 107. This also means that 'science' is subordinated to 'grammar' – grammar as one of the purest forms of art (combination).

[75] Ibid., p. 116.

76 (Ibid.) But we have already seen, not only, how problematic the status of the necessary 'artificiality' of the new science is, but also how the transition from 'what is' to 'what ought to be' creates great methodological problems for any political philosopher, due to the 'artificiality' of the scientific terms producing what in essence is a 'fictional' genre of discourse. The sense in which the newly upgraded 'artificial' version of the principle of the identity of interests is 'fictional' is a purely 'literary' sense. It is 'fictional' in so far as it is a 'projection' of the author's view of 'what ought to be', based on a naturally occurring construct, but positing it in an 'interventionist' mode with the purpose in mind of creating a better political environment, - a touch of utopia as such, and in this sense – as a work of writing – a 'fiction'. What saves this kind of fictional discourse from lack of 'substantiation' is it being grounded in the naturally occurring grammatical and semantic constructs of discourse reflecting our relation to real entities. But still, much work has to be done in 'prevention' and in 'unlearning', for the 'tyranny of language' and the exaggerated import of words not to stand in the way of our understanding of 'how to do the right thing'.

increase wealth and to create capital"[77] could be seen as compatible with Bentham's 'preventive' approach to legislation and governance. There can easily be found points of 'theoretical' contingency between Smith's 'natural' approach' and Bentham's preventive and holistic legislative measures. In constructing the new science of morals and legislation, Bentham designs an array of distinctions, terms, and principles, which are meant to act in a typical 'adjectival' manner' making such legislative actions at least appear more 'natural' than they actually are. In Bentham the active 'constructive' work takes place on a more grammatical level by means of the combination of desired predicates (mostly 'adjectival' predicates) with major grammatical subjects. He thus avoids making or having to make 'substantive' changes, helping to keep up 'natural' appearances. Would Bentham's 'principle of the artificial identity of interests' really stand out when compared with Smith's 'principle of the natural identity of interests'? Not to the untrained eye. 'Artifice' and 'science' here enter by the back door and by means of a 'Trojan horse' of 'adjectival', seemingly 'non-substantive' terms.

Halevi writes: "Bentham's aim in applying the principle of utility in the sphere of morals and legislation was to make the reign of reason prevail in these matters over that of instinct and feeling."[78] This is another way of saying that with Bentham the prevalence of the natural which was key in Smith's approach is being complemented by the 'artifice' of human reason, which is being achieved primarily in my view by reliance on the same natural semantic and grammatical constructs. The constructs involved could, and are in fact, viewed and used by Smith primarily for their substantive value, such as when he uses the principle of the natural identity of interests as a means to support the division of labour, while Bentham takes the same construct, recognizes it for its grammatical role as an 'artifice', 'man-made construct', and names it the 'principle of the artificial identity of interests'. The difference between the two uses of the same construct is in the manner of employment (as trivial as that may sound at first): Smith uses the construct as a 'natural principle of identity of interests' and as such he employs the construct 'instrumentally', while Bentham employs the same construct 'constructively' as part of the censorial mode of operation – 'this is how it ought to be done' (and our work as legislators must promote this naturally occurring construct as an end in itself). The difference between using the same construct or term 'instrumentally' or 'constructively' is also the difference between the 'natural' and the 'artificial' when it comes to political theory.

> "Consequently it was on the two principles of the new philosophy – the principle of utility and the principle of the association of ideas – that Beccaria based his theory of punishment…the aim of chastisement [punishment] is nothing but to prevent the criminal from injuring society any more and to deter his fellow citizens from attempting similar crimes. Now, punishment fulfills this task by reason of the principle of the association of

[77] Ibid.
[78] Ibid., p. 57.

ideas: wit is proved that the union of ideas is the cement which binds together the whole edifice of the human understanding, and that without it pleasure and pain would be isolated feelings, having no effect on practice'."[79]

We can see in the above the relation between the principle of utility and the principle of the association of ideas, and a further manifestation of the distinction between the natural and the artificial.

The universality of the rules laid down by Bentham:

"…in this way there develops a theory of penal code which no longer resorts, as the theory of Montesquieu and the jurists had done, to the fictions of the 'nature of things' and of legal retaliation. The rules laid down by Bentham are on the one hand absolutely universal: they are true regardless of time and place. On the other hand they are capable of an absolutely rigid application to all particular cases which may arise."[80]

Halevi argues,[81] that Bentham's theory of punishment does not suffer from the duality of 'nature' and 'artifice' as does his philosophy of civil law. And "this is because Bentham's philosophy of civil law was derived from Hume, while his philosophy of penal law on the other hand came from Helvetius: the naturalistic tendency fades away while the rationalistic remains."

As I have stated before, I think that certain principles in Bentham which are the pillars of his theory, such as the 'principle of the artificial identity of interests', integrate (as they are grounded in a natural construct) both the natural and the artificial and provide the transition from the former to the latter, a transition which in itself becomes the defining moment of Bentham's theory (this transformation from 'what is' to 'what ought to be' is what makes the theory so radical, transformative, and with a capacity for 'world-making' ('construction').

And it is exactly this point of the 'censorial' role, which Bentham found in the artificial version of the principle, that Halevi is addressing: "he did not hope to suppress suffering, but rather he confiscated, in favour of the legislator with his knowledge of what is useful, the power of inflicting punishment in order to bring about an artificial identity of interests."[82] (my emphasis) Halevi says that even the Panopticon plan "was a new application of the artificial identification of interests…"[83]

(Concerning the principle of the identity of interests:) "But how then can the same ideas,

[79] Ibid. p. 57.
[80] Ibid., p. 73.
[81] Ibid., p. 74.
[82] Ibid., p. 74.
[83] Ibid., p. 82.

> expressed almost in the same words, lead to such different conclusions with different authors? It is interesting to note the nature of the logical crisis through which the principle of the natural identification of interests passed twenty years after the publication of Adam Smith's classic, and twenty years before the appearance of Ricardo's book, likewise a classic. The problem can apparently be solved as follows. Godwin retains what may be called Adam Smith's naturalism, - the distinction between the natural and the artificial, joined with the conviction that nature is just, and that the artificial is in opposition at once to nature and to justice. But Godwin draws, in a different place than Adam Smith, the dividing-line which is so difficult to determine, between the natural and the artificial."[84]

The distinction between the natural and the artificial in the various authors of that time goes to form their respective definitions of 'property', 'wealth', 'government' and 'justice'. "Godwin's thesis is that the rich man, in so far as he is a rich man, cannot be socially useful; the distinction between rich and poor is an artificial distinction which destroys the natural identity of interests."[85]

THE ANALOGY LEADING FROM THE JURIDICAL DISTINCTION BETWEEN ADJECTIVE AND SUBSTANTIVE LAW TO THE GRAMMATICAL DISTINCTION BETWEEN ADJECTIVE AND SUBSTANTIVE NOUNS:

In *The Works of Jeremy Bentham*, Part VII, in the Introduction to *Principles of Judicial Procedure*, Bentham writes:

> "By procedure, is meant the course taken for the execution of the laws, viz. for the accomplishment of the will declared, by them in each instance. Laws prescribing the course of procedure have on a former occasion been characterized by the term adjective laws, in contradistinction to those other laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, substantive laws. For in jurisprudence, the laws termed adjective, can no more exist without the laws termed substantive, than in grammar a noun termed adjective, can present a distinct idea without the help of a noun of the substantive class, conjoined with it."[86]

Once the reader has recognized the 'kind' of method Bentham employs, he can actively apply this understanding, not merely in an 'instrumental' manner – as a means for facilitating a better reading of Bentham's arguments – but in a 'constructive' manner, thus completing Bentham's original requirement, that the right method be chosen, and that this choice be manifested as the changing of

[84] Ibid., p. 212.
[85] Ibid., p. 213.
[86] P. 6, *The Works of Jeremy Bentham*, (edited by Bowring), Edinburgh: William Tait, 1837

the way in which we use the good old terms – a 'turning around of the enquiry as a whole'.

It so happens that only by understanding the nature of the philosophical mode or method at work in Bentham, can the requirements and pre-requisite conditions for the practice of Bentham's theory be met; only then can the transition from the 'expository' to the 'censorial' mode be accomplished; only then can the transition from 'what is' to 'what ought to be' and from 'theory' to 'practice' be set in motion.

Bentham's theory puts the burden of 'doing the right thing' on the unsuspecting reader, beginning at the level of understanding the definitions of the various terms, and ending in the required transformation of 'self'. And in this sense, it truly is a radical theory of the individual in society.

THE 'NATURAL' VERSUS THE 'TECHNICAL' SYSTEM

In *Principles of Judicial Procedure*, Bentham says: "Such is the state of the disease. Now as to the remedy." This is a clear expression of two procedures taking place simultaneously[87]: (1) the transition from the 'expository' (non-prescriptive) mode to the 'censorial' (prescriptive) mode, and (2) the 'framing' of the theory as a whole in terms of 'prevention' and 'therapy'. The comment quoted is made as part of the section describing the oppressive nature of the 'technical' system, and the advantages of the 'natural' system ("natural and technical systems compared"). "One main feature of natural procedure is a special regard to avoid adding to the suffering of the innocent, the indigent, and the afflicted."[88]

It would appear that the sense in which Bentham here uses the term 'natural' is not the same sense in which he uses the term 'natural' in making (elsewhere) the distinction between the 'principle of the natural identity of interests' and the 'the principle of the artificial identity of interests'. What is meant by 'natural procedure'? We have already seen that "One main feature of natural procedure is a special regard to avoid adding to the suffering of the innocent…" But how is it 'natural'?

> "The fundamental principles of natural procedure are, - 1. Publicity maximized. 2. Exclusion of middle-men maximized. 3. Initiatory applications, not epistolary, but oral, maximized. 4. Penal security against falsity universalized, with warning of ditto. 5. No one made defendant, but on determinate and substantial grounds. 6. Epistolary statement receivable, to save delay and vexation, but never definitive; oral interrogation always addible. 7. Mode of procedure for the discovery of the appropriate truth, the same in all cases. 8. Delay, vexation, and expense, minimized in all cases. The fundamental principles of technical procedure are – 1.

87 Ibid., p. 172. Before we look into the kind of procedure this sentence represents, we can first notice that the expression 'the state of the disease' corresponds to the 'expository' mode, and the expression 'the remedy' corresponds to the 'censorial' mode. The sentence represents the transition from 'what is' to 'what ought to be', and this time as a 'therapeutic' procedure.

88 Ibid., p. 169.

> Publicity minimized. 2. Number of middle-men maximized. 3. Initiatory application by party to judge, not admitted. 4. Penal security against falsity, - extent minimized: distance from commencement of suit, maximized. 5. At the pleasure of every plaintiff, any person made defendant, antecendently to the allegation of any grounds determinate or un-determinate. 6. Recently established exception excepted, and that flagrantly inadequate, liberty of any man violated by confinement at the will of any man in the character of plaintiff. 7. Mode of procedure, on the pretence of the establishment of truth, different in different cases. 8. Aggregate of delay, vexation, and expense, maximized. Fictitious delay established in an infinity of proportion' according to occasion and pretence." (my emphasis).[89]

It seems that the term 'natural' is employed here precisely in its connotation as part of a 'preventive' regime: 'natural' as a name for anything that has not been tempered with (tempered with to accommodate the interests of the judge and lawyer perhaps, but not the defendant's). 'Natural' means here' in the context of Bentham's *Principles of Judicial Procedure*, merely the way things are factually (the real facts of the case) before the votaries of the 'technical system' have started to exploit it for their own gain. The 'natural' stands here in opposition to the 'artificial' – 'man-made' interventions of a 'formal' or 'technical' system left to its own devices for too long – a system constructed, not directly by man but by the accidents and habits often representing the less desirable aspects of human behaviour and disposition.

When we look at principle 7 (mode of procedure) we can see how within 'natural procedure' the 'mode of procedure' is "the same in all cases", while within the 'technical procedure' the mode of procedure is "different in different cases". This unity of 'mode of procedure' amounts here to 'unity of method', thus allowing for one comprehensive method to be employed (within the natural system), instead of one becoming a casualty of a system (the technical system), which is, by definition, inconsistent when it comes to method (mode of procedure).

And as we have seen, when we read about Procedure earlier, Juridical Procedure generally pertains to what Bentham calls Adjectival Law. And here he argues for the implementation of the 'natural system' of procedure because it provides methodological unity. It would only seem fair to conclude that the body of Juridical Procedure fully corresponds with Adjectival Law (and adjectival terms) on one side, and with Natural Procedure on the other, which makes (syllogistically speaking) *Adjectival Law and Natural Procedure, if not one and the same, then at least fully compatible*. Which means that the field of juridical procedure, as a whole, depends on the 'non-substantive' terminology characteristic of 'adjectival law'. This allows us to understand that the definition of 'justice' implied in Bentham, also depends on 'adjective' terms, terms of 'relation', 'place', and other

[89] Ibid., p. 178.

purely ‘modal’ categories. And this dependence on modal terms for ‘definition’ would be one of Bentham's main reasons, it seems, for having to come up with a new form of ‘definition’. The traditional formula of ‘definition’, which relied on ‘genus’ and ‘differentia’ also relied on ‘essential’ or ‘substantivity-contributing’ terms (all under the categories of ‘substance’). But since the definition of ‘justice’ falls within the realm of ‘juridical procedure’, and ‘juridical procedure’ is in fact ‘adjective law’, - the terms available to us for a definition of ‘justice’ must all be ‘adjectival’ terms. And since adjectival terms fall under the categories of ‘modality’ and not under the categories of ‘substantivity’, a new kind of ‘definition’ emerges, a kind of definition that can use ‘modal’ or ‘dispositional’ or ‘adjective’ properties (terms) for the construction of a definition. Such properties (terms) previously considered ‘non-essential’ in themselves, have now become, within Juridical Procedure, the building blocks of the definitions of abstracted terms such as ‘justice’. We can then also see how the drive to properly define abstracted terms such as ‘justice’ or ‘method’, not only produces a new kind of ‘definition’ (paraphrasis), but also a transformation of modal terms into ‘constructive’ terms employed in a definition. And it is the transformative nature of this method, which sets it apart from other philosophical methods – the transformation which the terms of the new definition have to undergo in order to become ‘defining’ or ‘definitive’ terms - this transformation becoming a part of both the new kind of ‘definition’ (part of the definition of ‘definition’) and of the method employed. Thus the new method (the method implied in Bentham) is necessarily a ‘transformative’ method, a method, which, once employed, causes the terms of our discourse themselves (for the most part ‘adjective’ or ‘modal’ terms) to transform into ‘constructive’ terms – into the building blocks of ‘world-making’ (one step ahead of mere ‘definition’). And this is what Bentham means when he talks about the names of existing offenses and the names of offenses yet to be named. Naming, as preceding ‘definition’, works to initiate the sequence of actions leading simultaneously to the ‘definition’ and to the ‘existence’ of the entity we have named, when it comes to abstracted entities such as ‘justice’ and ‘method’; we ‘define’ and ‘make’ them (in the sense of ‘world-making’) at the same time, - provided we have made the right choice of ‘method’. The choice of the right philosophical method then leads unavoidably to the ‘existence’ of both ‘justice’ and ‘method’, since these conceptions ‘exist’ as (well-defined) ‘entities’ only within the right mode of enquiry. Of course I employ the terms ‘exist’ and ‘existence’ here only as a jest, since within the right mode of enquiry (within the right method) the ‘reality’ of ‘justice’ can only be manifested in terms of ‘meaning’ and ‘meaningfulness’. It is then that 'justice' has its proper place in our world.

It is remarkable to see how within Bentham’s theory, the term ‘natural’ is often being superseded by the ‘artifice’ of ‘art’, of ‘man-made’ intervention in the otherwise ‘natural’ order of things. We have seen this happen throughout the discussions concerning the definition of the ‘principle of the artificial identity of interests’ (as distinguished from Adam Smith’s ‘principle of the natural identity of interests’).

At times it feels that the ‘correction’ made to the definition of the ‘natural identity of interests’ by Bentham, is, in his eyes absolutely necessary, if only as part of the ‘natural’ transition, occurring in every political theory, from ‘the way things are’ ('what something is') to ‘the way things ought to be’, - hence the ‘art’ or ‘artifice’. The question seems to be: what governs (or, what rules or criteria govern) the natural transition from ‘the way thing are’ (or from ‘what things are’) to ‘how things ought to be’ or ‘can be’). In other words, if we take into account the idea of ‘construction’ versus ‘instrumental employment’ of the same terms, what would guide us systematically to employ the terms of the enquiry ‘constructively’ (‘artificially’, or in ‘constructing an artifice’) so as not to fall into the traps of the ‘technical system’ so despised by Bentham. How would his ‘artificial’ version of certain principles improve on their ‘natural' version, without giving in to ‘habit’, and ‘formal’ oppression? How can an 'artificial' system avoid the pitfalls of the old ‘technical system’?

It seems that Bentham’s intuitive take on this problem has been, all along, that, since his new system is purposeful and unified by the principle of utility, it should be able to avoid the fate of the ‘technical procedure’, which has been the result of a highly fragmented and accidental accumulation of juridical history. [And we should bear in mind that “principles of utility two’ shows a division throughout Bentham’s otherwise ‘unified’ system.]

My own interest in this problem is, in trying to define the criteria and rules for ‘construction’, and especially, rules and criteria as they apply to, or govern, the transition from the grammatical or semantic constructs in their ‘natural’ capacity, to their employment as ‘artifice’. This transition or transformation from the ‘natural’ to the ‘artificial’ or ‘scientific’ corresponds to the transition from the ‘instrumental use’ of the terms of the enquiry’ to the ‘constructive’ use of the same terms. And it is precisely this correspondence that allows us to distinguish and define *a principle, which is only implied in Bentham’s work, – the principle governing the transformation of both the enquiry as a whole and the transformation of the person conducting the enquiry.*

The key to shedding some light on this ‘hidden’ principle, could be the fact that the unifying appeal of the utilitarian theory of Bentham, has a cleavage running through it – or in his own words: “principles of utility two” – the two senses of the principle of utility seem to hold a picture of a division which runs through the theory as a whole, a description of the transformative engine that gives Bentham’s theory its radical tint. [The unity of the theory depends on us understanding ‘transformation’ to be the unifying principle – the transition from ‘what it’ to ‘what ought to be’ as the transition from one ‘sense’ of the principle of utility to the other. Without ‘transformation’ as a key ingredient of the principle of utility, it has little meaning].

But the question still remains: what is the ‘trigger’ or what are the conditions, for our daily trivial ‘instrumental’ employment of the terms to turn into a feat of ‘construction’? What is it that might initiate the transformation of our perception of the original identity-construct at the base of Adam Smith’s ‘principle of the natural identity of interests’ into Bentham’s perception of it as ‘the

principle of the *artificial* identity of interests? I believe the 'trigger' for this change lies in our own practice of enquiry. Simply put, when we turn our attention, as Bentham did, to our own linguistic devices (one could jokingly say, that the young Bentham, 'left to his own devices', - a world of ghosts and apparitions out of which he carved his conception of linguistic fictions and ratio - had no choice in the matter), and we posit terms of speech, terms of grammatical significance, as our subject-matter, we then cause the 'heightening' of the 'mode of enquiry' itself, and thus cause the transition from the 'instrumental' employment of the terms to their 'constructive' employment[90]. What initiates the transformation of the terms is a two-fold decision made by the one conducting the enquiry: (1) the choice of the right method, and (2) the decision to posit certain objects as 'subject' (object of enquiry) and as 'grammatical subject'. Both of these choices seem trivial, but in the context of Bentham's kind of enquiry they are not (and again, the question, 'what makes these decisions 'not trivial' becomes an integral part of the our own investigation).

An added insight concerning this heightened mode of enquiry is the recognition that the items or entities posited here as 'subject', for the purpose of a proper definition, no longer command any 'substantive' terms for their definitions, and that such definitions must be comprised of 'modal' or 'accidental' or 'adjectival' properties, properties which normally are not used for purposes of 'definition'. It is here that Bentham's distinction between 'adjectival' and 'substantive' terms helps us follow a path of methodological consistency in both Bentham's theory and in our own investigation.

And we must not forget that Procedure Code or Judicial Procedure, which here Bentham divides into 'natural procedure' and 'technical procedure', is in itself defined by Bentham as the branch of Adjectival Law – the law of procedure - which is meant to aid in the implementation of Substantive law.

And while the distinction between 'natural' and 'artificial' applies (as it is expressed in the distinction between the 'principle of the natural identity of interests' and the 'principle of the artificial identity of interests') to the whole field of jurisprudence – making it a division of everything political and social - the division between 'natural procedure and 'technical procedure' applies only to the 'procedure' part of law – Adjective Law, and not directly to Substantive Law, since only Adjective Law is law of 'procedure'.

> "By procedure, is meant the course taken for the execution of the laws, viz. for the accomplishment of the will declared, or supposed to be declared by them, in each instance.

90 One example of such a 'change' into a 'constructive' mode of enquiry, I found in Plato's *Eryxias*, where the term 'property' is posited as the 'object of enquiry' – as the 'grammatical subject'. Once the term 'property' has been posited as the 'subject' ('subject' as 'the term to which we attach predicates') it no longer remains 'property' – it is now 'subject' and its meaning starts to change. This is a unique case of the one term ('property'), which is defined by it grammatical position. Once we change the grammatical position of the said term its definition must change as well.

> Laws prescribing the course of procedure have on a former occasion been characterized by the term *adjective* laws, in contradistinction to those other laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, *substantive* laws."[91]

This helps us see that the term 'natural' in 'natural procedure' is used as a description of a 'system prior to intervention', when discussing judicial procedure in terms of prevention. And the use of the term 'natural' in 'the principle of the natural identity of interests' is meant to distinguish that version of the principle from its 'artificial', 'censorial' relative, and pertains to all legislation whether adjectival or substantive.

I continue to go over the mapping of the 'natural/artificial' and 'adjective/substantive' distinctions in Bentham's work, especially as these terms sometimes overlap with the more particular terminology concerning Judicial Procedure and its division into 'technical' and 'natural', because it would allow us to define Bentham's method properly – the 'kind' of terms he employs, and the contexts in which they are employed, - their employment ('use') comprising much of their 'meaning'.

By looking at Bentham's detailed account of judicial procedure, we are able to highlight (hopefully) some of the elements pertaining directly to philosophical method. Elsewhere in his work Bentham explains the precedence that Security has over Equality. It is in the elaboration here of the subject of 'procedure code' that we see how 'security' is interpreted, not only as 'security from loss of property', but also as 'security against the evils opposite to the ends of justice'. In appendix A, *Initial Sketch of the Procedure Code*, Bentham writes: "The procedure code, as well as the judiciary establishment, has for its business the avoidance of the evils opposite to the several ends of justice. Opposite to the declared ends are – 1. Mis-decision. 2. Non-decision in cases which call for decision. They accordingly have for their common business the providing of the requisite security against these same evils."[92]

It is easy to view the above comments in Bentham as trivial or as making merely instrumental use of the terms. But in fact we are witnessing here Bentham's continued classification, by means of division after division, of the terms of the enquiry and of the terms to be used for the construction of the future system of procedure and adjective law. And this seems to amount to a vast array of adjective and dispositional terms scrutinized, divided and divided again, re-defined, and re-applied in a new context.

And as 'trivial' or 'instrumental' as some of this may seem, this is where the 'method' is born – the ground zero of methodological construction - in the minutest distinctions of words usually considered by hard-core philosophers to be merely the 'wrapping paper' for the book on law. This is

[91] Ibid., p. 5 (introduction to *Principles of Judicial Procedure*).
[92] Ibid., p. 178.

also where 'method as content' meets 'method as form': here Bentham destroys the validity of procedure as mere form – what he calls the 'technical system' – and continues his journey of prevention so as to restore the 'natural system'. At the same time, all of this happens in the context of Bentham going beyond Adam Smith's natural version of the 'principle of the identity of interests' and towards the artificial version of that principle[93].

The formal, 'technical' system of procedure – procedure, which in itself (as a whole) is Adjective Law – an array of dispositional and modal terms – has little use for Bentham, but it necessitates an active dismantling, so that what has existed there 'naturally' – good juridical health – could survive. Future 'construction' of procedure involves the active dismantling of the old formal system[94]. But, and here is the catch, the new system, while referred to in terms of the previous 'natural' system of procedure, is not to be erected by means of the '*natural* identity of interests', but by means of the principle of the '*artificial* identity of interests'.

Juridical construction can only be achieved according to Bentham by means of 'human', man-made artifice – a purposeful engagement – an act of intention and of the Will. It wouldn't suffice just to attack and destroy the old 'formal' system of procedure, and restore harmony and balance (here termed the 'natural system'). *Within the acts of prevention and restoration lies hidden the potential of the terms of the Adjective system of law to become the tools for constructing a code of procedure, which on its face, is not 'formal', but avoids the pitfalls of the old formal system by having transformed the meaning of the terms of adjectival law to now serve as tools for defining the substance of the 'non-substantive' entity of all – Justice.*

THE COMBINATION OF REWARD AND PUNISHMENT or THE IDEA OF ABSOLUTE PERFECTION

Bentham suggests the combination of reward and punishment: "The most favourable opportunities for legislation are those in which the two methods are so combined, that the punishment immediately follows the omission of the duty, and the reward its performance. This arrangement presents the idea of absolute perfection. Why? Because to all the force of the punishment is united all the attractiveness and certainty of the reward."[95]

The term 'natural' appears here again, in the context of having to put constraints upon men's

93 One could argue that Bentham creates here a new semantic 'nature' of sorts, an old-new method of 'construction' in the sense of 'world-making' – a world made of 'man-made' objects. Somewhat similar to what we view today as the 'natural' or 'given' environment created by science.

94 The dismantling of the old 'formal' ('technical') system is, in itself, a tedious task of 'unlearning' and 'unteaching', primarily because the 'technical' system has no 'rhyme or reason' to it – no real system, it being the result of the accumulation of conventions. 'Dismantling as unlearning' is the more challenging the less reason there is to the 'system' to be dismantled. This is the equivalent of 'uninstalling' a computer program that is written in a few unfamiliar computer languages, with only a few threads of construction arbitrarily imposed upon them (the 'technical system').

95 Ibid., p. 197.

inclinations:

> "The prosecution of a criminal for the sake of the pecuniary benefit derivable from it is generally regarded as discreditable; but he who undertakes the prosecution to avoid being himself punished, will be considered at least as excusable. The desire of self-preservation is called a natural propensity; that is to say, is regarded with approbation. The desire of gain is a propensity not less natural; but in this case although more useful, it is not regarded with the same approbation. This is a mischievous prejudice: but it exists, and it is therefore necessary to combat its influence. We must treat opinions as we find them, and not act as though they were what they ought to be."[96]

In the above, Bentham describes both the desire for self-preservation and the desire of gain as 'natural', but points out the prejudice we have towards the desire of gain, and uses this opportunity to show how we must, as expositors (pertaining to 'what is'), accept such a prejudice as a given, and not confuse it with our role as censors (pertaining to 'what ought to be'). Our natural propensities should be regarded within the expository mode and not be mystified or modified by our censorial tendency.

The "idea of absolute perfection" ("the combination of reward and punishment") entails: "we must treat opinions as we find them, and not act as though they were what they ought to be", thus having some limits set to this 'perfection'. In the following passage we can see a limit set to 'universal interest'. Earlier we saw that "complete perfection requires universal accuracy: universal accuracy requires infinite detail." A more complete sense of the notion of universality in Bentham is starting to form. The limits Bentham is setting to 'universality' on various occasions relate to 'self-interest in relation to reward and punishment', 'classification by division', and 'the greatest happiness principle' (in the following passage). In the above, though, the idea of universality (as 'the idea of absolute perfection') is being conveyed in terms of the distinction between the 'expository' and the 'censorial' mode ('we must not act as though opinions are what they ought to be'). And this shows that even the notion of universality, as 'complete perfection', is limited by the 'expository/censorial' distinction. The careful awareness of the distinction between the expository to the censorial mode thus defines 'universality' and the 'principle of utility' as well ("principles of utility two").

A POINT ABOUT 'UNIVERSALITY': 'UNIVERSAL INTEREST' = 'AGGREGATE INTEREST OF INDIVIDUALS'. THE UNIVERSALITY OF 'THE GREATEST HAPPINESS OF ALL' IS NOT POSSIBLE; THEREFORE WE SAY: 'THE GREATEST HAPPINESS OF THE GREATEST NUMBER.'

[96] P. 197, Ibid.

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"This Constitution has for its general end in view, the greatest happiness of the greatest number*; namely' of the members of this political state: in other words, the promoting or advancement of their interests. By *the universal interest* [97]".understand the aggregate of those same interests ,

Bentham adds in a footnote:

"* If the nature of the case admitted the possibility of any such result, the endeavour of this constitution would be – on each occasion, to maximize the felicity of every one of the individuals, of whose interests the universal interest is composed; on which supposition, the greatest happiness of all, not of the greatest number only, would be the end aimed at. But such universality is not possible. For neither in the augmentation given to the gross amount of felicity, can all the individuals in question ever be included; nor can the infelicity, in which the expense consists, be so disposed of, as to be borne in equal amount by all: in particular, such part of that same expense, as consists in the suffering produced by punishment. Thus it is, that to provide for the greatest felicity of the greatest number, is the utmost that can be done towards the maximization of universal national felicity, in so far as depends on government."[98] (my emphasis)

The universality associated with 'the greatest happiness of*all*.[99]elbissop ton si '

The principle of utility itself, especially when being substituted by Bentham for the 'greatest happiness' principle, seems to be defined in terms of 'interest': (in *Principles of Morals and Legislation*) "…the greatest happiness or greatest felicity principle: this for shortness, instead of saying at length that principle which states the greatest happiness of all those whose interest is in

[97] Ibid., p. 269.

[98] Ibid.

99 The limit defined here, of the 'greatest felicity principle', in respect of its universality, is similar to the limit set by Bentham to the burden of interest (what is sometimes referred to as 'Bentham's dictum" - here in a quote from Bentham's *Rational of Reward*): "On the one hand, then, each man is under an obligation to submit to any burthen that shall be proposed; on the other hand, each man has an equal right to see the burthen imposed, not upon himself, but upon some other. If either of these propositions be taken in their full extent, as much may be said in favour of the one of them as of the other. In this case, if there were no middle course to take, things must rest in *status quo*, the scale of utility must remain in equilibrio, one man's interest weighing neither more nor less than another's; the burthen would be born by nobody, and the immunity of each would be the destruction of all. But there is a middle course to take, which is, to divide the burthen, and lay it in equal proportion upon every man." (p. 207, Vol. VII, *Works*). Here, in the discussion of the 'greatest felicity principle' Bentham sets a limit to 'universality' (as pertains to the term 'everyone'), and in *Rational of Reward*, when discussing the obligation of each man 'to submit to any burden that shall be proposed' in respect of utility, again Bentham sets a limit to action to be taken: 'In this case, if there is no middle course to take, things must rest in *status quo*, the scale of utility must stay in equilibiro…" It becomes clear that, neither from the point of view of each person's interest (individual interest) nor from the point of view of the 'aggregate' of individuals (everyone), can every and each case be represented or dealt with in a just manner. It would seem, as mentioned by Bentham elsewhere, that when either 'security' or 'equality' must suffer, 'equality' goes first (security has priority) – the status quo is kept. [It seems that the discussion of the standing of the individual in respect of universality is the flip side of the discussions Bentham's dictum elsewhere].

question, as being the right and proper, and only right and proper and universally desirable, end of human action: of human action in every situation, and in particular in that of a functionary or set of functionaries exercising the powers of government."[100] (my emphasis) Even here in the exposition of the principle of utility, the terms 'interest' and 'government' are used, to remind us of the underlying principle of the identity of interests of governors and governed. The mention of these terms in this context actually shows how the principle of utility and the principle of the identity of interests complete each other: in fact, it seems that the need to maximize happiness or felicity which is the end of the principle of utility) may initiate the transition from the 'natural identity of interests' to the 'artificial identity of interests'. The 'natural identity of interests' would have been a merely 'expository' statement, while the 'artificial identity of interests' can accommodate the need for the 'man-made' (artificial) maximization of felicity and happiness. And let us not forget that "principles of utility two", has (suggests) both an expository and a censorial sense. It seems as though Bentham's own transition from the principle of utility to the principle of the greatest happiness corresponds to the movement from the expository sense of the principle of utility to its censorial sense.

"ADVANTAGES OF THE PRESENT METHOD" – BENTHAM'S OWN ACCOUNT OF HIS METHOD OF DIVISION AND CLASSIFICATION (or "THE DISTINCTION BETWEEN WHAT ARE OFFENSES AND WHAT OUGHT TO BE")

[In *Introduction to the Principles of Morals and Legislation*, p. 260, (Chapter XVI, *Division of Offenses*, section LVI)] *Advantages of the Present Method*:

In section LV (Ibid. p. 254), Bentham goes over 'civil conditions', and again, just as in 'Conditions in Life' (in *Leading Principles of the Constitutional Code*, in Volume VII of works. Page 270 – 'of security'), he conducts a survey of the conditions prevailing in society. "*Condition in life*: a factitious[101] and fictitious entity, compounded of, *power*, and *reputation*, in indeterminate and indefinitely diversifiable proportions." 'Conditions of life' is one of the five heads of subject matter concerning *Security*.

When Bentham conducts the *Division of Offenses*, in Chapter XVI of the *Introduction* he arrives, by the end of the chapter, at the discussion of "the advantages of the present method" (LVI), and of "the general idea of the method here pursued." Preceding this section on 'the advantages of the present method' Bentham has a section on 'civil conditions' (LV). In the division of offenses, Bentham first divides offenses into classes. He then divides 'Class' into offenses against, (1) person, (2) property, (3) reputation, (4) condition, (5) person and property, (6) person and reputation. We

[100] Benthm, *Introduction to Principles of Morals and Legislation*, p. 291, note 1.

101 Factitious - artificially created or developed. It might be significant that 'conditions of life', which is the combination of 'property', 'power' and 'reputation', is in itself an artificially created concept, the result of grammatical construction, if you will.

have already seen that in *Leading Principles of the Constitutional Code* (p. 269-270 of Works volume VII) Bentham writes that "Security' has five heads: (1) Person, (2) Property' (3) Power, (4) Reputation, and (5) Conditions in life. The similarity between the division of 'Offenses' and the division of 'Security' has to do with the fact that offenses against 'security' seem to cover most classes of offenses. Interestingly enough, the term 'power', which appears as one of the five heads of 'security' in the principles of the constitutional code, is not listed as one of the classes of offenses in the *Introduction*.

Another item of interest, when we look at these divisions from the point of view of method, is the *"distinction between what are offenses and what ought to be*"[102] This is the opening line of Chapter XVI – *Division of Offenses* – and it is followed by an endnote [#209] titled "*Method pursued in the following divisions*." (We'll get to the comments concerning 'method' in a moment).

> "It is necessary [continues Bentham], at the outset, to make a distinction between such acts as *are* or *may* be, and such as *ought* to be offenses. Any act may be an offense, which they whom the community are in the habit of obeying shall be pleased to make one: that is, any act which they shall be pleased to prohibit or punish. But upon the principle of utility, such acts alone ought to be made offenses, as the good of the community requires should be made so."[103]

Bentham here divides 'offenses' into offenses perceived of in the expository mode – 'what are offenses' – and offenses perceived of in the censorial mode – 'what ought to be offenses'[104]. This is a peculiar way of dividing 'offenses', since all other divisions of 'offenses' are divisions pertaining to 'existing' or 'possible' offenses, also perceived as 'existing' (a division of an existing pool of possible offenses). But when the consideration of 'what ought to be offenses' comes into play, as an outcome of the principle of utility (and certain acts 'ought to be offenses' for the sake of utility), it seems that the distinction between the 'expository' and the censorial' mode itself takes on a new meaning. What makes this difficult is the way in which Bentham employs the terms 'what is' and 'ought to be'.

When we read the title 'division of offenses' we habitually assume that there is a 'pool' of offenses that need be divided into classes. But Bentham's method calls for what might be considered

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[102] Ibid., p. 192.
[103] Ibid., p. 192.
104 Bentham in fact makes the distinction between "such acts as *are* or *may* be, and such as *ought* to be offenses", putting together 'offenses that are or may be' on one side and 'offenses that ought to be' on the other. This is interesting logically since it widens the scope of existing offenses to both actual and possible ('such as are and may be') offenses, and does not include 'offenses that may be' in 'offenses that ought to be', thus raising some interesting questions about the nature and definition of 'offenses', and about the method employed to divide them (a method allowing for the distinction between 'what is and may be' on one side and 'what ought to be' on the other, avoiding the common mistake of confounding 'what may be' with 'what ought to be'.

both 'horizontal' and 'vertical' division: "The logical whole, constituted by the sum total of possible offenses, has been bisected in as many different directions as were necessary…"[105] Bentham thus seems to divide not only 'existing' offenses, but also 'possible' offenses, because in order to apply to offenses the 'censorial' term 'ought' ('offenses what ought to be') certain such offenses would have to be brought to light for the first time and given the proper name. 'Division' goes here beyond 'what is' to 'what ought to be' in the sense that the Censorial mode of enquiry 'produces' newly named terms, terms which represent by means of such names, completely new entities, factitious or fictitious. This extreme manner of division is a completely 'constructive' ('world-making'), and thus 'artificial', procedure.

The whole train of thought associated with 'what act ought to be an offense', takes place in the realm of concept construction, the realm of the participation in speech, the intersubjective, the public, - the political. And here the political mimics the grammatical, in its predicational formula of constructing or naming offenses: "the logical whole, constituted of the sum total of possible offenses, has been bisected in as many different directions as were necessary, and the process in each direction carried down to that stage at which the particular ideas thus divided found names in current use in readiness to receive them." Both political and grammatical construction have thus become dependent on 'naming'. The new elements or 'entities' of the enquiry would remain meaningless without having been first properly named.

Right after Bentham opens the chapter on the 'division of offenses', and makes the "distinction between what are offenses and what ought to be" (and in fact, as an explanation of that distinction), Bentham directly addresses the question of method (in note 209):

> "*Method pursued in the following divisions*. This chapter is an attempt to put our ideas of offenses into an exact method. The particular uses of *method* are various: but the general one is, to enable men to understand the things that are the subjects of it. To understand a thing is to be acquainted with its qualities or properties. Of these properties, some are common to it with other things; the rest, peculiar. But the qualities which are peculiar to any one sort of thing are few indeed, in comparison with those which are common to it with other things. To make it known in respect of its *difference*, would therefore be doing little, unless it were made known also by its *genus*. To understand it perfectly, a man must therefore be informed of the points in which it agrees, as well as of those in which it disagrees, with all other things. When a number of objects, composing a logical whole, are to be considered together, all of these possessing with respect to one another a certain congruency or agreement denoted by a certain name, there is but one way of giving a perfect knowledge of their nature; and that is by distributing them into a system of parcels, each of them a part, either of

[105] Ibid.

> some other parcel, or, at any rate, of the common whole. This can only be done in the way of bipartition, dividing each superior branch into, and but two, immediately subordinate ones; beginning with the logical whole, dividing that into two parts, then each of those parts into two others; and so on. These first distinguished parts agree in respect of those properties which belong to the whole: they differ in respect of those properties which are peculiar to each. To divide the whole into more than two parcels at once, for example into three, would not answer the purpose; for in fact, it is but two objects that the mind can compare together exactly at the same time."[106]

The above passage seems to be the most detailed description of Bentham's method provided by him. It comes as an endnote meant to elaborate on the first division of offenses into "what *are* offenses" and "what *ought* to be", which we have seen is, in itself, quite a peculiar distinction since it assumes 'possible offenses' ("such acts as *are* or *may* be offenses") to be part of the logical domain of offense to be divided, thus making the definition of offenses rely on the meaning of the term 'offense' used as a name for that domain. It also makes 'offense' an 'artificial' entity ('factitious' – man-made) and a 'fictitious' one (not 'corporeal') – again the dependence on the 'name'.

(1) The general use of method is to understand the things that are posited as the subjects of method – "the things that are the subjects of it[107]". As we can see further in the same passage, names come prior to understanding, which would explain how we can posit 'things' as 'grammatical subjects' prior to fully understanding them. (2) To understand a thing is to acquainted with its properties, - the properties it has in common with other things and the properties unique to it. This may sound trivial to the modern ear, but what Bentham is describing – the comparison of 'similarities' *and* 'differences' fits only the description of one form of inference: 'analogy'. In analogy we compare both the similarities and dissimilarities of any two objects compared (unlike in 'deduction' or 'induction'). Unique to 'analogy' here employed is the absence of the use of the term 'universal' in its substantive form – as 'a universal' (not to be confused with 'genus'). This affects Bentham's conception of generality and 'universality' throughout. In addition, if the primary concern of 'method' here is to make possible the understanding of the things posited as its 'subject', this positing, of the thing to be understood, as 'subject' (grammatical subject for that matter) becomes the first requirement or condition of this method – a seemingly trivial condition, since all subject-matter are posited as 'subject' – but nonetheless a real condition of the method. What this means is basically that the grammatical condition for a thing to have been posited as 'subject' has primacy over more

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[106] Ibid., note 209, p. 192.

107 This leads us later to the comparison of the "principles of utility two" to the Syllogistic. In the Syllogistic, the object of enquiry is posited as a 'middle term' for the purpose of learning to fully understand its meaning and in order to construct its definition.

'substantive' considerations which might pertain to 'what the thing to be understood is'. Here, in Bentham's method, the first order of priority is to fulfill the grammatical condition of the thing having been posited as 'subject'. This also marks the method as grounded in grammatical and semantic requirements. And this also calls to the attention of the unsuspecting reader the very real possibility that in Bentham's method the otherwise trivial or 'instrumental' employment of the grammatical and predicational terms has been transformed into a 'constructive' employment, thus explaining the 'world-making' quality of simple grammatical terms here. (3) The points on which a thing agrees with other things and the points on which the same thing disagrees with other things, form a pattern of sorts (another trait of 'analogy', which also means 'pattern'). "To understand it perfectly, a man must therefore be informed of the points in which it agrees, as well as of those in which it disagrees, with all other things." The expression "with all other things" or 'agreement or disagreement with all other things' make the nature of any such comparison of universal significance. The notion of 'universality' produced (or 'employed') is defined not 'substantively' – as '*a* universal' – but by a term having the capacity to be applied to 'anything' and 'everything' (the applicability to 'everything' as a definition of 'universality'). The 'metaphysical' notion of universality, which relies on terms of 'substantivity', tends to limit the comparisons of any two objects to their commonalities, thus seeking out the property or properties that 'form the universal object'. But this metaphysical method produces entities that have in themselves lost the connection to other such entities, since the method of their own production has eliminated all 'difference' (each such 'universal' was produced by a comparison in respect of similarities, not differences). But if we use Bentham's method of comparison, comparison in respect of both similarities and differences, we reveal a 'pattern' connecting all objects compared, and all universal entities, as they are related to one another and to 'everything' (another seemingly trivial term, which here gains constructive meaning). This concerns the form of inference or the logical category in which we choose to operate. With Bentham it is not 'deduction' or (J. S. Mill's form of choice) 'induction'; it is 'analogy', which perhaps resembles what Peirce called 'abduction', and is typically not geared so much towards defining 'universals' as entities, but in creating 'patterns' consisting of the relation between terms that have the capacity to be applied to anything and everything and the terms to which these 'universally applicable' terms can be applied. This is another aspect of the 'construction' in Bentham's theory, 'construction' made possible here by the 'world-making' capacity of the 'pattern' itself, the 'pattern' produced by the comparing of both 'differences' and 'similarities' of the objects of enquiry. The 'pattern' itself – 'analogy' as the form of inference of choice - is a 'world-making' mechanism, in that it is 'pattern' – a grid of sorts, or as Plato liked to refer to it: the 'weave'.

Much of the above interpretation here is of course purely my own. Bentham provides the terms characteristic of 'pattern' and 'analogy', but at the same time he still refers us to 'difference' and 'genus' as the formula for definition. It seems he is a little unclear about the role of 'genus',

since ‘genus’ is a purely metaphysical term, a term pertaining to ‘being’, and doesn’t fit well with the other elements of Bentham’s mode of enquiry (method) which relies mostly on semantic or grammatical terms, terms which are not compatible with a metaphysical term such as ‘genus’. Strictly speaking, defining an object according to ‘difference’ and ‘genus’ is not the same as defining it according to ‘difference’ and ‘similarity’. The use of the term ‘genus’ makes the comparison in respect of similarity a comparison in respect of ‘being’, while in the context of Bentham’s otherwise semantic or linguistic method, the comparison between objects as to their similarities would pertain primarily to the ‘meaning’ of the terms used to represent them, and only secondarily to the ‘being’ of the entities referred to. To understand Bentham's method we need to understand the difference between a comparison in respect of ‘meaning’ and a comparison in respect of ‘essence’ or ‘being’. The best example of the difference would be a construct of comparison we have already discussed – the identity of interests of governor and governed. When we compare the interests of 'governors' and 'the governed' - and in Bentham’s version of the principle (the principle of the *artificial* identity of interests) we aim at artificially producing and maintaining such an identity – we can clearly see that in their ‘essence’ the interests of governors and governed are never exactly the same, and we can see how it would be possible to find a point of identity – a meeting of the minds – where such essentially different points of view can have the *same meaning* for ‘governor’ and ‘governed’ (the identity occurs on the level of the response to a common term, both 'governor' and 'governed' responding to the term 'government'). What makes this kind of formulation in respect of ‘meaning’ so useful is the fact that the formula itself does half the work: the construct of the identity of interests concerning ‘government’ provides, as the semantic construct that it is, the point of identity, the place where, by design, the interests of the two parties meet because they both are bound logically and semantically by their correspondence to the term ‘government’. The principles of both the natural and the artificial identity of interests rely on the ‘semantic’ fact that both ‘governor’ and ‘governed’ respond to the term ‘government’ as the name for their relation. And this relation is valid only within the logico-semantic construct. The pattern produced here is then valid or significant only in respect of ‘meaning’, and when not so perceived of, the pattern evaporates, and all we are left with are the disjointed parts of a ‘metaphysical’ (and in this case, meaningless) mess.

> “When a number of objects, composing a logical whole, are to be considered together, all of these possessing with respect to one another a certain congruency or agreement denoted by a certain name, there is but one way of giving a perfect knowledge of their nature; and that is by distributing them into a system of parcels, each of them a part, either of some other parcel, or, at any rate, of the common whole. This can only be done in the way of bipartition, dividing each superior branch into, and but two, immediately subordinate ones; beginning with the logical whole, dividing that into two parts, then each of those parts into two others;

and so on."[108]

Bentham makes the method of comparison 'air-tight' logically, by requiring that each two objects compared be somehow related *by name*: "…all of these possessing with respect to one another a certain congruency or agreement denoted by a certain name."[109] And this first requirement produces the second requirement, the requirement that only two objects be compared at a time ("in the way of bipartition"). Why only two objects at a time, we might ask? Because 'comparison' cannot, by definition, provide or support a 'relation' between more than two objects at a time – a simple logical limitation. And to divulge a little secret: the 'third' in all such comparisons, is not some mysterious 'third-person' imagined position, but the 'mode of enquiry' itself. 'Method' is always the third, both in the case of the identity of interests, or in the comparison of objects by analogy. And it is the choice of the right method, which makes both the principle of the identity of interests, and any analogical comparison possible. And in a less than obvious way, the 'choice of the right method' becomes in Bentham an integral part of the definition of 'method' (and of 'justice', for that matter) – an 'external' condition of sorts, pertaining to the 'kind of method', and to the compatibility of 'object of enquiry' to 'method of enquiry', and thus producing our capacity to properly understand and define the objects of our enquiry.

And Bentham continues (still in note 201):

"Thus then, let us endeavour to deal with offenses; or rather, strictly speaking, with the acts which possess such properties which seem to indicate them fit to be constituted offenses. The task is arduous; and, as *yet* at least, perhaps *for ever*, above our force. There is no speaking of objects but by their names: but the business of giving them names has always been prior to the true and perfect knowledge of their natures. Objects the most dissimilar have been spoken of and treated as if their properties were the same. Objects the most similar have been spoken of and treated as if they had scarce any thing in common. Whatever discoveries may be made concerning them, how different soever their congruences and disagreements may be found to be from those which are indicated by their names, it is not without the utmost difficulty that any means can be found out of expressing those discoveries by a conformable set of names. Change the import of the old names, and you are in perpetual danger of being misunderstood: introduce an entire new set of names, and you are sure not to be understood at all. Complete success, then, is, as yet at least, unattainable. But an attempt, though imperfect, may have its use: and, at the worst, it may accelerate the arrival of that perfect system, the possession of which will be the happiness of some maturer age. Gross ignorance decries no difficulties; imperfect knowledge finds them out, and struggles with them: it must

[108] Ibid.
[109] Ibid.

be perfect knowledge that overcomes them."[110]

"There is no speaking of objects, but by their names: but the business of giving them names has always been prior to the true and perfect knowledge of their natures."[111] The name of an 'act' ("the acts which possess such properties as which seem to indicate them fit to be constituted offenses") comes prior to understanding and defining it. But the acquaintance with the name (simply understanding what it means) immediately reveals the semantic (logico-semantic) construct naturally present in language – the relation, within 'action', between 'action' and 'acted upon' and between 'the one acting' and 'the acted upon'. It is this 'natural' occurrence of the relation between 'action' and 'the acted upon' that makes the principle of the identity of interests so appealing (as the relation between 'governors' and 'the governed'), and has Bentham read the *De Anima* more than once, he might have noticed that this is how Aristotle defines the various faculties of 'soul'. Bentham nonetheless takes this naturally occurring principle in the version provided by Adam Smith [the principle of the *natural* identity of interests (why naturally occurring? because it is a construct naturally occurring in language)], and 'upgrades' it to the 'censorial' version ('what it ought to be') – the principle of the *artificial* identity of interests of governor and governed[112]. Bentham obviously is not aware of the methodological significance of the procedure here employed by him in upgrading a principle, defined by a naturally occurring semantic construct, to an artificial version of the same. Bentham initiates a transition from 'what is' to 'what ought to be' – from the 'expository' mode of operation to the 'censorial' mode of operation – a change of method. Language is pliable like that, - it allows for the exploitation of its naturally occurring constructs in 'artificially' enhanced principles of human purpose. Language is, in this way, both 'natural' – as it has naturally occurring constructs – and 'artificial' – as it allows for the artifice of combining 'predicate' with 'grammatical subject' as a matter of linguistic routine. And all of this potential for 'constructive' work is being presented while the person conducting the enquiry has not yet grasped that potential, and is still regarding the terms of the enquiry in the 'trivial' or 'instrumental' capacity. Once the additional transition of awareness from the mere instrumentality of the use of the terms to their constructive use starts to happen, the real construction starts – the real making of the semantic artifice. Bentham found himself in a position in which he had to 'beg, steal, and borrow' the methodological elements to comprise one

[110] Ibid.
[111] Ibid.
112 The 'principle of the *artificial* identity of interests' is the 'censorial' version of the principle because the addition of the term 'artificial' to the name of the principle takes the 'natural' ('semantic') occurrence of this identity into the realm of 'people *ought* to employ this construct of identity of interests in matters of legislation'. Adam Smith took this naturally occurring construct and pronounced it to be a 'principle' (by adding to it the term 'interest') – a rule of sorts; Bentham, in adding the term 'artificial' is pronouncing this identity of interests to be a necessary condition for all legislation, a man-made legislative artifice that would from now on be inseparable from our definitions of both 'justice' and 'method'. The term 'artificial' pertains here, not to the construct in itself, but to its application.

comprehensive system of philosophy. And the pieces do not always fit, since the scrutiny of the desired system or method as per its 'kind of method' has not been properly conducted or even elaborated by the author. His description here of his method of classification seems to be the closest that Bentham gets to be doing so.

> "Whatever discoveries may be made concerning them, how different soever their congruences and disagreements may be found to be from those which are indicated by their names, it is not without the utmost difficulty that any means can be found out of expressing those discoveries by a conformable set of names. Change the import of the old names, and you are in perpetual danger of being misunderstood: introduce an entire new set of names, and you are sure not to be understood at all."[113]

Changing the import of the old names, or introducing an entire new set of names, Bentham suspects, will not guarantee complete success. But I believe that on this occasion Bentham is 'over-shooting' the target, since 'changing the meaning of the terms' in the sense of 'changing the way we use the terms' seems to be all we need. And educating the public to this new system would just be another revolution in public education. Worse, and more radical and cruel transformations have been implemented and experienced by humans, and for lesser a purpose.

THE SECOND VERSION: "GENERAL IDEA OF THE METHOD HERE PURSUED"

(Passage LVI in *Introduction*) "*General idea of the method here pursued*." Bentham's intention here is to explain "the method of division here pursued", - perhaps not 'method' in the sense of generally his method of doing philosophy. But aren't the two – Bentham's method of division of offenses and generally his philosophical method one and the same?

What makes the method of the division of offenses so basic for the whole theory? For an answer we must look at what 'offenses' are. An act can be considered an offense, only if it is detrimental to the good of the community. And in order to be detrimental to the good of the community, such an act – an offense – 'must be detrimental to some one or more of its members'. This makes any act that is detrimental to any one of the members of a community also detrimental to the 'state'. The person or persons offended must be 'assignable' – they must be recognized by name or be associated with some property as owners. In short an offense is perceived of as an act detrimental to the interest of an individual or individuals (who are 'assignable') being committed.

The identity of interests of government and governed (or 'governors' and 'governed') is already worked into the definition of offenses, since the terms defining offense are almost the same terms as the ones defining the identity of interests – interest, personal interest as weighed against

[113] Ibid.

public interest and inseparably connected to it, the 'public' existing as an aggregate of individuals, and not as some entity separately defined. It is easy to lose touch with the meaning of some of the terms here: neither 'public' nor 'genus' are treated here as names of 'universal entities'. The notion of universality employed here pertains only to the capacity of certain terms to be applied to 'anything' and 'everything'. Other terms, such as 'genus' or 'public', are names used to refer to aggregates. Both the principle of the identity of interests and the method of the division of offenses rely on the terms of an individual's point of view, either balanced within an identity formulation of the relation between 'government' and 'governed' or when defined as an 'assignable' sufferer of an offense. And in both cases the individual is represented by his name, properties, and interest. ['Public offenses' are offenses against "an unassignable indefinite multitude of the whole number of individuals, of which the community is composed."[114]]

Bentham divides 'offenses' into five classes. The fifth class he describes as "Multiform *offenses*, viz. 1. *Offenses by falsehood*. 2. *Offenses against trust*." (in Ch. XVI, section X[115]). When discussing the subdivision of this fifth class of offenses, and offenses by falsehood in particular, Bentham (in section XXIV) says:

> "offenses of this class in some instances change their names; in others not. It is the common property, then, of the offenses that belong to this division, to run over the same ground that is occupied by those of the preceding classes. But some of them, as we shall see, are apt, on various occasions, to drop or change the names which bring them under this division: this is chiefly the case with regard to simple falsehoods. Others retain their names unchanged; and even thereby supercede the names which would otherwise belong to the offenses which they denominate… <u>It is therefore rather in compliance with the laws of language, than in consideration of the nature of the things themselves, that falsehoods are made separate mention of under the name and in the character of distinct offenses</u>" (my emphasis).[116]

The connection between 'names' and the 'things named', becomes even more 'acute' when certain such phenomena named are 'shifty' enough "to drop or change the names which bring them under this division…simple falsehoods."[117] This of course plays into the distinction between existing names and names to be invented or reassigned by the legislator or by the moralist. It would seem that since of all the classes of offenses, 'falsehoods' have the capacity to change names, this type of offenses might be the most accommodating to a theory requiring either the change of the existing meanings of

[114] Ibid., passage IX, p. 194.
[115] Ibid., p. 194.
[116] Ibid. p. 205.
[117] Ibid.

the terms involved in the enquiry, the introduction of new names, or both. And how important are the distinctions concerning 'naming' to Bentham method?

> "As to the fifth class, this, as hath already been observed, exhibits, at first view, an irregularity, which however seems to be unavoidable. But this irregularity is presently corrected, when the analysis returns back, as it does after a step or two, into the path from which the tyranny of language had forced it a while to deviate. It was necessary that it should have two purposes in view: the one, to exhibit upon a scale more or less minute, a systematical enumeration of the several possible modifications of delinquency, denominated or undenominated; the other, to find places in the list for such names of offenses as were current in use: for the first purpose, nature was to set the law; for the other, custom. Had the nature of the things themselves been the only guide, every such difference in the manner of perpetration, and such only, should have served as a ground for a different denomination, as was attended with a difference in point of effect. This however of itself would never have been sufficient; for as on one hand the new language, which it would have been necessary to invent, would have been uncouth, and in a manner unintelligible: so on the other hand the names, which were before in current use, and which, in spite of all systems, good or bad, must have remained in current use, would have continued unexplained. To have adhered exclusively to the current language, would have been as bad on the other side; for in that case the catalogue of offenses, when compared to that of the mischiefs that are capable of being produced, would have been altogether broken and uncomplete. To reconcile these two objects, in as far as they seemed to be reconcilable, the following course has therefore been pursued. The logical whole, constituted by the sum total of possible offenses, has been bisected in as many different directions as were necessary, and the process in each direction carried down to that stage at which the particular ideas thus divided found names in current use in readiness to receive them. At that period I have stopped; leaving any minuter distinctions to be enumerated in the body of the work, as so many species of the genus characterised by such or such a name. If in the course of any such process I came to a mode of conduct which, though it required to be taken notice of, and perhaps had actually been taken notice of, under all laws, in the character of an offense, had hitherto been expressed under different laws, by different circumlocutions, without ever having received any name capable of occupying the place of a substantive in a sentence, I have frequently ventured so far as to fabricate a new name for it, such an one as the idiom of the language, and the acquaintance I happened to have with it, would admit of … in a language to which admits not, like the German and the Greek, of their being melted into one, can never be upon a par, in point of commodiousness, with those univocal appellatives which make part of the established stock. In the choice of names in current use, care has been taken to avoid all such

> as have been grounded on local distinctions, ill founded perhaps in the nation in which they received their birth, and at any rate not applicable to the circumstances of other countries"[118]

Bentham guides his enquiry, working to avoid the 'tyranny of language' (which threatens to push the enquiry off course) and seeking both a proper use of existing names and the well-formed production of new names. And it is within this context of the 'use of existing names' and 'fabrication of new names' that "to reconcile these two objects, in as far as they seemed to be reconcilable, the following course has therefore been pursued. The logical whole, constituted by the sum total of possible offenses, has been bisected in as many different directions as were necessary, and the process in each direction carried down to that stage at which the particular ideas thus divided found names in current use in readiness to receive them."[119] It is within the strict context of the 'use of names' and 'naming' that the methods of 'classification by division' and 'paraphrasis' ("these names consisting in most instances, and that unavoidably, of two or three words brought together...") come to life. [considerations of 'naming' produce a 'method of definition' and not the other way around].

> "It was necessary that it [the analysis] should have two purposes in view: the one, to exhibit upon a scale more or less minute, a systematical enumeration of the several possible modifications of delinquency, denominated or undenominated; the other, to find places in the list for such names of offenses as were current in use: for the first purpose, nature was to set the law; for the other, custom. Had the nature of the things themselves been the only should ,and such only ,every such difference in the manner of perpetration ,guide as was attended with a ,enominationhave served as a ground for a different d This however of itself would never have been .difference in point of effect [120]".sufficient

The two purposes of analysis here are: (1) the "systematical enumeration of the several possible modifications of delinquency, denominated or undenominated." (2) "To find places in the list for such names of offenses as were current in use." Bentham makes clear that we cannot rely, in our classification (division) of offenses, solely on "the nature of the things themselves". The "manner of perpetration" of an offense (the thing itself) would not be sufficient for 'naming' that offense properly, and the new language that would have to be invented will not be ('in a manner') intelligible, and the old names used so far would still have remained in use but without proper

[118] Ibid., p. 262.
[119] Ibid.
[120] Ibid., (repeating) p. 262.

designation.

The new method has thus been designed with the reconciliation of the above two purposes in mind, "To reconcile these two objects, in as far as they seemed to be reconcilable, the following course has therefore been pursued. The logical whole, constituted by the sum total of possible offenses, has been bisected in as many different directions as were necessary, and the process in each direction carried down to that stage at which the particular ideas thus divided found names in current use in readiness to receive them."[121] The exhaustiveness of the division of offenses in every possible direction appears to guarantee for Bentham that the problem inherent in 'naming' (and the 'tyranny of language'), would be overcome in a systematic manner, and that the names for any offenses, 'existing' and 'possible', would make good use of the existing pool of names. In this sense, Bentham's method of division and classification addresses issues preceding 'definition', since 'naming' comes prior to 'definition', and while other methods would be vulnerable to the 'tyranny of language' – vulnerable to the tendency of names to run ahead of the things named, Bentham protects his system by creating a method that addresses the procedure of naming both existing and possible entities (existing and possible offenses). Here Bentham steps beyond the capacity for systematic enumeration of offenses as represented in 'law', to rely on the capacity of 'custom', "to find places in the list for such names of offenses as were current in use."

> And,
>
> "If in the course of any such process I came to a mode of conduct which, though it required to be taken notice of, and perhaps had actually been taken notice of, under all laws, in the character of an offense, had hitherto been expressed under different laws, by different circumlocutions, without ever having received any name capable of occupying the place of a substantive in a sentence, I have frequently ventured so far as to fabricate a new name for it, such an one as the idiom of the language, and the acquaintance I happened to have with it, would admit of."[122]

And in this sense, Bentham's method is both comprehensive and protected from the limitations of language itself, since the combined effort of 'definition by division', and 'naming' relies on both 'law' and 'custom', evoking the compatibility of every name (and term) with the existing idiomatic tradition of the relevant language. Thus leading to 'paraphrasis': "These names [new names 'fabricated' by Bentham] consisting in most instances, and that unavoidably, of two or three words brought together, in a language to which admits not, like the German and the Greek, of their being melted into one, can never be upon a par, in point of commodiousness, with those univocal

[121] Ibid.
[122] Ibid.

appellatives which make part of the established stock."[123]

THE RELATION BETWEEN THE 'EXPOSITORY' AND THE 'CENSORIAL' MODE CORRESPONDS TO THE RELATION BETWEEN THE FIRST AND THE SECOND COMPARISONS OF 'PROPORTIONATE ANALOGY' (THE OBJECT COMPARED TO ITSELF – 'WHAT IT IS', AND TO 'WHAT IT OUGHT TO BE'). AS SUCH, THE DISTINCTION BETWEEN THE 'EXPOSITORY' AND THE 'CENSORIAL' MODES IS IN ITSELF A PROPORTIONATE ANALOGY.

The 'expository/censorial' distinction – how it is related to 'analogy'.

The distinction between 'what something is' (or 'understanding what something is' or 'understanding what there is') and 'what it ought to be' (or 'saying what it ought to be'), - this distinction goes like a thread through all of Plato and much of Bentham, and, as we have just seen, for a good reason, since this distinction represents the first and second relations of analogy, thus defining the category of inference within which everything discursive takes place – 'example' (inference from 'particular' to 'particular'). This same distinction defines both in Plato and Bentham the transformation from 'what something is' (and our understanding of that) to 'what it ought to be' (and our having thus pronounced it as such) thus defining both Justice and Method. This same transformation (a turning around of the inquiry as a whole - moving from one mode of inquiry to another) defines a regulative principle, not in itself a substantive one.

In my view, J. S. Mill's interpretation of Bentham leaves much to be desired, but nonetheless Mill's comments on Bentham's method bring out more distinctly the peculiar nature of Bentham's method. The more Mill insists that Bentham was merely a 'practical mind' the more Bentham's significance as a philosophers' philosopher stands out. And some of Mill's comments also bring to the fore the 'analogical' form of inference underlying Bentham's method (in the following).

BENTHAM, THE 'PRACTICAL' PHILOSOPHER. OR SO AT LEAST MILL PERCEIVES OF HIM.

> [from Mill's *Bentham*] "To speak of him first as a merely negative philosopher – as one who refutes illogical arguments, exposes sophistry, detects contradiction and absurdity; even in that capacity there was a wide field left vacant for him by Hume, and which he has occupied to an unprecedented extent; the field of practical abuses. This was Bentham's peculiar province: to this he was called by the whole bent of his disposition: to carry the warfare against absurdity into things practical. His was an essentially practical mind. It was by practical abuses that his mind was first turned to speculation -- by the abuses of the

[123] Ibid.

profession which was chosen for him, that of the law."[124] (my emphasis).

"By thus carrying the war of criticism and refutation, the conflict with falsehood and absurdity, into the field of practical evils, Bentham, even if he had done nothing else, would have earned an important place in the history of intellect."[125]

"HE [BENTHAM] WAS NOT A GREAT PHILOSOPHER, BUT HE WAS A GREAT REFORMER IN PHILOSOPHY"[126]. MILL RECOGNIZES BENTHAM'S UNIQUE CONTRIBUTION TO METHOD.

"If we were asked to say, in the fewest possible words, what we conceive to be Bentham's place among these great intellectual benefactors of humanity; what he was, and what he was not; what kind of service he did and did not render to truth; we should say he was not a great philosopher, but he was a great reformer in philosophy. He brought into philosophy something which it greatly needed, and for want of which it was at a stand. It was not his doctrines which did this, it was his mode of arriving at them. He introduced into morals and politics those habits of thought and modes of investigation, which are essential to the idea of science; and the absence of which made those departments of inquiry, as physics had been before Bacon, a field of interminable discussion, leading to no result. It was not his opinions, in short, but his method, that constituted the novelty and the value of what he did; a value beyond all price, even though we should reject the whole, as we unquestionably must a large part, of the opinions themselves. Bentham's method may be shortly described as the method of detail; of treating wholes by separating them into their parts, abstractions by resolving them into Things, classes and generalities by distinguishing them into the individuals of which they are made up; and breaking every question into pieces before attempting to solve it. The precise amount of originality of this process, considered as a logical conception -- its degree of connexion with the methods of physical science, or with the previous labours of Bacon, Hobbes or Locke -- is not an essential consideration in this pace. Whatever originality there was in the method -- in the subjects he applied it to, and in the rigidity with which he adhered to it, there [sic] was the greatest. Hence his interminable classifications. Hence his elaborate demonstrations of the most acknowledged truths. That murder, incendiarism, robbery, are mischievous actions, he will not take for granted without proof; let the thing appear ever so self-evident, he will know the why and the how of it with the last

[124] Mill. J. S., 1969/1838. *Bentham*. In *Collected Works of John Stuart Mill*, Volume X. J. M. Robson (ed). Toronto: University of Toronto Press. 77-115.

[125] Ibid.
[126] Ibid.

degree of precision; he will distinguish all the different mischiefs of a crime…"[127]

"It is the introduction into the philosophy of human conduct, of this method of detail -- of this practice of never reasoning about wholes until they have been resolved into their parts, nor about abstractions until they have been translated into realities -- that constitutes the originality of Bentham in philosophy, and makes him the great reformer of the moral and political branch of it."[128]

Mill's words clearly express his view that Bentham had, peculiarly enough, contributed to practical matters *and* to philosophical method, but, according to Mill, not to philosophy in the sense of 'opinions' and 'ideas': "It was not his opinions, in short, but his method, that constituted the novelty and the value of what he did."[129] How exactly can the various bits and pieces Mill attributes to Bentham be consolidated into one coherent view of Bentham's work remains to be seen. How can Bentham have been (according to Mill) both a practical innovator, and a pioneer in philosophical methodology, and at the same time "not a great philosopher"? It is Mill's powers of interpretation and his own method that must be questioned here, not Bentham's.[130]

THE PRINCIPLE OF UTILITY IS GOVERNED BY THE CATEGORY OF 'CONFORMITY' – THE CONFORMITY OF THE EXPOSITORY MODE OF ENQUIRY TO THE CENSORIAL MODE OF ENQUIRY.

Continuing the quote from Mill's *Bentham*: "Bentham shall speak for himself on this subject: the passage is from his first systematic work, 'Introduction to the Principles of Morals and Legislation', and we could scarcely quote anything more strongly exemplifying both the strength and weakness of his mode of philosophizing."[131]

In *Introduction to Principles of Morals and Legislation* (Ch. II, passage XIV, endnote 7) Bentham mentions, in passing the category governing the principle of utility (under the title '*Various phrases that have served as the characteristic marks of so many pretended* systems'):

"7. Law of Reason, Right Reason, Natural Justice, Natural Equity, Good Order. Instead of the phrase, Law of Nature, you have sometimes Law of Reason, Right Reason, Natural Justice, Natural Equity, Good Order. Any of them will do equally well. This latter is most

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[127] Ibid.
[128] Ibid.
[129] Ibid.
130 I would suggest that Mill, with all his extensive work in logic (especially on the subject of 'induction'), has not fully recognized the type of formula of inference and the categories associated with it, at work in Bentham's work (as a formula of inference, 'example' is a different kind of 'induction' than Mill would allow for in his analyses of 'induction').
[131] Ibid.

used in politics. The three last are much more tolerable than the others, because they do not very explicitly claim to be anything more than phrases: they insist but feebly upon their being looked upon as so many positive standards of themselves, and seem content to be taken, upon occasion, for phrases expressive of the conformity of the thing in question to the proper standards, whatever that may be. On most occasions, however, it will be better to say utility. Utility is clearer as referring more explicitly to pain and pleasure."[132]

It seems from the above quote that *'Utility' = "the conformity of the thing in question to the proper standards"*. This means that 'utility' or the 'principle of utility' – which we have previously defined in terms of its two 'senses': the 'expository' and the 'censorial' – is also defined by its function as a representation of the conformity of anything which is the case (the thing in question) with the 'proper standards'. It requires one to take a repeated look at the above sentence, to see the correspondence between 'the thing/proper standard' relation and the 'what is/what ought to be' relation. If 'utility' is a relation of conformity between a 'thing in question' and 'the proper standards', that is the same as saying that 'utility' is a relation of conformity between 'what is' and 'what it ought to be' – 'utility' thus being a relation of conformity between the expository and the censorial modes as well. The transformation thus occurring within the principle of utility between the expository and the censorial, is a transformation under the aspect of 'conformity' – the conformity of the expository to the censorial. The conformity in question is not simply a conformity of 'the thing' ('what is') to 'the proper standards' ('what ought to be' or 'what it ought to be'), but a relation between modes of operation, modes of enquiry. And this makes the principle of utility a principle which governs the transformation from the expository mode to the censorial mode under the aspect of the conformity one the former mode to the latter. The idea of the expository mode and the things within it (everything within the expository mode is 'a thing to be transformed in conformity to proper standards') having to conform to the expository mode and the 'proper standards' it represents, has purely methodological connotations, since it represents the transition from one mode of enquiry to the next. It is also a practical tool since all 'things in question' are being so transformed all the time. We have seen all of this before, but here with the addition of the notion of 'conformity' we get to see the category under the aspect of which the transformation defining the principle of utility occurs: the category of 'conformity' – a most general category of 'compliance with rules, standards or laws – a category of relation, if you will.

As can be seen from the quote above (in 7) Bentham considers the 'principle of utility' to be

[132] Passage XIV, endnote 7, Bentham, *Introduction to the Principles of Morals and Legislation*, Dolphin Books, 1961.

the equivalent of Law of Nature, Law of Reason, Right Reason, Natural Justice, Natural Equity, and Good Order. And, as I we have seen, it is the conformity between the expository sense of the principle and its censorial sense that defines it proper. We have by now defined the inner construct upon which the principle of utility is built, the manner in which it works (the constant transformation from the expository to the censorial mode), and the category under which it works – the category of 'conformity' (the conformity of the expository mode to the censorial mode, and the conformity of the 'thing in question' to the 'proper standards').

THE TWO SENSES OF THE PRINCIPLE OF UTILITY (BASED ON THE DISTINCTION BETWEEN THE EXPOSITORY MODE AND THE CENSORIAL MODE) FORM TWO COMPARISONS OF THE OBJECT IN QUESTION, AND A COMPARISON OF THE TWO COMPARISONS, THUS FORMING A 'PROPORTIONATE ANALOGY' CONSISTING OF FOUR TERMS.

The distinction between 'what is' (the 'expository' mode of enquiry) and 'what ought to be' (the 'censorial' mode of enquiry) indeed defines the principle of utility ("principles of utility two"). This distinction helps us understand the category under which the principle can be meaningful: the category of 'conformity' – the conformity of the 'expository' mode to the "censorial' mode. In other words, it is the relation of compatibility, conformity, and if you will, of transition and transformation between the 'expository' and the 'censorial' modes, that defines the principle of utility. This formulation of the relation between the two 'senses' of the principle of utility also allows us to see the principle as a 'proportionate analogy' formula: any object of enquiry is first compared to itself (within the 'expository' mode – 'what it is'), then the object is compared to 'what ought to be' or 'what it ought to be' (within the 'censorial' mode of enquiry), and finally, as the 'conformity' check kicks in, the first and the second comparisons are compared to one another – the expository and the censorial, as they pertain to one object of enquiry - are compared in respect of the 'conformity' of the former to the latter. This is also typically the structure of proportionate analogy, since the two comparisons, the comparison of (1) the 'analytical' comparison of the object to itself, and (2) the 'dispositional' comparison of the object to its ideal form, these two comparisons are (3) being compared to each other, resulting in a construct of comparison that has four elements, the 'object of enquiry mentioned twice (once in the expository mode, and once in the censorial mode), and 'what is' and 'what ought to be' as elements 'two and 'four'.

It can be seen that the final comparison between 'what is' and 'what ought to be' must be made by means of the previous double comparison of the original object of enquiry to each. A short-cut is not warranted here. The final comparison also depends on the emphasis on the 'name' of the object, 'what it is', and 'what it ought to be' (the ideal Form in which the object 'participates' if you will): the name is the vehicle for completing the analogical construct.

It is for this reason that 'naming' is the first and foremost important phase of the study of any subject in the Benthamite system, and as we have already seen (in the division of offenses) even the existence or the definition of certain offenses depends on our ability to correctly name them and eventually invent new names for them when needed[133]. The existence of the reality, individual and political, which is the subject-matter of our philosophical studies, depends for the most part on our ability to properly name the parts of that reality. And 'naming' precedes 'definition'.

Proportionate analogy, as applied to political philosophy is a delicate machinery to handle. Most people in the field have enough trouble as it is understanding the principle of utility, and the division of the principle of utility into an 'expository' sense and a 'censorial' sense only confuses them further. But so are all highly abstracted theories of the universe. By positing the principle of utility as the conformity of the expository mode to the censorial mode in the investigation of the principles of morals and legislation, Bentham put the structure of proportioante analogy smack in the middle of all political thought. No object of philosophical political enquiry can again claim to be unified, since the enquiry itself is divided into a relation between the expository and the censorial modes. And as we aim at defining the object, the definition would be constructed around the same division. 'Existence' does not have priority here. In the hierarchy of method here the order is: (1) naming. (2) mode of enquiry (the transition from expository to censorial). (3) 'definition of object' as the 'bridging' of the cleavage between the expository and the censorial, by means of the name given to the object earlier. (4) since the 'object' is a highly abstracted entity, only it having been properly named and then defined can guarantee its existence. Hence 'the existence of the object of enquiry' comes as the last phase of this process. It seems that with Bentham, the category of 'conformity' (the conformity between the expository and the censorial modes of the principle of utility) has taken the place usually occupied in other political theories by 'substance' and 'quantity' (and even outright 'equality'). And it is in this sense a political theory that is purely methodological, since all of its principles and distinctions are principles of method first, and 'substantive' in the worldly sense second. [for this reason, when Mill says of Bentham, “it was not his opinions, in short, but his method, that constituted the novelty and the value of what he did,” he is right, since with Bentham's political theory the method is the message. Mill thought he found a flaw in Bentham, when in fact what he found were the limits of his own understanding.

THE PRINCIPLE OF UTILITY, AS A CONSTRUCT BASED ON A PROPORTIONATE ANALOGY, RESEMBLES THE SYLLOGISTIC FORM. THE FOUR TERMS (THE

133 The structure of proportionate analogy, with its four heads [(1-2) the object mentioned twice, (3) what it is, and (4) what it ought to be] is also the basic structure of the syllogism. In the syllogistic, whether Platonic or Aristotetliam, the middle term 'B' is being mentioned twice, once in relation to 'A' and once in relation to 'C', thus producing four terms.

OBJECT MENTIONED TWICE, WHAT IT IS, AND WHAT IT OUGHT TO BE) CORRESPOND TO THE SYLLOGISTIC TERMS 'A', 'B1'-B2' (THE MIDDLE TERM MENTIONED TWICE) AND 'C'.

The structure of proportionate analogy, with its four heads is also the basic structure of the syllogism. In the syllogistic the middle term 'B' is mentioned twice, once in relation to 'A' and once in relation to 'C', thus producing four terms (if we count each 'mention' as a 'term'). In the Aristotelian Syllogistic the term A is predicated of the middle term B (the first mention of the middle term), and the term B is predicated of the term C (the second mention of the middle term). This operation provides us with the conclusion that A can be a property of (can be predicated of) C. What happens when we apply this operation to our discussion of the 'two senses of the principle of utility' ("principles of utility two")? Since in proportionate analogy we have one object mentioned twice, once in relation to 'what it is' and a second time to 'what it ought to be', the resemblance to the two 'senses' of the principle of utility is striking. And since the principle of utility is defined not merely by the relation between the expository and the censorial mode, but by the transition from the former to the latter, we can see how this transition from the first leg of the principle to the second resembles the transition from the first comparison of proportionate analogy to the second, which corresponds to the transition (the inferential movement) from premises to conclusion in the syllogistic. This then shows the principle of utility to be, not merely a criterion or measure of action, but a formula of inference, by means of which any object introduced as its 'middle term' (object of enquiry) necessarily undergoes a logical-inferential transformation.

With the principle of utility we mention the object twice (the object of enquiry considered for 'what it is' and for 'what it ought to be', once in the expository mode and once in the censorial mode), and as we have seen, we define the principle of utility by means of the transition from the first mention of the object – the expository mode – to the second mention of the object – the censorial mode. When we use the syllogistic for any object we also see a transition from the first relation of the middle term to the second, a transition which defines the syllogistic form. What is peculiar to the syllogistic form is that with the first mention of the middle term (our object of enquiry), the middle term B serves as the grammatical subject to which the predicate A belongs (we say, 'A belongs to B'), and with the second mention of the middle term B, the term B serves as the predicate belonging to the grammatical subject C (we say, 'B belongs to C'). This makes the relation between the two 'mentions' of the middle term B (our 'object') a relation between 'the term B as grammatical subject' and 'the term B as predicate)[134]. And when compared to our 'object of enquiry',

134 In this analysis of the syllogistic (and of the principle of utility) I suggest that we not use the form 'A *is* B' and 'B *is* C', but the form 'A belongs to B' and 'B belongs to C'. Using this form allows us to perceive of the syllogistic in terms of predication instead of the terms of existence. This brings out the two relations of the middle term (our object of enquiry) as two relations of predicate and grammatical subject, and the beauty of it is (when so conceived) that we can then see how in the first relation ('A belongs to B') the middle term B is the

considered here for its utility, it seems that the two senses of utility (represented as the relation between the expository and the censorial modes) correspond to the object perceived of as 'grammatical subject' and the object perceived of as 'predicate'. Within the expository mode, our object can be considered to be the grammatical subject, and within the censorial mode, our object becomes the predicate. And as such the transition from the expository to the censorial mode – the transition from 'what it is' to 'what it ought to be' – is also a transition (logically and grammatically speaking) from the object serving as 'subject' to the object serving as 'predicate'. When we set out to question the utility of an object of enquiry, we set out to define the relation between 'what the object is' and 'what it ought to be', and in this transition-of-a-relation we start with the 'object' as our 'subject' only to see it transforming into 'predicate', which means, that by the time the 'what is' has turned into 'what it ought to be' our object of enquiry is no longer defined by its 'essential' properties, such as the term A, but by its own relation – as 'predicate' – to a term C (perhaps an ideal form represented within the censorial mode by the expression 'what it ought to be'). It then appears that within the transformation from the expository mode to the censorial mode (the two senses of the principle of utility) not only the 'mode' changes, but also the definition of 'definition', since the 'object', defined within the first mode, by the traditional 'genus and differentia', is now defined, within the censorial mode, by its relation (as predicate) to another object or form. This shows how due to the transformative nature of the principle of utility, the definition of 'definition' has changed, and the *definition* of the object has changed, and therefore the object itself. *By (or when) applying the principle of utility to any object, then, we change the definition of 'definition', we change the definition of the object in question, thereby changing the object itself.*

Both the syllogistic and the construct of the relation between the 'expository' and the

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subject, while in the second relation ('B belongs to C') the middle term is the predicate. The second 'hand' of the syllogistic thus provides us with a 'modal' property of the middle term – 'a relation to C'. With the principle of utility, we also need to shift to a terminology of predication, turning the 'expository' comparison of the object of enquiry ('what it is') into 'the actual attributes of object B' (the attributes describing 'what it is' presently), and turning the 'censorial' comparison of the object ('what it ought to be') into 'the object's relation to its ideal form. When we so modify the terms of the two senses of the principle of utility, we get two expressions almost identical to the syllogistic, the first where the 'object' is the subject ('what it is'), the second where it is the predicate ('what it ought to be' – a relation to an ideal form). And the resemblance to Plato's theory of Forms is uncanny [what the object of enquiry 'ought to be' (when considered censorially) turns out to be (grammatically speaking) a 'relation to a Form' in the Platonic sense, such a Form being, in the Benthamite sense a 'fictitious entity' perhaps, but a meaningful one nonetheless]. My point here is, that since we perceive of this second relation of the middle term as representing a property of the middle term (a property of our object of enquiry) we have to write it in the following way: 'the object ('B') has the property 'relation to C', or the 'object of enquiry has the property 'relation to what it ought to be' (with 'what it ought to be' being a much more abstracted idea of the object in question). Simply put, 'a relation to C', which is a 'modal property' if ever there was one, becomes (in both the syllogistic and in the principle of utility) the second property of the object of enquiry (the 'middle term' – that which is the case). We then have an 'object of enquiry' that is defined, within the principle of utility, by one so-called 'substantial' (essential) property and by one so-called 'modal' (accidental) property. If the definition of any object to which the principle of utility might be applied is comprised of one 'essential' property and one 'modal property', what does it tell us about the nature of such an object? To be more specific: what kind of an object is 'justice' (or 'method' for that matter)?

'censorial' register a transition any object of enquiry is bound to undergo when one conducts a 'scientific' enquiry – a transition during which the object of enquiry goes from being defined by 'what it is' to being defined by its relation to another Form or object (its 'own' perfected form[135]) – defined by 'relation to an object'. And this is clearly a shift in category, since the original 'what it is' falls easily within the category of 'substance' while the resulting 'what it ought to be' or 'defined by relation to object' falls under the category of 'relation'. And, as we have already seen, Bentham mentions the category of 'conformity' (the conformity between the two senses of the principle of utility) as providing for a smooth 'logical' and 'semantic' transition between the two modes, as a guarantee for the unity of the principle ('conformity' also being a category of relation).

We have thus far seen how the principle of utility, when defined by the relation between the expository and the censorial modes, brings about, not only a transformation of the object of enquiry, but necessarily, a transformation of the definition of 'definition' (thus explaining Bentham's use of 'paraphrasis'). The comparison between the grammatical-semantic structures of the syllogistic and the principle of utility brings out the continuity between the principle of utility, the 'expository/censorial' distinction, and the new definition of 'definition'. Without this analysis these three philosophical phenomena in Bentham might appear not connected, or accidental. Of course the comparison between the syllogistic and the principle of utility would not have been possible had not the respective philosophical enquiries been grounded in the same grammatical and predicational constructs (setting them apart from run-of-the-mill metaphysical and epistemological enquiries).

In light of the comparison between the principle of utility and the Syllogistic it is now easier to understand the principle of utility, not merely (as does Mill) as a principle fixing our attention on the consequences of actions, but as a principle we can use to make decisions, judgements, moral and political. This also gives a new meaning to Gerald Postema's comments as to the principle of utility being both an 'evaluative' and a 'decision' principle (again the division between 'what is' and 'what ought to be') [in Postema's *Bentham's Utilitarianism*]:

"The principle of utility ...was the fundamental axiom of Bentham's moral and political

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135 The relation of 'object of enquiry' to another object or form, can be a relation of the object to its own perfected form. When we think of the object of enquiry within the censorial mode – as 'what it ought to be' – we are in fact comparing it to what Plato would have called, a perfected Form of that object. 'B (object of enquiry) belongs to C (what it ought to be)' makes 'a relation to C' a property (a modal property) of B. When compared to its own perfected form, then, the object of enquiry gains a modal property: 'a relation to its own perfected form' (a predication in which 'perfected or desired form' is the grammatical subject, and 'object of enquiry' is the predicate. Since this 'modal' property has now become part of the analysis of the object of enquiry, and thus, an element of its definition, it would seem that this 'relation to a perfected form' ('what it ought to be') must be part of the definition of any object of enquiry. To put this in terms of Plato's theory: since any object of enquiry is compared twice, once for 'what it is' (a so-called 'essential' property) and once for 'what it ought to be' (a 'modal' or so-called 'accidental' property), it seems that 'relation to a Form' (in Plato's sense) would be a necessary element of any definition. And it is in this sense that Bentham's application of the 'censorial' mode of enquiry could be seen as an 18th century version of Plato's notion of 'participation in a Form'.

> philosophy. This "ruler and decider of all things" was to function as an evaluative principle and as a decision principle. As an *evaluative principle*, it set out the ultimate grounds of the rightness of action and offered the ultimate court of appeal for moral and political disputes. As a *decision principle*, it was meant to guide the deliberations and decisions of all moral agents, and yet Bentham's work focused almost exclusively on matters of public and institutional, rather than interpersonal, morality. This greatly shaped his understanding of the principle of utility."[136]

To say that 'Bentham's work focused almost exclusively on matters of public and institutional, rather than interpersonal, morality' is literally true (when we account for 'what Bentham talks about'), but if we learn to see how in Bentham's work the fundamental 'intersubjective' forms – the grammatical and predicational forms – have become 'constructive', and actually define each principle of the theory (including the principle of utility), the significance of the theory as a moral theory becomes clearer. Bentham creates a methodological environment in which choosing the right method (and undergoing the transformation of 'subject' and 'object' it entails) *is* the chief moral principle[137]. Thinking of morality in terms of the choice of the right method introduces us to Bentham's conception of 'justice', the definition of which (in Bentham) will be studied in the essay Two.

END

[136] Postema, G. J. *Bentham's Utilitarianism*, in *A Guide to Mill's Utilitarianism*, H. R. West, ed., London: Blackwell Publishers, 2006, pp. 26-44.

137 Since the principle of utility and the principle of the artificial identity of interests are methodological principles first and political principles second, adhering to these principles has primarily a methodological significance and a political meaning secondarily. And it is in this sense that the notion of 'right action' or 'right choice of action' has been reduced in Bentham to 'employing the right method'. By reducing the political to method and to its correct employment, Bentham induces 'moral choice' in the unsuspecting reader (the benevolent reader, that is). 'Understanding the method' (or 'employing the right method') becomes synonymous with 'doing the right thing'.

Arnon Ben-David

Essay Two:

BENTHAM'S VIEW OF JUSTICE

Treatises on method normally provide an answer to the question 'what would the best method be?' Theories of justice on the other hand respond to our need to know 'how to be just' or 'how to act justly'. And upon first inspection these two responses (in respect of method and justice) appear to belong to different worlds. But I think that with the more advanced theories of justice, such as I believe Bentham's theory to be, 'choosing the right method' and 'being just' or 'acting justly' are almost identical. Hopefully the present essay will support this seemingly counter-intuitive claim.

The difference between 'what we do' and 'how we do it' or between 'what we say' and how we say it' goes usually unnoticed on most occasions. But it is precisely this distinction between the substantive employment of words and the adjectival employment of words (or simply the distinction between 'substantive' and 'adjective' terms) that will help us understand the definition of justice implied in Bentham's work. Bentham employs two or three well placed distinctions to define his approach to the subject – more by exemplification than by actually talking directly about justice – such as the distinction between 'substantive' and 'adjective' terms and the distinction between the role of the expositor and the role of the censor (or between the expository and the censorial modes of enquiry). The popular idea of justice can be expressed as 'doing the right thing', and it is this seemingly trivial expression that holds the key to Bentham's approach to the subject. With expressions such as 'doing the right thing' justice is not being merely described but is indeed, and almost unnoticeably, being defined: it is defined by the right action, and by the dispositional properties associated with judging one's actions and with the manner of carrying them out. There is not a 'substantive' term in this expression, except for the word 'thing' (as in 'the right thing'), which is also used here in a purely grammatical manner referring to 'that which is being done' ('the thing' as grammatical subject), which in itself is not a so much a typical 'substance' as it is 'a decision' or an 'act' or a 'discourse' (as in 'the right thing to say'), all 'things' defined by 'adjective' or dispositional terms. We can thus see that regardless of Bentham's peculiar way of doing philosophy, the term 'justice' as normally represented in our everyday discourse seems to be associated with the 'adjectival' employment of terms and not so much with the 'substantive' variety of terms.

What might seem as a preoccupation with the form of the discourse dealing with 'justice', and with 'the way one writes about justice', leads in Bentham to works such as the Preface to the *Fragment on Government*, or as Bentham likes to call it, a Comment on the Commentaries, in which Bentham deals with Blackstone's literary style as much as with the latter's approach to English law. The point, which I hope to make later in the present paper is that 'the way we talk about justice' is as

important for the definition of 'justice' as 'what we say about justice'. Or in other words, the definition of a term, which is in itself a 'relation' ('justice' as 'judgment') would be best served by an adjectival use of the terms, as it is always advised that the mode of our enquiry (the method) be compatible with the terms of the enquiry and (it goes without saying) with the subject or object of the enquiry. Such compatibility would allow the theory to be truly comprehensive and universally applicable.

At the end of the previous essay on Bentham's method we have arrived at the conclusion that the principle of utility is defined by a construct similar to proportionate analogy (and the syllogistic form based on it), which meant that any object or action (or belief-disposition) to which the principle of utility is applied undergoes a scrutiny similar to that of an object posited as the middle term of the syllogistic. The application of the principle of utility to an object would thus promote the 'analysis' ('scientific understanding' or 'definition') and the 'judgement' (the moral adequacy or 'worth') of the object put in that position. And, as we have seen, this procedure is indeed 'a procedure', and not in the trivial sense, but a real transformation based on the transition (within this application of the principle) from the 'expository' mode to the 'censorial mode' (the two 'senses' of the principle). The transition, within the principle of utility, between the expository and the censorial senses, has the force of a formula of inference (the movement from premises to conclusion), thus making the principle of utility, a principle of principles, a principle by which to measure other principles, and thus a very good foundation for a theory of justice. And we shall see that this transition between the expository and the censorial modes of enquiry also defines the transformational nature of justice in Bentham (what some consider its radical nature).

My position concerning Bentham's method and his conception (or definition) of justice has been, almost from the start, that both 'method' and 'justice' are defined in Bentham by properties that are in themselves modalities of speech, action and belief, and as modalities, these properties, defining 'method' and 'justice', do not fall within the parameters of definition by genus and differentia, since for that we need what we call 'essential properties' and not 'modal properties'. This, as we have seen in Essay One, was partially the reason why Bentham had to resort to 'paraphrasis' for the definitions of the abstracted entities he had in mind. Paraphrasis gave him the latitude to use not only traditionally 'substantive' terms but also 'adjectival' terms, terms that are often used as names for modal properties, in order to define 'method' and 'justice'.

We have also seen that great parts of Bentham's analyses of legislative and juridical subjects belonged to the category of 'Adjectival Law', the branch of law supporting 'Substantive Law', and Bentham himself draws the analogy between the 'adjective law'/'substantive law' distinction and the 'adjective noun'/'substantive noun' distinction (a grammatical distinction). When we thus see how the 'adjective/substantive' distinction and the 'expository/censorial' distinction run through all of Bentham's thought, it becomes easier to see that 'justice' would rely on both distinctions for its definition.

Another element, which was discussed only briefly in the first essay, is the transition, occurring in Bentham, from the 'trivial' or 'instrumental' employment of the terms to a 'constructive' – 'world-making' – employment of the terms of the enquiry. This transition (which is a transition from one mode of enquiry to another – a categorial change) is brought about in Bentham, first, by the positing of highly abstracted conceptions, such as 'justice', as 'subject' (as objects of enquiry), and secondly, by seeking definitions for such objects[138], necessarily leading to 'modal terms' becoming the building blocks of the new construction (and when modal properties and terms become the defining elements of the newly posited abstracted conceptions – 'justice' and 'method' – it seems that even the last of the trivial and instrumental terms of the enquiry become 'constructive'). The enquiry as a whole spins into a hyperealised state, a state of real construction. And this is not simply a 'state of mind', but a real phenomenon affecting the actual building of new entities, 'justice' amongst them. 'Justice in itself' only 'exists' within the discourse defining it. What we experience as just or unjust are manifestations of justice, not necessarily terms we can use for defining it. As a tribute to Plato one may say that there must be a relation to a perfected Form in the definition of justice[139].

We have, then, some idea of how the 'adjectival/substantive', the 'expository/censorial', and the 'instrumental/constructive' distinctions affect the definition of 'justice' in Bentham. And these distinctions seem to have primacy over the final formulations of the various principles in Bentham (such as the principle of utility), since the various principles are defined by these distinctions, and not in a trivial or merely instrumental way.

I have also claimed, by the end of Essay One, that Bentham created a philosophical environment in which choosing the right method (and undergoing the transformation of 'subject' and 'object' it entails) *is* the chief moral principle (a principle of justice, at that). Method and Justice thus

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138 The transition from the 'instrumental' employment of the terms to the 'constructive' employment of the terms occurs in two stages: the first stage in which the term is posited as 'grammatical subject' (as 'object of enquiry'), and a second stage in which the one conducting the enquiry seeks a definition for the term. These two stages seem to correspond with 'naming' (or 'mention') and 'definition' ('analysis'), clearly marking the precedence 'naming' has in all procedures of analysis aiming at a definition. Plato was acutely aware of the role of names and naming in analyses leading to definition, when he posited 'sharing a name' as the only link between a perfected Form and the one participating in it ('government' and individual participating in the Form of 'government' – either as 'governor' of 'governed' – share the same name). In Bentham this 'sharing' of a name' is manifested almost in similar manner, not within a theory of Forms but in principles such as the 'principle of the identity of interests' and in distinctions such as the 'expository/censorial' distinction. By giving 'naming' and the awareness of having posited the term in question as grammatical subject priority, the transformation of the terms themselves (the term in question and the terms of the enquiry as a whole) begins.

139 What we usually experience as the manifestations of justice are, for the most part, the quantifiable results produced by the modalities of 'action', 'speech' and 'belief', but not those modalities in themselves. It is therefore easy to confuse 'manifestations of justice' with the attributes (the modal properties) actually defining justice. It is a 'tall order' in respect of 'understanding': on the one hand the quantificationally inclined results of just acts should not be confused with the modal properties defining 'justice', and on the other hand one has to realize that the properties defining 'justice' are not in themselves traditional 'substantive' properties, but modal or 'accidental' properties, which only on this occasion, the occasion of the definition of 'justice', evolve or transform within a 'paraphrastic' context to the level of 'essential' properties.

seem to share the same fate (or 'occupy the same position') in Bentham's theory, and it remains for us to find a more detailed definition of Bentham's notion of justice, beyond its similarity to 'method' (the similarity between 'method' and 'justice' is a difficult concept to grasp, and hopefully by the end of this second essay the reader will acquire a greater familiarity with the terms defining both 'method' and 'justice').

Bentham's conception of justice is different from the definitions we are familiar with in the metaphysics of substances (to which most theories of justice belong). Because Bentham's theory of justice is not a metaphysical theory or an epistemology, and because justice is a highly abstracted concept, the definition of 'justice' in Bentham is constructed of properties we normally describe as 'dispositional', 'accidental', 'modal' or 'contingent'. This strange kind of definition needs to be explained, and will be shown to be compatible with Bentham's method as defined in Essay One.

The principle of utility runs like a thread trough Bentham's work, but, as primary principles go, its mention in different parts of the text does not always serve to clarify matters for the reader, and accordingly interpretations of the principle vary in the secondary discourse. Even J. S. Mill's idea of utility (and thus his interpretation of Bentham's principle), greatly varies from Bentham's. At times Bentham's 'dictum' is mentioned as a possible 'extension' or explication of the principle of utility (Mill does that, in *Utilitarianism*), - but then again, the 'dictum' itself needs interpreting. So the principle of utility (as Bentham defines it), as central to the theory as it is, needs much interpreting and appears at times to be part of the problem and not so much part of the solution (in respect of understanding Bentham's meaning). I will interpret the principle of utility the best I can, in light of the considerations of Bentham's method in Essay One and in light of the close relation in Bentham's work between 'method' and 'justice'. [One of the conclusions of this essay on Bentham's principles of justice will be that most of the properties defining 'justice' can also be used to define 'method' (as counter-intuitive as that may sound)].

I would count as 'principles of justice' not only constructs described as such in the context of the political, legislative or moral problems discussed by Bentham, but also several other distinctions made by Bentham throughout his work – distinctions which effectively function as principles in Bentham's theory of justice (strictly speaking they function *as* principles of justice). Such are: (1) the distinction between the Expository and the Censorial roles of the legislator, and (2) the distinction between 'Substantive law' and 'Adjectival law' (from which Bentham also draws the analogy to the grammatical distinction between 'substantive' and 'adjectival' nouns). (3) The distinction, which Bentham made between Adam Smith's 'principle of the *natural* identity of interests', and his own 'principle of the *artificial* identity of interests', is based on the difference between 'naturally occurring applications of certain principles' and 'artificially applied principles', - in the case of the 'principle of the identity of interests', it being the same principle. This raises the question of Bentham's use of the 'nature/artifice' distinction, especially when he employs this distinction in discussing the difference

between the 'natural' and 'technical' systems of law.

Indeed mere distinctions do not have the prescriptive force of principles, but since in Bentham's work such distinctions usually relate to dispositional and modal terms – they help analyze or designate 'the way' we act and intend to act (and the way we engage in discourse) – the prescriptive 'ought' is not far behind; so when Bentham makes the distinction between 'substantive' and 'adjectival' law, the distinction immediately and necessarily assigns a certain role to a whole branch of law – the 'adjectival' branch of law meant to support the 'substantive' branch of law and guide us in its execution. Other principles, directly related to 'justice', such as the 'principle of the identity of interests of governors and governed' (discussed in Halevi), reveal, in a more detailed manner, the structure and nature of both Bentham's idea of 'justice' and the nature of his 'mode of inquiry' (his actual method). The 'principle of the artificial identity of interests of governors and governed', is revealing in the analytical sense, because it posits as central to the whole theory a construct of a relation between 'agent' (governor) and 'patient' (governed) – an identity, which, when achieved or applied artificially (man-made, by means of legislation) produces 'justice' (an identity between the *interests* of governor and governed can be achieved by means of legislation – it is not a given or a natural fact). A theory of justice employing this principle is not a theory of natural principle but a theory of construction based only partially on natural phenomena[140] (language being in this sense not only a means of grammatical construction but also a part of human nature).

Bentham's view of justice can be seen, based on some of his writings, as a purely theoretical notion (as pertains to a real definition). And it can also be seen as it emerges from Halevi's study of Bentham – a view of Bentham's idea of justice as it is expressed in the legislative principles and reforms he worked to implement in England (Bentham the 'practical' innovator). Of course, the two aspects of Bentham's view of justice often overlap, - the 'practical', when it comes to Bentham, often being governed by theory, and theory meant to be 'useful'. This duality of practice and theory is what often defines political theory in the first place, but in Bentham's case, since the distinction (which I found it necessary to make) between Bentham's prescriptive and non-prescriptive work (following the lines of Bentham's own distinction between the roles of the Censor and the Expositor) - since this distinction seems to correspond to the distinction between 'practice' and 'theory', it becomes necessary for me to try and apply it (the distinction between practice and theory) to Bentham's theory as a critical tool, showing that Bentham, while succeeding in properly defining so many of the terms of his enquiry, might have failed to trace the transition from 'theory' to 'practice' and from the 'non-prescriptive' to the 'prescriptive' in his own work. Unfortunately, this distinction, a distinction he might have considered 'instrumental' and thus of trivial significance, in fact has a

140 The relation, within 'governing', between 'governors' and 'the governed' is a relation occurring naturally in language – it is a logico-semantic construct. But adding the predicate 'interest' to it, and then applying it 'artificially' (as the 'principle of the *artificial* identity of interests') are both 'man-made' or 'artificial' acts.

'constructive' role in his theory, and has to be acknowledged as such[141].

AGAIN WE SEE THAT ONCE WE HAVE STARTED SEARCHING FOR A DEFINITION OF 'JUSTICE' WE NEED TO CHANGE OUR METHOD OF PHILOSOPHY (A CHANGE IN THE WAY WE PHILOSOPIZE). AND HOW THIS TRANSFORMATION IS AFFECTED BY THE SHIFT FROM THE NON-PRESCRIPTIVE TO THE PRESCRIPTIVE MODE OF DISCOURSE.

To get a glimpse of Bentham's view of justice, set within the historical background we can look at Henry Sidgwick's, *Bentham and Benthamism in Politics and Ethics*[142]:

> "While he [Bentham] is as confident in his power of constructing a happy society as the most ardent believer in the moral perfectibility of mankind, he is as convinced of the unqualified selfishness of the vast majority of human beings as the bitterest cynic. Hence the double aspect of his utilitarianism, which has caused so much perplexity both to disciples and to opponents. It is as if Hobbes or Mandeville were suddenly inspired with the social enthusiasm of Godwin. Something of the same blending of contraries is found in Helvetius; and he perhaps, rather than Hume, should be taken as the intellectual progenitor of Bentham."[143]

I believe that this seeming contrariety which Sidgwick here describes as inherent in Bentham's work - Bentham as a believer in the moral perfectibility of mankind on one hand and as one convinced of the unqualified selfishness of the vast majority of human beings - is indeed a real contrariety and not a contradiction; the two approaches to 'humanity' being two 'values' on the scale of human characteristics[144]. The real source of perplexity for both critics and supporters of Bentham's brand of utilitarianism would be Bentham's seeming disregard for the great difference between the non-prescriptive and the prescriptive parts of his own work, and the seemingly easy transition he makes from the former mode to the latter.

> "Observation, he [Helvetius] says, shows us that there are a few men who are, inspired by "un heureux naturel, un désir vif de la gloire et de l'estime," with the same passion for justice

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141 We have seen in Essay One that the principle of utility itself has two 'senses' ("principles of utility two") - an expository and a censorial sense, which correspond to the terms 'non-prescriptive' and 'prescriptive' respectively.

142 *The Fortnightly Review*, 21, January-June 1877, pp. 627-652.

143 Ibid.

144 The 'moral perfectibility' and 'the unqualified selfishness' of mankind are indeed 'contrary' and not 'contradictory' terms, since (again, as we have seen in Essay One) the two 'senses' of the principle of utility correspond to 'what mankind ought to be' (its moral perfectibility) and 'what it is' (its unqualified selfishness). And as the two 'aspects' of the same principle, especially when compared to the two comparisons comprising proportionate analogy, the expressions representing 'what ought to be' and 'what is' are contrary but compatible (as the two legs of one form of inference, if you will – see the comparison of the principle of utility to the syllogistic, also in Essay One).

> and virtue which men generally feel for wealth and greatness. The actions which promote the private interest of these virtuous men are actions that are just, and conducive or not contrary to the general interest. But these men are so few that Helvetius only mentions them "pour l'honneur de l'humanité". The human race is almost entirely composed of men whose care is concentrated on their private interests. How, under these circumstances, are we to promote virtue?"[145]

If indeed this is the case, then obviously the transition from the non-prescriptive part of the philosopher's work ('observation shows that there are a few men...') to the prescriptive part (answering the question 'how under these circumstances, are we to promote virtue?') becomes marked by an urgency (a fictitious or unfounded urgency perhaps) which subverts and distorts one's (the original observer's - the one who first produces the non-prescriptive part) perception of the reality, the reality on which the non-prescriptive observation was initially based. So it is this unguarded transition or sometimes transformation of the non-prescriptive discourse into a prescriptive one that distorts one's perception of both the reality on which the original non-prescriptive observation was based and (thus distorts and hinders) any such future observations (it would distort what we normally call 'our perception of reality'). And since the reality of justice and virtue in human life consists, to begin with, of series of modalities of action and speech, any forces distorting our perception of either previous or present observations, also directly interfere with our ability to produce further such modalities, and thus hinder our ability (capacity) to apply wisdom to both regions of life, the public and the private (as Plato would have phrased it).

We can thus see how Bentham's view of justice is inherently affected by the way the transition from the non-prescriptive part of his work to the prescriptive part takes place. In other words, because our notion of justice is perceived by (or 'as') *how* we act and speak, - the *way* we do things (the modalities of action and speech), when we then try and define what 'justice' is, we are up against a whole host of modalities of speech and action, the gathering of which, under one definition,

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145 (Ibid.) The cleavage between private interest and the public good (and the transition between the two) is a naturally occurring distinction, but how we perceive of it (and define it) has much to do with our choice of philosophical method. The difference between private and public interest, can be viewed as an insurmountable obstacle methodologically and practically when perceived of within a metaphysical or epistemological approach, - and the same distinction can be viewed as comprising the relation between 'governors' and 'governed' (on which the principle of the identity of interests is based) when perceived within a semantic of semiotic approach, providing us with a continuity between the private and the public within one formula, within one principle. So it is not always the structural elements of a principle that define it, but the kind of approach (method, mode of enquiry, whether metaphysical or semiotic). Method thus precedes the the actual construction of a principle – the choice of the right method or approach eventually gives any principle its meaning. And as concerns the distinction between public and private interest discussed above, we must approach it within a theory of meaning, not a metaphysics, otherwise our access to the theory as a whole would be denied (and on methodological grounds at that). The distinctions made as to the 'kind' of method' actually hold the key to the functionality of the theory as a whole.

is greatly affected by the *way* we speak and act (the same modalities by which we perceive of 'justice' as such). Any influence distorting this our perception of 'justice', or what justice might be, makes for a totally confused notion of justice (and makes any application of 'wisdom' to 'life' impossible). There is no way to separate the way we perceive of an action or a phrase spoken as 'just', from our efforts to describe or define 'justice' properly. Our description of Bentham's notion (or view) of 'justice' must then be affected by the way he speaks about it (his actual method), and less so by what Bentham says about it[146] (or what we say about it).

And by this emphasis on *how* Bentham writes (speaks) about Justice, we have already arrived at the distinction between the prescriptive and the non-prescriptive approach to writing (speaking) philosophy. And still Sidgwick's question resonates, "how, under these circumstances, are we to promote virtue?"[147] Or, we could also ask, 'can virtue be promoted, within this same prescriptive approach, or must one change the way one speaks and acts, so as to allow for a more conscientious transition from non-prescriptive to prescriptive philosophy?' And a radical change in the way one speaks and acts is indeed a change of method. Again we see that once we start with the search for a definition of 'justice' we arrive at the need to change our method of philosophy[148]. Could it be that it is not only with particular inquiries (Bentham, Plato, Wittgenstein) that we arrive at the need to bring about a complete change of method, but that generally all inquiries concerning the notion of justice should result in such a methodological turnaround, and that perhaps such a method-U-turn defines 'justice'?

'Justice' thus would be defined as that complete or methodological transformation, a transformation of *the way* we act and speak. And the more obstructions we remove from the path of this transformation, the easier the transformation becomes, hence the 'therapeutic' nature of Plato and Wittgenstein's work in philosophy (and Bentham's theory of 'prevention'). Helvetius speaks of a change of method, but he means something different by it, "It is clear, he [Helvetius] thinks, that the work will not be done by moralists, unless they completely change their methods"[149], and he means that it is a futile endeavor to try and alter the tendency of men to seek their private happiness. But the mere mention of a methodological change is encouraging.

All in all, at least according to Sidgwick, Bentham'a prescriptive approach tends to take over; "Those, however, who study him as he would have wished to be studied, not for literary gratification, but for practical guidance, will feel that his fatiguing exhaustiveness of style and

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146 The distinction between 'how we speak about justice' and 'what we say about justice' is meant to signify the difference between 'mode of enquiry' and 'object of enquiry', and only in this sense – the difference between the 'how' and the 'what'. It is strictly a difference between 'how something is' – the modalities of its existence – and 'what something is' – its 'essence'.

147 Ibid.

148 We have already seen that the search for a definition of 'justice' has triggered a new kind of definition – 'paraphrasis'. And the employment of a new kind of definition is, by itself, an initiation of a new method.

149 Ibid.

treatment has great advantages. It to some extent supplies the place of empirical tests to his system."[150] [Because Bentham's 'system' exists on the level of grammatical-linguistic constructs, writing is its medium, for all matters of validity and theoretical construction and 'experimentation' (and not in the trivial sense of 'all or most philosophy is written')].

Sidgwick's remark about the advantage of Bentham's "fatiguing exhaustiveness of style and treatment" supplying (to some extent) "the place of empirical tests to his system"[151] supports my claim for the constructive nature of Bentham's method insofar as it causes the meaning of the terms of the enquiry to change, and insofar as it causes the otherwise 'instrumental' employment of the terms to become a 'constructive' employment. Since the 'construction' I attribute to Bentham's method exists on the level of the terms themselves (the 'world-making' capacity of language when not used instrumentally), the experimentation and application of the newly changed (meanings of) terms occurs primarily on the level of discourse, and only secondarily vi-a-vis solid objects (to find out whether our definition of 'justice' holds water, we don't have to rent a buggy and start distributing goods to the population; it would suffice to use the newly constructed definition in a sentence or in a pamphlet on justice to test its adequacy and viability.

If we follow Helvetius (according to Sidgwick) we can see what might have motivated the young Bentham (and forged his notion of justice): "The hidden source of a people's vices is always in its legislation; it is there that we must search if we would discover and extirpate their roots." "Moralists ought to know that as the sculptor fashions the trunk of a tree into a god or a stool, so the legislator makes heroes, geniuses, virtuous men, as he wills: . . . reward, punishment, fame, disgrace, are four kinds of divinities with which he can always effect the public good."[152] In short, Helvetius conceives that universal self-preference might, by legislative machinery, be so perfectly harmonized with public utility that "none but madmen would be vicious:"[153] it only wants a man of insight and courage, "échauffé de la passion du bien général," to affect this happy consummation.

IS BENTHAM MERELY THE PRACTICAL PHILOSOPHER, AS MILL AND HALEVI PORTRAY HIM TO BE, OR DOES HIS INTEREST IN FINANCIAL PROJECTS REPRESENT HIS INTERST IN THE GRAMMATICAL CONSTRUCTS UNDERLYING 'PROPERTY' AND 'MONEY'?

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150 Ibid. Sidgwick says that Bentham's "fatiguing exhaustiveness of style and treatment... to some extent supplies the place of empirical tests to his system". Since 'justice' is a highly abstracted concept, its definition can be tested only within 'method' and not in the real world (the world of Rawls's 'goods', for example). In other words, the definition of 'justice' can only be tested within discourse, discourse being its 'empirical' environment, the 'place' where it 'exists'.

151 Ibid.

152 Ibid.

153 Ibid.

Based on Halevi's The *Growth of Philosophical Radicalism*[154], as concerns Bentham's method (and as concerns the more restricted notion of justice), - a summary of principles: "Even as early as 1789 the theory of the right of Man was repudiated by Bentham. At the beginning of this same year, he added to his *Introduction* a final note, in which he criticized the American 'declaration of rights'…"[155]

> "Consequently Bentham, who was hostile to the principles of the French Revolution, as he had been to the principles of the American Revolution, remained indifferent to the political problem… He was passionately interested in reforms of detail. He was still the practical inventor…"[156]

Halevi's interpretation of Bentham's actions and priorities here resembles Mill's assessment (in *Bentham*); both of them attribute to Bentham an interest in the practical, and in "reforms of detail" (in Mill this is associated with what Mill considers to be a lack of philosophical comprehensiveness in Bentham). But I see here a different pattern:

"In 1795 he [Bentham] published simultaneously *A Protest against Law Taxes* and a pamphlet entitled "*Supply without Burden*"; or escheat vice taxation… But the direct purpose of the administration of justice is to render justice accessible and not inaccessible to all."[157] [Halevi quoting Bentham] "In 1800 and 1801, he was busy on a more important financial project. He proposed that the State should issue, following the example of private banks …bills bearing interest …Every poor man might be his own banker …make banker's profit of his own money."[158]

All this takes place while the publication of the *Introduction* in 1789 "passed unnoticed." And my point here is: (1) Bentham's hostility to the principles of the French Revolution, and to the principles of the American revolution, and (2) what has been perceived as his interest in "reform of detail" and in the "practical" (Halevi), and his method being perceived as again oriented towards detail, and not philosophically comprehensive (J.S. Mill), and (3) his attention to "more important" financial projects, the Annuity Note scheme, and '*A Protest against Law Taxes*', - in conclusion '1', '2' and '3' - fall, in my view, into one consistent pattern, which, to be brief, can be called the Project of Grammatical Dependence (or Bentham's Project of Grammatical or Predicational Accuracy).

The attention invested in seemingly 'a-political' financial projects is, in part, a direct continuation of the interest invested by Bentham in principles of morals and legislation, and generally in the art of the statesman (I here apply Plato's notion of the contributory arts, as the arts by means of which we define the primary art of 'statesmanship').

The contributory arts (such as the art of making money, earning wages, civil service, &c) are

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[154] Halevi, The Growth of Philosophical Radicalism, The Beacon Press, 1966.

[155] Ibid., p. 174.
[156] Ibid., p. 177.
[157] Ibid.
[158] Ibid.

in fact the elements defining the primary art, when applied (as being 'contributory') to a subject expected to be the primary art ('statesmanship' or the 'city'). Why is the art of finance, especially in the realm of the middle class (see the Annuity Note scheme) 'contributory'? It is 'contributory' because 'money' is a representation of the grammatical notion of 'having a property' (represented as 'exchange value'), and 'having' or 'making' money is the 'having' or 'making' of 'having'. Thus the art of middle class or individual household finance is a constant representation and (thus) a reminder of the grammatical (the grammatical expressed as a modal property of a modality (a property of a property). [It is easier to understand this if we think of the term 'property' as having two meanings: (1) 'property' as 'goods owned', and (2) 'property' as 'attribute to be predicated of of a grammatical subject'. 'Wealth' would then mean 'the having of a lot of property' or 'the having of having' – a purely grammatical term].

Bentham, by being busy with "a more important financial project" did not, in doing so, stray from his interest in the state (or in principles of morals); he in fact went from having to deal with the appalling 'symptoms' of unsound legislation (in France and America) to the heart of 'statesmanship' - the contributory arts defining the state and legislation (and to the purely grammatical constructs associated with 'having property').

On the "necessity of the two institutions of justice and property, which are inseparable from one another."[159] They both rest on the impossibility of dividing natural goods among men in quantities, which are equal and sufficient to enable them to live.

Bentham's response to the Poor Bill[160]:

> "In February 1797, he addressed to Pitt some *Observations on the Poor Bill*, and his attitude is a curious one. He thinks that it is enough to prove that the bill is an equalitarian measure in order to condemn it: 'the *equalization system*, as applied to *wages*, seems hardly less threatening to industry, and thence to *property* (to say nothing of the *expense*) than, as applied to *property*, it would be to *property*, and thence to *industry*'. He condemns any attempt to establish a normal wage, either by direct or indirect means, and particularly he condemns what he calls the *Under Ability*, or *Supplemental Wages Clause*."

So far we have (some evidence of), (1) Bentham's aversion to the linguistic fictions so instrumental to the French and American revolutions, (2) Bentham's intense interest in the contributory arts, - money-making, the class of wage-earners representing the grammatical [to be explained later], and the contributory art in itself, as a property defining the main art of legislation ('statesmanship'). (3) Bentham being on record as opposing quantitative equalization of distribution of goods.

Halevi says, (1) "Bentham, like Godwin, had always accepted the principle according to

[159] Ibid., p. 227.
[160] Ibid., p. 232 (quoting from Bowring, vol. VIII, pp. 440-461).

which individual characters are held to be the work of social conditions." (2) "…for Bentham …the despotic principle of the artificial identification of interests [a system of education] is the fundamental principle of his pedagogic as of his juridical philosophy."[161]

Remember Mill in *Bentham*: "Morality, consists of two parts. One of these is self-education; the training, by the human being himself, of his affections and will. That department is blank in Bentham's system."[162]

The questions arising based on Halevi and Mill are: (1) How does Bentham's rejection of the quantitative equalization of goods - what many consider to be 'justice' - and his "despotic principle of the artificial identification of interests" (as the fundamental principle of his pedagogic and of his juridical philosophy), - how do these two ideas help define Bentham's view of justice? Or, how can we understand 'benevolence-guided' self-interest to produce justice in education and in court (while not allowing for the equal distinction of goods as concerns both 'economy' and 'education', - or are economy and education the same thing in Bentham - both being reduced to 'economy'?).

'JUSTICE' AS THE ARTIFICIAL (MAN-MADE) IDENTITY OF INTERESTS OF GOVERNORS AND THE GOVERNED

The principle of the artificial identification of interests, "This identity of interests between the governors and the governed."[163]

> "To make people believe that this identity of interests between the governors and the governed had already been brought about was the tendency of all the speeches of the members of the governing corporation. Gathered under the banner of Bentham and James Mill …the Philosophical Radicals attacked systematically and *en bloc*, the fallacies of the conservative parties."[164]

From the above it becomes clear that Bentham's notion of justice - since it cannot have anything to do with the quantitative equalization of distribution of goods - concerns the achieving of a real identity of interests, and in political terms - the identification of interests of the governed and the governors. [The reason why Bentham's theory and method can be more easily defined as 'a theory of meaning' (a Semiotics) and not 'a theory of being' (a Metaphysics) becomes clear with this 'principle of the artificial identity of the interests of governors and governed': an 'identity of interests of governors and governed' is here necessarily an identity in respect of 'meaning' and not in respect

[161] Halevi, p. 234.
[162] Mill. J. S., *Bentham*. In *Collected Works of John Stuart Mill*, Volume X. J. M. Robson (ed). Toronto: University of Toronto Press. 77-115.

[163] Halevi, p. 247.
[164] Ibid., p. 313.

of ‘essence’ (being), because the interest of ‘governor’ and the interest of ‘governed’ are not essentially the same, - they have nonetheless the same ‘meaning’ as they respond to the same word ‘government' as their name. This (semantic) distinction between ‘meaning’ and ‘essence’ becomes necessary because of the special nature of the principle of the artificial identification of interests of governors and the governed. It demonstrates the multi-dimensionality of such principles in Bentham, principles that are based on grammatical constructs.] **Justice = the artificial (man-made) identity of interests of governed and governors** (not the quantitative equality found in the distribution of goods among the governed).

(p.314) "Finally, they attacked philosophical fallacies. These were, in a sense, the basis of all the others. [Philosophical fallacies "the basis of all the others", Injustice grounded in philosophical fallacies]. According to Bentham, 'sentimental' and particularly 'ascetic' morality was the product of an aristocratic regime. Those who taught the morality of sacrifice, who exhorted the individual to sacrifice his interest to a higher ideal."[165] We can thus align Bentham with Nietzsche in respect of the opposition to the ascetic principle. We can also compare Bentham with Kant's *Critique of Judgement*, which, according to Bernard, the translator of the *Critique*, corresponds to the parameters of pleasure and pain, similarly to the parameters of the Principle of Utility. The aversion of Nietzsche the philologist to ascetism, can be compared to the aversion of Bentham, who is concerned with linguistic fictions, to the same. **Injustice = "exhorting the individual to sacrifice his interest to a higher ideal" (ascetism).**

Justice then depends on the completeness of the logico-semantic formula[166] - the relation between 'governing' and 'the governed' - when understood as an identity of interests (in practice), which is based on the semantic identity of governor and governed, an identity of meaning - not of essence. Justice then depends on the distinction between an identity of meaning and an identity of essence. When 'acting' and 'acted upon' do not have the same meaning, when the interests of 'governing' (governor) and 'governed' are not identical, the consequence is injustice. But the interests of governed and governing (governor) can by definition only be the same (identical) in meaning, not in their essence. The structure of the comparison between the interest of governors and the governed allows only for an identity of meaning, because in their essence 'governors' and 'the governed' are different. For this reason the structure of the comparison between governing and being governed in respect of their interests has to be analogical, allowing for the sameness of meaning and the difference in essence[167].

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[165] Ibid., p. 314.

166 By ‘logico-semantic’ I mean, ‘pertaining to the conditions necessary for something to be meaningful’ as distinguished from ‘logico-metaphysical’ which means ‘pertaining to the conditions necessary for something to exist or be’ (the terms are defined by the distinction between ‘meaning’ and ‘essence’).

167 Only in analogy can two objects be compared according to both their similarities and their differences. In the case of the comparison ('identity') of the 'interests of governors' with the 'interests of the governed', the

What emerges from this analysis as important for the study of Bentham's principle of Utility is that the principle (as defined by Bentham) does not involve the claim that the interest of 'governing' (governor) is *in essence* the same as the interest of the 'governed'; the claim made is that the interests of 'governing', 'governors', and the 'governed', can or should *have the same* meaning, within one logico-semantic formula – the formula of the relation between 'governors' and 'the governed'. This presents a problem for all further interpreters of the principle of utility, starting with J.S. Mill, because many of them interpret the principle without allowing for the distinction (necessary for its proper interpretation) between an identity of meaning and an identity of essence. Thus Mill, and others, seek in vain for a possible 'essential' identity (an identity in respect of 'essence') of interests of governor and governed, which is by definition impossible[168]. Bentham gives us an important clue as to the inner structure of the principle of utility, when he declares, "principles of utility two", and defines the principle by the distinction between an 'expository' and a 'censorial' sense of the principle.[169]

It is thus not only the semantically founded relation between 'governors' and 'the governed' that defines Bentham's theory of justice, but the transition, within the principle of utility itself, between the 'expository' mode and the 'censorial' mode. But we will get to these considerations after we have seen how Bentham's theory of justice has been perceived by some of his contemporaries.

The principle of the artificial identity of interests is as much a principle of method as it is a principle of justice, and for that reason we find ourselves time and again talking about method in Bentham when in fact we aim, as in this second essay, to define Bentham's conception of justice. The various discussions of 'justice' in Bentham and in commentators referring to his work bear, of course, the marks of the 'popular' or 'psychological' notion of 'justice' – what people mean when they use the term. Henry Sidgwick's discussion of Bentham's work provides just that kind of account with a slight, but not too pronounced historical and psychological and even autobiographical emphasis.

SIDGWICK ON BENTHAM, AND HOW IN BENTHAM THE 'MODE OF SPEECH' AND THE 'METHOD' ARE RESPONSIBLE FOR DEFINING 'JUSTICE'

Sidgwick also addresses some of the misconceptions associated with Bentham's work in his times [In

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difference in respect of 'essence' and the similarity in respect of 'meaning' constitutes (as a whole) the form of 'analogy' – of 'proportionate analogy' if you will (having four 'heads': the term 'interest' mentioned twice, one in relation to 'governors' a second time in relation to 'governed').

168 They eventually retreat to the more 'metaphysical' terminology of 'goods' and the 'distribution of goods', which leads to quantitative measures of equality. In this sense, J. S. Mill 'method' plants the seed of future theories of justice such as Rawls's, which are based in quantitative-metaphysical terminology. Method-wise Mill and Bentham don't play the same game, and their respective 'logics' answer to different categories.

169 In the *Table of Springs of Action*, in what Bentham calls *The Marginals*, in number 49 (p. 9 of my 1817 edition), the distinction between the expositor and the censor resurfaces as an unexpected division of the principle of utility itself: "48. Principle of the general utility the only trustworthy guide, but every where opposed. 49. *Principles of utility two, or if but one it is understood in two senses – viz. the censorial and the expositive or exhibitive*. (Censorial, what. Expository, what.)"

Henry Sidgwick, *Bentham and Benthamism in Politics and Ethics*, The Fortnightly Review, 21, January-June 1877, pp. 627-652]:

> "In the critical narrative, equally brilliant and erudite, which Mr. Leslie Stephen has given us of the course of English thought in the Eighteenth century, there is one gap which I cannot but regret, in spite of what Mr. Stephen has said in explanation of it. The work of Bentham is treated with somewhat contemptuous brevity in the chapter on Moral Philosophy; while in the following chapter on Political Theories his name is barely mentioned."[170]
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> ..."It is true that, from our point of view, the reason of Bentham appears the perfect antithesis of the reason of Rousseau; but it is very doubtful whether this would have been evident to Rousseau himself. The mainspring of Bentham's life and work, as his French friends saw, was an equal regard for all mankind: whether the precise objects of this regard were conceived as men's "rights" or their "interests," was a question which they would not feel to be of primary concern. He himself, indeed, was always conscious of the gulf that separated him from his fellow-citizens by adoption. "Were they," he writes in 1796, "to see an analysis I have by me of their favourite Declaration of Rights, there is not perhaps a being upon earth that would be less welcome to them than I could ever hope to be.""[171]

Principles of justice in Bentham here mentioned are: (1) 'that civil distinctions can be founded only on public utility' ("The very Declaration of the national Assembly, that solemnly set forth the maintenance of the national, imprescriptible, and inalienable rights of man, as the sole end of government, announced in its very first clause, that 'civil distinction' therefore, can be founded only on public utility'."). (2) "and yet the almost comical contrast that we find between Bentham's temper and method in treating political questions , and the habitual sentiments and ideas of his revolutionary friends"[172] [so much for Bentham's view of justice as it pertains to the French revolutionary discourse]. (3) "To obviate the inconvenience to which a political is exposed in the exercise of its functions. Each rule of this tactics can therefore have no justifying reason, except in the prevention of an evil. It is therefore with a distinct knowledge of these evils that we should proceed in search of remedies. These inconveniences may be arranged under the ten following heads: 1. Inaction. 2. Useless decision. 3. Indecision. 4. Delays. 5. Surprise or precipitation. 6. Fluctuations in measures. 7. Quarrels. 8. Falsehoods. 9. Decisions, vicious on account of form. 10. Decisions, vicious in respect of their foundation. We shall develop these different heads in a few words."[173].

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[170] p. 627, Henry Sidgwick, *Bentham and Benthamism in Politics and Ethics*, The Fortnightly Review, 21, January-June 1877, pp. 627-652
[171] Ibid.
[172] Ibid.
[173] p. 632, Ibid. (The errata are in the source).

""When the orator forgets his subject, and begins to wander, a table of motions offers the readiest means for recalling him. Under the present regime, how is evil remedied?"[174] It is evident from these quotes that the achieving of results in the realm of good and evil - justice, if you will - depends on the mode of speech (or philosophical method) and the intersubjective (logico-semantic) constructs employed to subvert useless speech (to subvert whatever possibly might contribute to evil). **The notion of justice is thus being defined by method**. **[it is not necessarily the case that we define 'method' (the mode of inquiry) by means of 'justice', but, that we define 'justice' by means of 'mode of operation', 'mode of speech' or 'method'.]** {which, in philosophy, means, that a definition of 'justice' depends on one's choice of the 'right method' or 'mode of inquiry', - and that the mere division of the field into more than one method, makes the transition or 'transformation' from one mode of inquiry to another, unavoidable}[175].

Bentham's notion of justice can be temporarily defined by us in the terms Sidgwick here brings from Helvetius:

> "Helvetius puts with a highly effective simplicity, from which Hume was precluded by his more subtle and complex psychological analysis, these two doctrines: first, that every human being 'en tout temps, on tout lieu seeks his own interest, and judges of things and persons according as they promote it; and secondly, that, as the public is made up of individuals, the qualities that naturally and normally gain public esteem and are called virtues are those useful to the public."[176]

If for a moment we turn to the idea, so familiar in contemporary philosophy, that to a great extent 'use' equals 'meaning', and we observe how the two principles defined in Helvetius rely on the usefulness of actions or speech to one or to one's society, we can then also see that, in this sense, these principles associated with utility in the public or private region, in their reliance on 'usefulness', in fact, to a great extent, also rely on the 'meaningfulness' of such actions or speech. In this, our act of substituting 'meaning' for 'use', we might be reminded that this kind of substitution usually occurs in the context of the study of the meaning of words, and that here, with the principles defined by Helvetius, utility, usefulness (in our 'substitutional' terminology) are used **in a prescriptive manner** as attributes (and modal attributes at that) of actions and speech. We must then take into account the distinction between a prescriptive use of such attributes, and their employment in the context of the

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[174] Ibid.

175 "Each rule of this tactics can therefore have no justifying reason, except in the prevention of an evil. It is therefore with a distinct knowledge of these evils that we should proceed in search of remedies." The rules Bentham sets here for the prevention of injustice are indeed 'preventive' rules – part of a his theory of justice as a whole being a theory of prevention, what we would call a holistic theory in which the removal of obstacles (obstacles mostly pertaining to 'speech', 'disposition' and 'mode of operation') help define both the desired method (in itself a method of prevention) and the theory.

[176] Ibid., p. 638-9.

learning of the meaning of words, - in the latter, also as modalities of the way we learn the meaning of words, not mentioned in a prescriptive, but perhaps in an analytical context. In other words: (as in Helvetius) that one seeks one's own interest met is an observation of Helvetius concerning 'how things actually work', but at the same time this observation quickly becomes a legislative prescription of sorts (one's notion of justice should or could be defined in terms of individual and public utility or usefulness). But in Wittgenstein for example, the description of the way the meaning of words is learned, has little prescriptive impetus, and is clearly meant to provide a better understanding of 'how thing are' in that area (one would never attribute to Wittgenstein the pretense of claiming that the reader *should* learn the meaning of new words by learning to use them (by recognizing their usefulness), this would make little sense. I think this comparison between Helvetius' more prescriptive use of 'usefulness' and Wittgenstein's less prescriptive employment of 'usefulness' might shed some light on a problem typical of discussions of principles of utility. For the most part the study of the principle of utility in a social or legislative context is perceived by both its practitioners and critics as prescriptive, when, if one is to judge from the way the chief 'perpetrator', Bentham, has written about it, there seems to be, at least in the *Introduction to the Principles of Morals and Legislation*, little prescriptive emphasis. And the less prescriptive emphasis in the discussion of 'utility' or 'usefulness', the more beneficial becomes the substitution of 'meaning' for 'use'. Eventually Bentham's 'theory of utility' can be understood as the 'theory of meaning' that it is, and not merely along the lines of the prescriptive practicalities that Mill and Sidgwick tend to attach to it, and by means of which they and others tend to evaluate the significance of Bentham's work.

THE DISTINCTION BETWEEN THE NON-PRESCRIPTIVE AND THE PRESCRIPTIVE MODES IN BENTHAM'S WORK AND THE TRANSITION BETWEEN THE TWO MODES, SEEM TO MAKE THE TEXT ITSELF THE TESTING GROUND FOR NEW IDEAS (AND FOR THE DEFINITION OF JUSTICE). THE ABSTRACTED AND RELATIONAL NATURE OF THE CONCEPT OF JUSTICE MAKES DISCOURSE ITSELF THE FIELD IN WHICH TO TEST ANY FORMULATION OF JUSTICE. THE REALITY OF JUSTICE EXISTS PRIMARILY IN THE TEXT IN WHICH, OR BY MEANS OF WHICH, WE STUDY JUSTICE.

Sidgwick comes close to defining the effect that Bentham's work, with its lack of awareness of the above distinction, might have had on different people at different times, "Thus from different points of view one might truly describe Bentham as one of the most or the least idealistic of practical philosophers. What is, immediately suggests to him what ought to be; his interest in the former is never that of pure curiosity, but always subordinated to his purpose of producing the latter."[177] What

[177] Ibid.

is, immediately suggests to him what ought to be. In my view, A big divide to be crossed with haste. This expression ('what is, immediately suggests to him what ought to be') gives us a concise glimpse of the problematic existing generally in philosophies of morals and legislation and in Bentham in particular. For Bentham, once the 'non-prescriptive' has been properly defined and the terms fully delineated, the 'non-prescriptive' can then be the foundation for a variety of prescriptive projects, such projects then carried out primarily not in the field but tested in as much detail as possible in the discourse projecting the plan (the prescription). This seems to be a strategy which allows Bentham to feel that the prescriptive part of his work still remains within the domain of the discursive and does not become fully realized, thus maintaining some power of perfection, a perfection which is more characteristic of 'non-prescriptive' work (once actualized, a notion or a design are always imperfect merely by the fact of having been actualized). But this strategy of giving his schemes a 'dry run' in discourse, does not solve the problem of the still almost automatic transition from non-prescriptive to prescriptive philosophy[178].

The distinction between the non-prescriptive and the prescriptive modes in Bentham's work and the transition between the two modes, seem to make the text itself the testing ground for new ideas (and for the definition of justice). The abstracted and relational nature of the concept of justice makes discourse the field in which to test any formulation of justice. *The reality of justice is the text in which, or by means of which, we study justice.*

We seem to think that the when we apply a political idea to 'life' we have thus tested its adequacy and benefit to society. But the truth is, that since the conception of justice is an abstracted conception, and justice is defined by 'adjectival' terms, there is little that we can learn from an immediate application of our idea of justice to real life situations. Bentham's tendency to test his conception of justice within the exhaustive procedures of his own discourse (and possibly within a non-prescriptive mode) seems to pay off[179]: the idea of justice would thus be put to the 'discursive' test, and if it holds up in speech, that would indicate that it is robust enough to last the accidents of social life. Highly abstracted notions such as 'justice' can truly be tested only in the realm in which they have been defined to begin with – the realm of 'speech' or the realm of the 'intersubjective',

178 While in this context (the context of the composition of his theory as a whole) Bentham seems to take the transition from the 'non-prescriptive' to the 'prescriptive' parts of his work for granted, he does posit the distinction between the 'non-prescriptive' – as the 'expository' – and the 'prescriptive' – as the 'censorial' – when he discusses elsewhere the two 'senses' of the principle of utility ("principles of utility two") - the 'expository' sense and the 'censorial' sense of utility. And as we find out (see Essay One) it is the transition from the expository (the 'non-prescriptive') mode to the censorial ('prescriptive') mode that defines the principle of utility, and Bentham's theory of justice as a whole.

179 The environment in which Bentham's discourse about 'justice' and his implied definition of 'justice' reside is a 'semiotic' or 'logico-semantic' environment (as distinguished from both the 'metaphysical' and 'epistemological' modes of enquiry), such as we encounter in Peirce's "logic as semiotics". Quine, as is mentioned at the beginning of Essay One, attributes this to a 'conceptual' mode of enquiry – a categorization that does not contribute much to the study of Bentham but at least distinguishes Bentham's mode of enquiry from 'metaphysics' and to a limited extent from 'epistemology'.

which in itself represents a relation.

The 'unity' and 'substantivity' of the conception of 'justice' are in question here as well, and it seems that the need for a new method of definition (paraphrasis) goes hand in hand with the highly abstracted nature of 'justice'; since 'justice' does not have a superior genus, it cannot be defined by differentia and genus and Bentham turns to paraphrasis, which means that the terms defining 'justice' would be primarily 'adjectival' terms (as distinguished from 'substantive' terms). It therefore would appear that 'justice' cannot be defined under the aspect of, or within the category of, 'substance': it ('justice) lacks the unity typical of substances – it is in itself a 'relation' or a 'comparison' – and we, as the ones studying 'justice', lack the 'substantive' terms to define it, since available to us are primarily the 'adjectival' terms characterizing 'justice' (the modalities of 'speech', 'action' and 'belief'). It thus becomes clear that a category other than 'substance' must be used when studying 'justice'. And the categories of 'relation', 'comparison', 'plurality' and 'modality' come to mind.

Another glimpse into the sources of Bentham's prescriptive tendency: in order to harmonize universal self-preference with public utility (by means of the legislative machine, - the system needs a man of insight and courage) Bentham at twenty five writes in his common-place book of 1774-5, "France may have philosophers. The world is witness if she have not philosophers. But it is England only that can have patriots, for a patriot is a philosopher in action". "But in the moral no less than in the physical world", adds Sidgwick,

> "one cannot improve a machine without understanding it; the study of it as it exists must be separated from the investigation of what it ought to be, and the former must be thoroughly performed before the latter can be successfully attempted. This is to us so obvious a truism that it seems pedantic to state it expressly; but it is a truism which Bentham found as much as possible obscured in Blackstone's famous Commentaries. The first thing then which he had to do was to dispel that confusion between the expository and the censorial functions of the jurist, which seemed to be inherent in the official account of the laws and constitution of England. The clearness and completeness with which this is done are the chief merits of the Fragment on Government."[180]

It is clear that Bentham is motivated by the distinction between the expository and the censorial modes of enquiry in his critique of Blackstone, and we have also seen that Bentham applies the distinction in his definition of the principle of utility ("principles of utility two"). The question remains, whether Bentham also applies the distinction between the expository and the censorial to the method or mode of enquiry of his theory as a whole, and to his definition of 'justice'. I hope to show as a conclusion of essays One and Two that Bentham's conception of 'justice' can be defined as

[180] Ibid.

the transition from the expository mode to the censorial – defined as a transformation of terms, object, and subject, in the process.

> "The clearness and completeness with which this is done are the chief merits of the Fragment on Government. In this elaborate attack on Blackstone's view of municipal law Bentham does not as yet criticize the particulars either of the British constitution or of British administration of justice: his object is merely to supply the right set of notions for apprehending what either actually is, together with the right general principles for judging of its goodness or badness."[181]

It appears now that at the center of any philosophy of morals and legislation the same methodological problem exists. In Plato almost everything in the philosophical realm is dedicated to this problem, phrased at times as the problem of the correct application of 'wisdom' to both regions of 'life', the public and the private (in the *Greater Hippias*). Plato had, at one point in time, an opportunity to venture with his essentially non-prescriptive work into the actual world of politics. Perhaps the lesson learned from Socrates' untimely death was, that when the truly philosophical, non-prescriptive discourse (mode of discourse) meets head on with the daily pressures of prescriptive normative behaviour, and the habituated social and religious customs (also mostly of a prescriptive nature), - in this collision the philosopher will be the physical casualty - his body dragged through the streets, with the crowd, having been frustrated by the philosophers non-prescriptive logico-semantic mysteries, cheering on. Thus Plato seeks and finds the methodological solution to the problem, while in Bentham the discrepancy seems to linger on, eventually destroying Bentham's reputation both on the ‘philosophical’ and on the 'practical' fronts. The historical aspect of Bentham's problem has an expected complexity, in that the critics of Bentham's work divide naturally into two groups: the group best represented by J.S. Mill, who denies Bentham both philosophical and practical repute, based on an erroneous reading of Bentham, and the second group of philosophers, who with great admiration for Bentham's philosophical genius, still find themselves criticizing his work, as I have been doing, for its strange mixture of non-prescriptive and prescriptive discourse. In Plato such a mixture would always occur within the appropriate medium - the dramatic form of writing - and in a controlled manner, serving a philosophical purpose. With Bentham the 'medium' of that mixture - an uncontrolled mixing at that - is his own actual life, Bentham himself moving hastily from non-prescriptive truly methodological-theoretical writing, to method as applied science, applied to his own immediate political circumstances. Plato, after some prolonged efforts at applying 'wisdom' to his own circumstances - his dealings with Dionysius of Syracus (and earlier in the aftermath of Socrates's death) - retreats into purely philosophical work - a non-prescriptive enterprise at that - in a

[181] Ibid.

last ditch effort to salvage philosophy (and divine wisdom) from the ravages of time and man. Bentham it seems has barely acknowledged the existence of the problem in the first place (a failure which seems to correspond to his traditionally acquired understanding of the significance of Plato and Aristotle).

SUMMARY OF ELEMENTS OF BENTHAM'S VIEW OF JUSTICE IN SIDGWICK.

(1) Bentham's task then was (at the age of twenty five) to be the 'man of insight and courage' to effect the harmonious consummation of self-preference with public utility, as suggested by Helvetius.

(2) So the first step in the forging of Bentham's view of justice seems to have been his capacity to take on at a young age the responsibility of acting as that harmonizing agent and an inventor of the 'legislative machinery' to govern or lead this harmonization. Bentham, according to Sidgwick, "conceives himself to be in an exceptionally favourable position for realising this union of morals and legislation."[182]

(3) [Bentham, writing in his commonplace-book for 1774-5] "France may have philosophers. The world is witness if she have not philosophers. But it is England only that can have patriots, for the patriot is a philosopher of action"[183]. The task of the philosopher of action is the improvement of the machinery of legislation.

(4) [Sidgwick] "But in the moral no less than in the physical world one cannot improve a machine without understanding it; the study of it as it exists must be separated from the investigation of what it ought to be..."[184] Sidgwick here, inadvertently perhaps, outlines the distinction between 'Understanding the legislative machine' - the non-prescriptive approach, and the 'investigation of what it ought to be' - the prescriptive approach.

(5) For Sidgwick, and perhaps for Bentham, the transformation from 'understanding it' to 'prescribing what it ought to be' might seem necessary and self-evident, "This is to us so obvious a truism that it seems pedantic to state it expressly; but it is a truism which Bentham found as much as possible obscured in Blackstone's famous Commentaries."[185] I will argue that the taking of this movement from non-prescriptive to prescriptive philosophy for granted mars the otherwise great philosophical achievements of Bentham. Bentham, according to Sidgwick here, criticized Blackstone for obscuring the truism of this transition - for obscuring what Bentham thought to be the necessary and self-evident connection between, first 'thoroughly understanding the legislative machinery' and 'the investigation of what it ought to be'. My criticism of Bentham will be exactly on this point, - that he takes this transition to be necessary, perhaps without realizing that it is a transition from a non-

[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.

prescriptive to a prescriptive approach in philosophy - in my view not a self-evident transition (more of a distinction in respect of 'method' than a self evident transition). In Sidgwick's language the distinction between 'understanding what it is' and 'the investigation of what it ought to be' becomes "the confusion between the expository and the censorial functions of the jurist", a confusion "which seemed to be inherent in the official account of the laws and constitution of England."[186]

(6) [A general description of Benthamism here in Sidgwick:]

"But the general principles by which the whole course of his industry was guided; that government is merely an organization for accomplishing a very complicated and delicate work, of which the chief part consists in preventing, by the threatened infliction of pain or damage for certain kinds of conduct, some more than equivalent pain or loss of happiness resulting from that conduct to some of the governed ; that the primary end of the political art is to secure that this work shall be done in the best possible way with the utmost possible precision and the least possible waste of means ; and that the rules controlling the appointment and mutual relations of different members of the government should be considered and determined solely with a view to this end - these were surely worth mentioning among political theories."[187]

The emphasis being on 'prevention' (a methodology of preventive measures).

(7) [again from Sidgwick:] "When once these principles were clearly and firmly apprehended by a man with the "infinite capacity for taking trouble" which has been said to constitute genius, though the eighteenth century, ideally speaking, was not yet over, the nineteenth had certainly begun."[188] Here we can see how it is not only Bentham's general principles that are required for what Bentham perceived as the correct fusion of 'understanding what it is' and 'investigating what it ought to be', but that it is required that these principles be "clearly and firmly apprehended by a man with the 'infinite capacity for taking trouble' which has been said to constitute genius..."[189] Sidgwick here also describes the 'kind' of theory Bentham's theory is: "A theory that is exclusively positive and unmetaphysical, at the same time that it is still confidently deductive and unhistorical, forms the natural transition from the "Age of Reason" to the period of political thought in which we are now living."[190]

(8) "And all that Bentham writes after 1817 is full of the heated and violent democratic fanaticism which is incident to the youth of many Liberals who in later years become "tempered by renouncement," but which, as we have seen, was conspicuously absent from the earlier stages of

[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] (Sidgwick) Ibid.
[190] Ibid.

Bentham's political activity."[191]

(9)

"It is the persistent rejection of Panopticon and many [644] other fair schemes which has inspired him with so intense a conviction that governments of One or Few invariably aim at the depredation and oppression of the Many. He tells us himself, in the "historical preface" to the Fragment on Government (republished 1828), that it is only after the experience and observation of fifty years that he has learnt to see in the imperfections of the British constitution "the elaborately organized and anxiously cherished and guarded products of sinister interest and artifice.""[192]

(11)

"And yet, when we examine the rational basis of his constitutional construction, whether as given in the introduction to his Plan of Parliamentary Reform (1817), or more fully and characteristically developed in the elaborate work just mentioned, we find that it consists in a few very natural inferences from the ethical and psychological premises on which his whole social activity proceeded; inferences, indeed, so simple and obvious, that we can hardly suppose him not to have tacitly drawn them, even in the earliest stage of his career."[193]

(12)

"We are thus led to the familiar system of Representative Democracy, with universality and equality of suffrage; but, be it observed, without any of the metaphysical fictions which had commonly been involved, in the construction of this system. Bentham's system is not a contrivance for enabling every one to "obey himself alone:" such an end would have seemed to him chimerical and absurd: it is merely an arrangement for securing that every one's interests shall be as well as possible looked after. To this difference of rationale corresponds naturally a difference of constitutional sentiment."[194]

(13)

"Another important difference appears at once in comparing the rationale of utilitarian democracy with that based on natural rights. The former, however dogmatically it may be announced, depends necessarily upon certain psychological generalisations, the truth of which may be continually brought to the test of experience. Between traditional legitimacy

[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] Ibid.

and natural freedom there was no common ground, and therefore really no argument possible."[195]

(14)

"The chief peculiarities, however, in the main outline of Bentham's constitution, are due not to his conception of the political end, but to his intense sense of the need of guarding his government against the danger of perversion: a danger which democrats of the older type, from their confidence in ordinary human nature, had commonly overlooked."[196]

Again, the emphasis on the seemingly trivial preventive nature of Bentham's theory - "guarding his government against the danger of perversion" - making 'preventive measures' a key to the conception of justice developed here, a conception defined mainly by 'adjectival' terms, - terms which are naturally conducive to 'prevention' (and 'non-substantive' at that).

ANOTHER APPROACH: WILLIAM HAZLITT'S CRITIQUE OF BENTHAM, IN *THE SPIRIT OF THE AGE*[197].

Hazlitt's 'verdict' of Bentham's oeuvre is simple:

"Mr. Bentham, perhaps, over-rates the importance of his own theories... Nor do we think, in point of fact, that Mr. Bentham has given any new or decided impulse to the human mind. He cannot be looked upon in the light of a discoverer in legislation or morals. He has not struck out any great leading principle or parent-truth... But Bentham's forte is arrangement... He has methodised, collated, and condensed all the materials prepared to his hand on the subjects of which he treats, in a mastery and scientific manner... His writings are, therefore, chiefly valuable as books of reference, as bringing down the account of intellectual inquiry to the present period, and disposing the results in a compendious, connected, and tangible shape".[198]

Paradoxically, Bentham might have agreed with Hazlitt's observations concerning the facts of his philosophy, since in principle, Bentham's philosophy was primarily an extended methodological treatise - a comprehensive methodological offering - and as such his importance was not in his prescriptive work but in his purely methodological (non-prescriptive) work. In this sense, to say that Bentham's work had little if no novel ideas or principles, would almost be like saying the same about

[195] Ibid.
[196] Ibid.
[197] William Hazlitt's *The Spirit of the Age, "Jeremy Bentham"*.
[198] Ibid.

Plato's work. In both, the methodological inquiry reaches a point where it becomes clear that 'justice' and 'wisdom' (and 'the way to apply wisdom to life') can most likely be defined *as* pure method. Method thus becomes the novelty, or better said, we find out that 'method' is 'the correct way to apply wisdom to life' and that 'justice' is not so much a principle used by us, but a cosmic principle (or eidos) in which we participate (thus properly defining 'justice' becomes impossible[199]).

Hazlitt has one sentence which inadvertently seems to sum up, in theories of utility, the relation between the principle of utility and the notion of justice: "Mr. Bentham is not the first writer (by a great many) who has assumed the principle of utility as the foundation of just laws, and of all moral and political reasoning."[200] Thus Bentham's view (or notion) of justice could be understood as founded on the principle of utility. A simple, but for our purposes here, very efficient formula.

"A FRAGMENT ON GOVERNMENT; BEING An EXAMINATION of whit is delivered, On the Subject of GOVERNMENT in General In the INTRODUCTION to Sir William Blackstone's COMMENTARIES: by Jeremy Bentham WITH A PREFACE, IN WHICH IS GIVEN A CRITIQUE on THE WORK AT LARGE."[201]

[In the *Preface*] Right from the second passage of the text Bentham makes the distinction between 'what is' and 'what ought to be', the two though slightly mixed together: "Correspondent to discovery and improvement in the natural world, is reformation of the moral; if that which seems a common notion be, indeed, a true one, that in the moral world there no longer remains any matter for discovery. Perhaps, however, this may not be the case..."[202]

Bentham posits 'reformation of the moral' as analogous to 'discovery and improvement in the natural world', and argues against the common notion that 'in the moral world there no longer remains any matter for discovery'. This may of course seem an almost trivial claim to make, a claim any reformer would make in the introductory passages to a text of this kind, but though trivial, these few lines reveal the way Bentham uses the elements of his theory in conjunction (or even in a sentence, for that matter). Once he posits 'reformation in the moral world' as parallel or correspondent to 'discovery and improvement in the natural world', one immediate conclusion for the reader might be that Bentham makes little if no distinction between 'discovery' and 'improvement' whether in the natural world or in the moral. This seems to imply that little if no distinction is being made between non-prescriptive modes of writing and prescriptive modes of writing in Bentham's key texts, except for the intuitive tendency to lean towards one mode or the other in earlier of later

199 If we consider 'justice' a Form in the Platonic sense, then we also would have to admit to the impossibility of properly defining 'justice' in itself, since any perfected Form cannot be properly defined by us – we, humans, lack the perfection associated with such Forms, which renders our attempts at defining any such Form, imperfect.

200 Ibid.

201 Bentham, *Fragment on Government,* T. Payne, London, *1776.* [I preserved the original typography]

202 Ibid.

writings. I have argued before that this freedom of movement between the non-prescriptive and the prescriptive modes of speech harms the meaning of Bentham's work tremendously (and his reputation of course) leading many a critic to assume that Bentham's strength or contribution lies in his practical innovations, and then tearing such innovations down as impracticable, when in fact, Bentham's meaning (and historical significance) lies in his non-prescriptive writings (such as what Ogden named *Bentham's Theory of Fictions*, or Bentham's *Introduction to Principles of Morals and Legislation*). It is in the transition from the non-prescriptive works to the prescriptive ones, or from the former to the latter mode within the same text, - it is in this often uncontrolled transition itself, that the loss of meaning seems to occur, perhaps because the transition is a categorical shift, a transition from one mode of enquiry (or speech) to another. The shift from 'discovery' to 'improvement' is a necessary one whenever the two modes are mentioned in one sentence or as modalities occurring within one discourse, and the shift is necessary (and must thus be properly defined) because it is a categorical shift, and as such cannot be ignored.

If I tried to break down Bentham's sentence ('correspondent to discovery and improvement in the natural world, is reformation in the moral'), I would start with the notion of 'reformation in the moral world' and ponder whether reformation in the moral world would be defined within a typically prescriptive or a non-prescriptive mode of writing. On the face of it, and following a direction inspired by Plato, I would venture to say that 'reformation' and particularly 'reformation in the moral world' falls on the side of 'understanding what something is' and less on the side of 'what something ought to be', since, with all the great philosophers the great moral reformations seem to depend exclusively on a profound reading of certain realities and meaningful constructs of certain realities. The inventive forces or novel elements which partake in such theories or are produced by them are mostly of the nature of things and principles discovered within such certain realities as are investigated for the purpose not initially of innovation but of understanding, and therein lies their strength. Plato, as I have mentioned earlier, being aware of the distinction, casts the prescriptive mode aside or employs it only as a dramatic device (for example, Socrates speaking in jest about the features of the ideal city in the *Republic*), as a platform from which to embark on his own private expedition of philosophy).

On the same occasion Bentham adds the following:

> "Perhaps, however, this may not be the case: perhaps among such observations as would be best calculated to serve as grounds for reformation, are some which, being observations of matters of fact hitherto either incompletely noticed, or not at all would, when produced, appear capable of bearing the name of discoveries: with so little method and precision have the consequences of this fundamental axiom, *it is the greatest happiness of the greatest*

number that is the measure of right and wrong, been as yet developed."[203]

If anything, this last quote can be read as an endorsement of the seemingly natural precedence which I have found non-prescriptive speech to have in what we commonly and so indiscriminately call 'reformations in the moral world'. [the movement from 'observation of matters of fact' to 'discoveries' seems to bypass the categorical formulation associated with 'ought'. Here the proper definition of 'what something is' based on the observation of its nature, leads to the discovery of the desired principles of morals and legislation.]

In light of all this, the question arises whether Bentham's view of justice, since it is so focused on methodological considerations (the necessary distinction between the modes, even if not explicit here) can be conceived of or perceived of in a coherent manner in Bentham, or must readers of Bentham's work make their way by picking and choosing the works and parts of works most accommodating for a coherent (non-prescriptive) formulation (reformation) of the moral world. Or in other words, is Bentham's warning to the reader to consider anything resembling an 'objective' (categorical) moral principle as 'nonsense on stilts' enough of a methodological push in the right direction, or is more pocking and fine-tuning of the system necessary (methodologically speaking).

Bentham here puts the emphasis on the mode of discovery, the discovery in the the natural world, to which reformation in the moral world is supposed to correspond. Bentham raises the question whether this is indeed the case, and whether observations such that serve as grounds for reformation would deserve the name of discoveries. When (under what conditions) does an observation qualify as a discovery? Under what conditions can an observation become a discovery? Are certain observations of facts "hitherto incompletely noticed or not at all" capable of bearing the name of discoveries? How possibly could have the comprehensive axiom of utility been developed under such flimsy practices of method, wonders Bentham? The most basic methodological means have not yet been defined properly so as to allow the most fundamental principle to flourish (become evident).

Bentham suggests that if there'd be room for making discoveries in the natural world, surely there would not be less room for proposing reformation in the moral. But in so arguing (and in that manner) I believe Bentham is not getting closer to resolving the issues involved, but in fact further obscures them. Watching Bentham arguing here is like watching a man slicing a loaf of bread the wrong way. Indeed one might find some redeeming qualities in very elongated slices of bread, but most of us would appreciate our sandwiches to be shorter. Similarly Bentham seems to make the distinctions in the wrong direction: the distinction between discoveries in the natural world and discoveries in the moral world is less interesting than the distinction between a non-prescriptive

[203] Ibid.

mode of inquiry and a prescriptive one. The latter distinction runs through both 'sides' of the former: both within the discovery in the natural world and within the moral world we need to make the distinction between prescriptive and non-prescriptive discourse. Simply distinguishing, as does bentham, between the natural world and the moral world in respect of 'discovery' does not get us closer to understanding the nature of moral reformation. But grounding our inquiry in the idea of the necessary transition from a non-prescriptive mode of inquiry to a prescriptive one, might get us closer to understanding what the moral world is all about, and particularly its legislative branch.

In this third passage of the Preface Bentham mentions 'making' discoveries, 'publishing' discoveries in the natural world, and 'making' discoveries and 'proposing' discoveries in the moral world. I find the subtle differences between these three modalities (modalities of philosophical inquiry if you will) intriguing - the difference between 'making a discovery', 'publishing a discovery', and 'making a reformation', and 'proposing a reformation'. The difference boils down to the fact that a discovery cannot be 'proposed' but 'made' or 'published', while a reformation cannot be 'published' in the same sense a discovery would have been. The distinction then between a discovery and a reformation seems to lie in the latter having to be not merely pronounced or published such as the disclosure of a discovery would involve, but that a reformation would have to be put in the form of a proposition, a re-formation of existing patterns, a re-formation which would involve public consent to already habituated patterns (formations of social and moral and semantic activity). The 'suggestive' power of 'discovery' is obviously less prescriptive than a proposed formation (re-formation) of moral patterns.

Bentham's project is to learn to know the "principles of the element we breathe... to comprehend the principles, and endeavour at the improvement of those laws, by which alone we breathe it in security"[204]. In the *Fragment* Bentham has identified an enemy of such a project of improvement. The rivalry between the enemy of Bentham's 'endeavour' – Blackstone - and Bentham's approach has persisted and has been transported into 20th century philosophical and legal discourse. We see the manifestations of this opposition in numerous publications on matters of philosophy of law in India, Australia and the United States. The principles of Bentham's work are still an integral part of the legal traditions in India and Australia, while in the United States Blackstone's influence has persisted. In perhaps a paradoxical way, regimes such as the Indian and the Australian have benefited from the prolonged and uninterrupted influence of English lawmaking, having thus been exposed consistently to Bentham's reformation all through the 19th century, while the drive for independence on the American continent may have worked as a sort of buffer against Bentham's influence, adhering to the mode of legislative practice established prior to US independence under the distinct influence of Blackstone's Commentaries.

[204] Ibid.

A *PREFACE* (BENTHAM'S) ABOUT AN *INTRODUCTION* (BLACKSTONE'S) - "A COMMENT ON THE COMMENTARIES" - or 'JUSTICE' AS A REFORMATIVE NOTION, IN ITSELF NOT A TYPICAL SUBSTANCE (A RELATION OR A TRANSFORMATION).

> "It is on this account that I conceived, some time since, the design of pointing out some of what appeared to me the capital blemishes of that work, particularly this grand and fundamental one, the antipathy to reformation; or rather, indeed, of laying open and exposing the universal inaccuracy and confusion which seemed to my apprehension to pervade the whole. For, indeed, such an ungenerous antipathy seemed of itself enough to promise a general vein of obscure and crooked reasoning, from whence no clear and sterling knowledge could be derived; so intimate is the connexion between some of the gifts of the understanding, and some of the affections of the heart."

Bentham's view of justice, has thus been defined by him as a comprehensive and generalizing view relating to the 'whole', a view directly opposing "a general vein of obscure and crooked reasoning, from whence no clear and sterling knowledge could be derived."[205]

I highlighted the above passage (passage five of the Preface) because Bentham himself describes this last passage as a concise wording of his 'view': "It is in this view then that I took in hand that part of the first volume to which the Author has given the name of INTRODUCTION."[206] Bentham's view is distinctly a 'responsive' or 'reactive' view, since it originated, as can be seen in the *Fragment,* as a reaction to an existing and well-entrenched system of legislation - a whole culture. In this sense Bentham's whole oeuvre is 'reactive', 'corrective' ("..that I conceived, some time since, the design of pointing out some of what appeared to me the capital blemishes of that work"), and perhaps in a purely Wittgensteinian sense, 'therapeutic'. More of a new wonder liquid for the removal of stains and blemishes, than a new 'substantive' yarn out of thin air, - a cure for a debilitating illness, possibly entailing a comprehensive holistic regiment, a (philosophical) regiment of prevention. And such 'preventive' or 'therapeutic' regiments do not have to be 'prescriptive', - they can operate as a philosophical, non-prescriptive system - a theory of meaning, not a theory of substances and existence. Bentham's work here is titled "A Fragment on Government", - a fragment, not in itself a whole thing, not a system in respect of 'substance' but a system in respect of 'meaning'. And a highly generalized system at that. It is as if Bentham implies that for a philosophical system to be highly generalized (comprehensive) it would have to be constructed only in respect of 'meaningfulness' - as a logico-semantic theory, and not in respect of 'substantivity' as a logico-

[205] Ibid.
[206] Ibid.

metaphysical theory. This of course reminds me of Plato's insistence that 'wisdom', its application to life, and generally all principles of legislation (justice) can be properly defined only by means of modal properties, the modalities of 'action', 'speech' and 'belief' (as distinguished from 'substantive' terms).

And it is enlightening perhaps that just as Bentham had found Blackstone's Introduction revealing of the latter's general principles and approach, so do we seem to benefit from Bentham's *Preface*. And Bentham's words about Blackstone's Introduction could be used to describe the benefit we have derived from Bentham's *Preface*: "It is in this part of the work that is contained whatever comes under the denomination of general principles. It is in this part of the work that are contained such preliminary views as it seemed proper to him to give of certain objects real or imaginary..."[207]

The philosophical point in all of this (considering all that has been said since the beginning of this paper) seems to be that Justice is, in itself, and from the human perspective (as defined in human terms) a transformative notion by definition, - not typically a 'substance' as we know of substances. We have seen both in Plato and in Bentham that Justice can be defined as a turning around of the inquiry as a whole, entailing a change of the way language is used; and in terms of the method or mode of inquiry, as involving a categorial shift (or strictly, a categorial shift as an integral structural part of the approach). It is not incidental then that for Bentham the term 'reformation' is associated with all proceedings pertaining to Justice. - For Bentham the term 'Reformation' *defines* Justice. Thus making 'justice' an essentially transformative notion.

BLACKSTONE'S ANTIPATHY TO REFORMATION – HIS "GRAND AND FUNDAMENTAL"[208] BLEMISH.

It seemed odd at first that Bentham identifies as the main blemish of Blackstone's approach "the antipathy to reformation", since, in respect of method, this sounds like a trivial thing to say; clearly, by definition, any 'formation' is bound to have some resistance to 're-formation', such as any pattern would resist it being re-designed. This is what patterns are all about, they are defined by a certain resistance to change (their naturally acquired 'consistency'). It would then seem at first odd how Bentham defines his critique of Blackstone's primarily by this feature, Blackstone's resistance to 'reformation'. And since Bentham, as much as our acquaintance with his work goes, is not in the habit of making trivialities his subject matter, we can assume that another purpose is driving this mention of Blackstone's main blemish. The answer to this lies in what we have already gathered concerning the nature of Bentham's notion of 'justice' - that it is in essence (in itself) a vehicle of transformation, and can therefore only be poorly defined using terms of substantivity. Because 'justice' is for Bentham such a transformative entity, Blackstone's "antipathy to reformation" would in

[207] Ibid.
[208] Ibid.

effect be identical to 'antipathy to justice', since 'justice' here stands for 'a mode of transformation', a mode of reformation. Now it has become easier to understand why Blackstone has been picked as the ultimate enemy, - he has been identified, on purely methodological grounds, as the enemy of justice. Remembering that we earlier saw how the term Method can be a substitute for the term Justice in Bentham's oeuvre, and that we have just now replaced 'reformation' with 'justice', we can now, also replace 'justice' with 'method', thus concluding that for Bentham, Blackstone's antipathy to 'reformation' amounts not only to an 'antipathy to justice', but also to 'an antipathy to 'method'[209]. Thus this blemish in Blackstone's work, expressed in seemingly so trivial a manner, turns out to hold, as in a capsule, the outline of Bentham's difference in respect of 'justice'.

HOW WITH BENTHAM, THE CRITIQUE OF BLACKSTONE'S WAY OF WRITING BECOMES THE SUBSTANCE OF A NEW THEORY.

In passages nine and ten of Bentham's *Preface* and generally throughout the *Preface* Bentham dedicates much effort to elaborating on his procedure of reading Blackstone's commentaries and on the step-by-step advance of his own 'Comment on the Commentaries'. Why is this significant, and how might it be relevant to Bentham's view of justice? Well, the short version would be, that since 'justice', 'method', 'mode of inquiry', 'modalities of action and speech' (and 'equity' for that matter) have been shown to be interchangeable for the purposes of Bentham's theory, - the fact that his own procedure is here highlighted by means of a detailed description of the *way* he reads, interprets and writes (his own mode of operation, his method) - must be represented as fully as possible, since the modalities of Bentham's speech are as pertinent to the inquiry as are the modalites of Blackstone's speech. Such modalities in fact define the transformative notion of 'justice' as the 'before' and 'after' of the transformation performed - the turning around of the inquiry as a whole. In other words, the notion of justice as such can be poorly represented by merely mentioning it or talking about it. It is best demonstrated by exemplification - by the actual modalities of the critic's speech and action, the modalities or mode which affect the turning around of the inquiry as a whole, the modalities which affect justice, the modalites that *are* justice. Thus again we arrive at a purely qualitative notion of justice, a definition dependent on our capacity for benevolent reading, interpreting and understanding, a definition of justice totally intertwined with our everyday *manner* of speech and action. There is no distance, semantic or logical, between this notion of justice and what we understand, what we say, and what we do. And this is why in Bentham the term 'justice' as such rarely surfaces in the text, is rarely used as the name of that notion so central to all theories of morals and legislation. At the same time there also is in Bentham this peculiar sense of 'speech as action' or 'speech as a substitute for practice or experience', where it sometimes seems as if within writing

209 'Antipathy to reformation' can be seen here as 'antipathy to method' in the sense that the resistance to reformation expresses the choice of the wrong philosophical method.

Bentham lays out the full gamut and future possible experiences connected with a term or with an idea. One could say that Bentham pulls 'equity' (or 'justice' for that matter) as the set of modalities of Unwritten law, back into the 'body' of Statute or Written law (returning or reattaching the 'female', the Rib, back to the 'body' of Adam - "Equity, who having in the beginning been a rib of Law..."). So it seems that on one hand, Bentham's notion of 'justice' is defined by the modalities of his own speech and action and by his awareness thereof, but on the other hand, Bentham shows a propensity for 'translating' many of the modalities of future possible actions into written form. Kenneth Burke has written about this tendency in Bentham[210], describing how resorting to the written form of discourse allows for a better representation of Eulogistic and Dyslogistic appelatives [*A Table of the Springs of Action*] (it is easier to represent abstracted terms in written discourse in the absence of tone of voice and body gesture). Not surprisingly Burke attributes the same discursive phenomenon also to Plato.

Since 'justice' seems to be defined by the modalities of 'action', 'speech' and 'belief', it is also typically a 'mode' of doing things, and as such exists only 'when in operation'. The man of justice is a 'man of action' (and of speech and belief, for that matter), to use an old figure of speech. 'Justice' is thus associated directly with 'motion' as the clearest manifestation of life. And it would not come as a complete surprise to any of us when we look at the role the notion of 'justice' plays in Anaximander's description of the universe[211]. 'Justice' appears there as the criterion for ('that according to which') transformation (the becoming and the perishing) takes place - a criterion, which from the human point of view has the makings of a principle, a law, or a logico-semantic construct.

With Bentham, the 'Comment on the Commentaries' becomes a war ("...that war which, for the interests of true science, and of liberal improvement, I think myself as bound to wage against this work."[212]). In this sense, Bentham's exemplification (demonstration) of 'justice' takes on the form of a full scale war. His view of 'justice', at least in this context, is that of a war waged against a ruthless enemy, 'a turning around of the inquiry as a whole' as a powerful struggle for survival.

"THERE ARE TWO CHARACTERS, ONE OR OTHER OF WHICH EVERY MAN WHO FINDS ANY THING TO SAY ON THE SUBJECT OF LAW, MAY BE SAID TO TAKE UPON HIM; THAT OF THE EXPOSITOR, AND THAT OF THE CENSOR."[213]

Next Bentham sheds some light on the distinction we previously mentioned, the distinction between 'what something is' and 'what something ought to be'. Here it takes on the form of the distinction between the character of the Expositor, and that of the Censor, "There are two characters, one or

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[210] Burke, Kenneth, *A Rhetoric of Motives*, New York, Prentice-Hall Inc., 1950.

211 "Whence things have their origin, thence also their destruction happens, according to necessity; for they give to each other justice and recompense for their injustice in conformity with the ordinance of time."

[212] Bentham, *Fragment on Government,* T. Payne, London, *1776.*

[213] Ibid.

other of which every man who finds any thing to say on the subject of Law, may be said to take upon him; that of the Expositor, and that of the Censor. To the province of the Expositor it belongs to explain to us what, as he supposes, the Law is: to that of the Censor, to observe to us what he thinks it ought to be. The former, therefore, is principally occupied in stating, or in enquiring after facts: the latter, in discussing reasons[214]. The Expositor, keeping within his sphere, has no concern with any other faculties of the mind than the apprehension, the memory, and the judgment: the latter, in virtue of those sentiments of pleasure or displeasure which he finds occasion to annex to the objects under his review, holds some intercourse with the affections."[215] This is so far the most detailed information we get from Bentham on the manner in which the principle of utility might actually apply to the distinction between 'how something is understood' and 'how it ought to be', or as I put it earlier, the distinction between non-prescriptive and prescriptive discourse[216]. I earlier associated the mode of 'discovery' with the notion of 'understanding what something is', - and here we can see how the role of the Expositor clearly corresponds to 'discovery': "To the province of the Expositor it belongs to explain to us what, as he supposes, the Law is." But 'discovery' is a tricky concept, when we apply it to the roles of Expositor and Censor. "To the province of the Expositor it belongs to explain to us what, as he supposes, the Law is: to that of the Censor, to observe to us what he thinks it ought to be. The former, therefore, is principally occupied in stating, or in enquiring after facts: the latter, in discussing reasons."[217] If to the Expositor it belongs to explain to us what is or to state the facts, and the Censor is principally occupied in discussing reasons, how do the two roles or modes differ in respect of 'discovery'? It is Bentham who makes the distinction (and draws the analogy) between 'making a discovery in the world of nature' and 'making a discovery in the world of morals'. What part does 'discovery' play in 'observing what is (the so-called 'facts')' and in 'discussing the reasons'? Bentham even uses the expression "to observe to us what he thinks it ought to be" when describing the role of the Censor, thus showing that in 'thinking what it ought to be' the agent is 'observing to us what he thinks it ought to be', suggesting that the 'prescriptive' mode of the Censor relies on 'observing' in the sense of 'discovery', similarly to Aristotle's definition of 'scientific inquiry' in the *Analytics* - scientific inquiry as the inquiry into the reasons. So with Bentham 'what something

214 Would the task of 'definition', or of defining any object of enquiry, fall to the expositor or to the censor? Isn't definition normally part of the investigation of 'what is' and therefore of the nature of things, leading to their definition? Bentham assigns to the censor “discussing reasons”, which normally would be part of the process of analytical approach to 'definition' – the reconstructing of the object for the purpose of a proper definition. So it seems that in this one sentence Bentham spreads the properties associated with a proper definition on both sides of the slice of bread. Otherwise, it would seem that 'definition' is part of the expositor's job, and not the 'censor's. But then again, 'definition' must adhere to both 'what something is' (the expository) and to 'what something ought to be' (the censorial).

215 Ibid.

216 I wrote this section at an earlier date, before I came across the comments Bentham makes concerning the division of the principle of utility: “principles of utility two” - the principle of utility having two 'senses', an expository and a censorial sense. [in the *Table of Springs of Action*, in *The Marginals*, #49]

217 Ibid. (*Fragment*).

ought to be' must be expressed in terms of the reasons for it, thus making this mode of the Censor not significantly different from the Expositor's in respect of 'discovery'. From a methodological point of view, how would an 'observing of the facts' differ from 'observing the reasons'?

The two 'kinds' of agent (the two kinds of the one conducting the inquiry) both reside within 'speech': "There are two characters, one or other of which every man who finds any thing to say on the subject of Law, may be said to take upon him; that of the Expositor, and that of the Censor."[218] These two characters are a distinction within the group of men 'who find anything to say on the subject of law', - two kinds of speakers, two distinct modes of speech. But Bentham, it seems, provides little help in defining those two modes of speech as distinct. In fact, I would argue, that more often than not Bentham tends to confound the two modes of speech.

But it is important that these two modes of enquiry be understood as 'modes of speech', since Bentham uses the distinction between an expository and a censorial mode of enquiry to define the principle of utility - "principles of utility two". And if the principle of utility itself is defined by the distinction between two modes of speech (a categorial shift – but one within 'speech', exclusively pertaining to 'speech') then the theory as a whole, which is based on this principle, must be perceived of within the realm of 'speech'. Another aspect of this distinction is that it is a distinction between 'two characters of man', which gives the distinction a range of application and relevance beginning with 'mode of enquiry' and ending with 'the character of the one conducting the enquiry'. This brings to mind Plato's theory of justice, in which the terms of the theory apply to both the definition of 'individual soul' and the 'city-state'. A more direct analogy to Plato's work applies here, since, as we have seen in Essay One, the distinction between 'what is' and 'what ought to be' (the expository and the censorial) is also the relation between the first and second leg of proportionate analogy – the distinction between 'what something is' and 'what it ought to be – its relation to a perfected Form' – a formula that is the basis for the syllogistic as well. These abbreviated references to Plato are only meant to show that Bentham's distinction between the expositor and the censor or between the expository mode and the censorial mode has its roots in the ancient logicist culture of proportionate analogy, which is also purely a logic of 'forms of speech'.

Bentham's project is to learn to know the "principles of the element we breathe... to comprehend the principles, and endeavour at the improvement of those laws, by which alone we breathe it in security"[219]. A worthy cause, but, in my view, one that requires that the distinction between non-prescriptive ('understanding what there is') and prescriptive ('what it ought to be') speech be clear. Because, as we have seen earlier, it is this distinction or the transformation from the former mode of speech to the latter (the two modes of speech comprising the distinction) which defines Justice.

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[218] Ibid.
[219] Ibid.

SURPRISINGLY PERHAPS, A CONCEPTION OF PERSONAL RESPPONSIBILITY IS PRODUCED[220] BY THE SHIFT FROM THE EXPOSITORY TO THE CENSORIAL MODE (AND SINCE THE PRINCIPLE OF UTILITY ITSELF IS DEFINED BY THIS SHIFT, WE NOW HAVE A NOTION OF WHAT PERSONAL RESPONSIBILITY MEANS WITHIN THE PRINCIPLE OF UTILITY).

Bentham widens the scope and adds characteristics to the description of the state of the one conducting the inquiry and his mode of thought and speech, thus further strengthening the dependence of the notion of 'justice' on the various modalities of thought and speech (dispositional properties, as distinguished from 'substantive' properties):

> "To a man who contents himself with simply stating an institution as he thinks it is, no share, it is plain, can justly be attributed (nor would any one think of attributing to him any share) of whatever reproach, any more than of whatever applause the institution may be thought to merit. But if not content with this humbler function, he takes upon him to give reasons in behalf of it, reasons whether made or found by him, it is far otherwise. **Every false and sophistical reason that he contributes to circulate, he himself is chargeable with**: nor ought he to be holden guiltless even of such as, in a work where fact not reason is the question, he delivers as from other writers without censure."[221] (my emphasis)

The moral aspect of this activity (the practice of speech - discourse) is the constant streak or thread of responsibility, personal responsibility, the agent is held accountable for. Accountability is personal at every phase and within every mode of speech, private or public, - we talk about 'equity' and we are held responsible for being equitable in our speech about 'equity'. And just as with Plato, the 'third' beyond this or that participant in discourse (the 'questioner' and the 'answerer' if you will) is not some

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220 Personal responsibility is associated with the relation between the expository and the censorial mode, because of the 'exposure' of the activity within the censorial mode to 'reputation' (it is 'reputation that affects the authority of the speaker) – an exposure to the 'public', to scrutiny by others within the realm of participation in speech. This links 'what something ought to be' (the censorial mode) to individual experience of 'things as they are' (in the expository mode) through the exposure to public scrutiny, making the 'public' (the progenitor of 'reputation') the arbiter of the relation between the two modes (the expository and the censorial) – a criterion of sorts. It also makes the dispositional or relational terms defining 'reputation' (what others think of one) the terms by means of which the relation between the two modes can be observed and perhaps defined. And since this relation defines the principle of utility - "principles of utility two" - it would seem that 'reputation', or scrutiny by others within discourse, also defines the principle of utility, thus 'universalizing' utility by making it a function of public scrutiny (a balancing of individual self-interest). Operations intended for or aimed at utility gain their authority not from some obscure personal judgement but also from what the community has to say about each and every one of us. By introducing 'reputation' at the censorial level and showing how the authority gained form it projects back to the expository level, Bentham in effect links the two 'senses' of the principle of utility and universalizes the principle as a whole (beyond the two modes being modes of speech – the two 'departments of letters').

221 Ibid.

obscure third 'objective' participant, but the mode of inquiry as such - Method. What holds everything together and gives it meaning is the moral as manifested in the transition from initially a non-prescriptive mode of speech to a prescriptive one. Both the intersubjective realm (speaker and listener, etc.) and the distinction in the methodological realm between the two modes of inquiry make the notion of justice available to us as a purely participatory value. Bentham's notion of justice is thus being defined purely in terms of a speaker's participation and accountability (purely in terms of 'method' for that matter).

The additional point raised in the above quote is, that so far as the speaker "contents himself with simply stating an institution as he thinks it is" - as 'expositor' – he bears no responsibility, but as soon as the speaker (the participant in speech) "takes upon him to give reasons in behalf of it" he becomes personally responsible. And since Bentham attributes the giving of reasons to the censor ("the latter, [the censor] in discussing reasons"), it seems that due to that function, the censorial mode entails a personal responsibility: "Every false and sophistical reason that he contributes to circulate, he himself is chargeable with."[222] It seems than, that according to Bentham, the transition from the expository mode to the censorial mode entails the necessary assumption of personal responsibility. And if the principle of utility – as the 'engine' producing justice – is defined by the transition between the expository and the censorial modes ("principles of utility two"), then it is this same 'engine' and this same transition between modes that produce what all theories of justice are after – a conception of personal responsibility.

JUSTICE IS THUS DEFINED AS A MODE OF TRANSFORMATION (A MODE OF REFORMATION IF YOU WILL).

So radical or absolute is the requirement for participation and personal accountability that Bentham writes, "it is men, not laws, that are the butt of arrogance."[223] All that pertains to legislation must be understood in terms of 'men' not 'principles'. Not so much 'men adhering to principles' in the traditional sense, but 'principles adhering to their *reformation* by men. Thus the key to justice or equity would be the correct application of 'wisdom' to 'life', a mode of application defined, as we have seen, by the modalities of 'speech', 'action', 'belief' and 'disposition'. 'Justice' is thus being defined as a mode of transformation (a mode of reformation if you will).

"**Of a piece with the discernment which enables a man to perceive, and with the courage which enables him to avow, the defects of a system of institutions, is that accuracy of conception which enables him to give a clear account of it.** No wonder then, in a treatise partly of the expository class, and partly of the censorial, that if the latter department is filled with imbecillity,

[222] Ibid.
[223] Ibid.

symptoms of kindred weakness should characterize the former."[224] [the wrong assumptions made within the censorial mode (reasons given, etc.) reflect back unto the work done within the expository mode].

Blackstone's work provided for Bentham the perfect 'foil' against which to present his own method. But since the characteristics of Bentham's method are so different from those of Blackstone's, and are such that 'fly under the radar' of Blackstone and much of English philosophy, the responses to Bentham's work, not only in the case at hand but also as concerns his oeuvre as a whole, have been philosophically speaking hostile (see J.S. Mill's *Bentham* for example). Friend (J. S. Mill) and foe (Whewell) considered him more of a practical innovator and less of an important philosopher. Bentham's method, naturally lending itself to a 'therapeutic' mode of inquiry, seems to have been constructed, less as a 'substantive' method and more as a 'reactive' mode of inquiry set around a few principles related to forms of speech and modalities of action and disposition. But that *is* the method, and that is the system of philosophy Bentham created. These characteristics are not merely manifestations of a philosophical system at work (or the lack of such a system) but they *are* the system.

"MERIT IN ONE DEPARTMENT OF LETTERS AFFORDS A NATURAL, AND IN A MANNER IRRECUSABLE PRESUMPTION OF MERIT IN ANOTHER"[225] - 'REPUTATION' AS THE GLUE HOLDING THE EXPOSITORY AND THE CENSORIAL MODES TOGETHER (REPUTATION GIVES WEIGHT TO COMMENTS MADE WITHIN THE CENSORIAL MODE, COMMENTS WHICH THEN BECOME SIGNIFICANT ALSO IN THE EXPOSITORY MODE).

A few elements, the presence of which has declined in theories of philosophy since Plato, seem to have resurfaced in Bentham. Such is for example the repeatedly mentioned importance of 'reputation' as a term of, perhaps, methodological significance: "In the mean time that I may stand more fully justified, or excused at least, in an enterprize to most perhaps so extraordinary, and to many doubtless so unacceptable..."[226] and,

> "If, on the one hand, a hasty and undiscriminating condemner of what is established may expose himself to contempt; on the other hand, a bigotted or corrupt defender of the works of power, becomes guilty, in a manner, of the abuses which he supports... Every false and sophistical reason that he contributes to circulate, he himself is chargeable with..."[227]

[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Ibid.

And,

> "Under the sanction of a great name every string of words however unmeaning, every opinion however erroneous, will have a certain currency. Reputation adds weight to sentiments from whence no part of it arose, and which had they stood alone might have drawn nothing, perhaps, but contempt. Popular fame enters not into nice distinctions. Merit in one department of letters affords a natural, and in a manner irrecusable presumption of merit in another, especially if the two departments be such between which there is apparently a close alliance."[228]

[the 'glue' keeping the two 'departments of letters' – the expository and the censorial forms – together (in a constant relation) is 'reputation': the power gained and squandered emanates from the relation to other speakers (the view and opinion other speakers have of the one in question); reputation is used as currency when one makes the transition from the expository to the censorial mode of speech]. Even utility is measured within this realm of 'letters' (and not, as is usually assumed, within the realm of metaphysically perceived substances). But it is within discourse and within this relation between the expository and the censorial modes of speech that 'meaning' travels 'upstream': when reputation affords a famous participant to make comments concerning 'what ought to be' or 'how it ought to be' – censorial commentary – the significance of such comments is being transferred back to the expository mode of dealing with the object of enquiry – to 'what it is'. 'Reputation' thus adds to the possibility of distorting our acquaintance with the object of enquiry by tempering with what we would otherwise perceive of as 'the object for what it is' (within the expository mode).

It is tempting to take 'definition' to be part of the expository mode of the enquiry, when we deal with 'what it is' we talk about (as distinguished from 'what it ought to be'), but in fact, the definition of the object of enquiry is as much a part of the censorial mode: while the expression 'what it is' seems to refer to the nature or essence of the object, and therefore to its definition, the expression 'what it ought to be' refers to the perfected concept of the object – its true or perfected nature, which would be best represented by its definition. So it seems that both the expository and the censorial mode pertain to the definition of the object of enquiry (as indeed should be the case, since the two modes combined form a proportionate analogy defining the object)[229]. Reputation seems to be one of the vehicles making the flow of meaning between the two modes of enquiry possible, and a

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[228] Ibid.

229 The expository 'what the object is' and the censorial 'what the object ought to be' correspond to the two comparisons forming a proportionate analogy – the object attended to for what it is and the object attended to for what it ought to be (in Plato, the latter is the relation to the perfected Form of the object). As I have shown in essay one the expository and the censorial modes, which correspond with the first and second comparison in proportionate analogy, also correspond with the first and second predications comprising the syllogistic – A belongs to B, and B belongs to C (where B is the object of enquiry posited as a middle term).

structural link between 'being known as a speaker' or 'being known as an authority' and the relation between 'what the thing spoken about is' and 'what the thing spoken about ought to be' or 'how it ought to be'.

The importance of 'reputation' or 'exposure to public scrutiny' resides in 'reputation' representing the 'intersubjective', the realm of 'speech'. 'Repute' plays a role in the author's awareness of (and dependence on) the response of others - a relation defining the modalites of his actions and speech (and intent), thus contributing a great deal to the author's notions of 'justice' and 'method' , notions which are defined by such modalities in the first place. 'Repute' also generally plays a part in the critical or reformative approach to philosophy since any critical enterprise must deal with the terms of one's reputation as an author being criticized or with criticizing others, with system-reformation or with 'being reformed'. Similarly to what one finds in Plato, Bentham repeatedly evokes the terms of authorship of both the system attacked and the critic of that system, thus emphasizing the relation of the criticism of method to the method employed by the critic – to the terms of discursive representation (forms of speech).

Bentham's notion of justice (Bentham's view of justice) can thus be divided into two 'departments': (1) his view of justice as directly expressed in the reformative observations he makes concerning English law, observations which he then posits as prescriptive positive improvements in practice, such as Halevi describes, and, (2) his view of justice as exemplified (directly) in the manner in which he writes - in the modalities of speech and disposition discussed by him at length, and in the modalities of his own disposition and speech - the modalities in effect defining 'justice'. This second department includes the degree and manner in which Bentham's 'style' differs from Blackstone's, since it is in this seemingly trivial 'stylistic' difference that we get the most information about the difference between Bentham and Blackstone's philosophical method. Again we must remember to observe the variation in the modalities of speech between the two – how they speak about the object of enquiry (English law and 'justice') as well as 'what they say'. The definition of justice thus peculiarly rests on the scrutiny of the subtle and not so clear difference between 'what is being said' and 'how it is being said'. So we have the reformative practice of law and legislation as a manifestation of Bentham's notion of justice; and we have the *manner* of the exposition of that approach (a 'manner' or 'mode of inquiry exemplified') as a direct demonstration of Bentham's notion of justice, a notion directly manifested in the practice of discourse.

Bentham's *Preface* is filled with expressions of modality, disposition, intention, belief and concern (and please excuse the repeating of the same quote): "Of a piece with the discernment which enables a man to perceive, and with the courage which enables him to avow, the defects of a system of institutions, is that accuracy of conception which enables him to give a clear account of it. No wonder then, in a treatise partly of the expository class, and partly of the censorial, that if the latter department is filled with imbecillity, symptoms of kindred weakness should characterize the former.

The former department, however, of our Author's work, is what, on its own account merely, I should scarce have found myself disposed to intermeddle with. The business of simple exposition is a harvest in which there seemed no likelihood of there being any want of labourers: and into which therefore I had little ambition to thrust my sickle. At any rate, had I sat down to make a report of it in this character alone, it would have been with feelings very different from those of which I now am conscious, and in a tone very different from that which I perceive myself to have assumed. In determining what conduct to observe respecting it, I should have considered whether the taint of error seemed to confine itself to parts, or to diffuse itself through the whole."[230] [notice how the range of modalities observed stretches from the 'expository/censorial' distinction pertaining to the speech and actions of the author criticized (Blackstone) to the attitude of the author criticizing (Bentham). Expressions such as "In determining what conduct to observe respecting it, I should have..."[231] provide Bentham with a truly comprehensive field of modalities comprising the subject of 'justice'. The force of 'judgement' which produces 'justice' must extend to both 'the thing judged' and the attitude of 'the one judging'. In fact, the force of 'judgement' extends, not only to the 'thing judged' and to 'the one judging the thing', but also to the one criticizing (judging) the 'one judging the thing', to the 'reputation' (judgment by others) of the one judging the thing, and to the response of the benevolent reader (all of them)].

Bentham makes a choice to respond in his *Preface* to Blackstone's Introduction (or merely a part of it): "The Introduction is the part to which, for reasons that have been already stated, it was always my intention to confine myself. It is but a part even of this Introduction that is the subject of the present Essay. What determined me to begin with this small part of it is, the facility I found in separating it from every thing that precedes or follows it. This is what will be more particularly spoken to in another place." And, "It is not then, I say, this part, it is not even any part of that Introduction, to which alone I have any thoughts of extending my examination, that is the principal seat of that poison, against which it was the purpose of this attempt to give an antidote. The subject handled in this part of the work is such, as admits not of much to be said in the person of the Censor. Employed, as we have seen, in settling matters of a preliminary nature in drawing outlines, it is not in this part that there was occasion to enter into the details of any particular institution. If I chose the Introduction then in preference to any other part, it was on account of its affording the fairest specimen of the whole, and not on account of its affording the greatest scope for censure."[232] Blackstone's work serves as a foil to Bentham's mode of inquiry, since Blackstone's work and disposition represent for Bentham an approach which "tramples the right of private judgement, that

[230] Ibid.
[231] Ibid.
[232] Ibid.

basis of every thing that an Englishman holds dear."[233] This shows how deeply seated the differences are between the two approaches - an opposition manifested as the one method 'trampling' the notion of justice - "the right of private judgement", that inner shrine of one's notion of justice - of the other.

Bentham's view of justice thus demonstrates a unique mechanism of survival, having the ability to 'attach' itself (as a manner of discourse) to the right (benevolent) reader, - one with the capacity for using 'dispositional' terms and an extended awareness of modal or 'adjectival' properties (in defining 'justice'). Bentham's system behaves in this sense like a living organism, not necessarily like a conceptual-theoretical content bound to be fed to prospective participants.

The question of 'reputation' goes also to our sense of 'authority', and as such, to our sense of what is just and what is not:

> "Under the sanction of a great name every string of words however unmeaning, every opinion however erroneous, will have a certain currency. Reputation adds weight to sentiments from whence no part of it arose, and which had they stood alone might have drawn nothing, perhaps, but contempt. Popular fame enters not into nice distinctions."[234]

As such, 'authority' or an authoritative definition of justice seems to have a systemic or methodological flaw. A useful contemporary example would be Wittgenstein's notion of 'criterion' which parts way with the philosophies advocating an authoritative notion for a criterion of identity (see Stanley Cavell's *The Claim of Reason*). Bentham here argues against the authority falsely based on reputation or based on a falsely gained reputation, which tends to produce the kind of authoritative criteria not justified semantically (the kind of authoritative criteria which fail to signify anything and are thus rendered meaningless).

'Reputation', producing the authority of the operator within the censorial mode, represents the agent's capacity for 'knowing' what ought to be or how it ought to be, which is the purpose of the censorial mode to begin with. This relation to a perfected Form (to use an ancient term), determining 'what ought to be', again brings to mind the 'place in the world' of the agent engaged in a censorial manner. The authority of the censor comes not merely from 'what others think of him', but primarily from the place the agent holds in life – age, experience, wisdom, etc. The agent-as-censor's authority can only be manifested within the realm of discourse – of participation in speech – but this 'authority' is a complex notion resulting from the agent's 'place' in the world, since this 'place' is what defines the agent's real relation to perfected Forms (and to other participants in the same field). In this sense, the conceptions emanating from Bentham's work bear resemblance to Plato's theory, though they exist in Bentham without the awareness of such a resemblance.

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[233] Ibid.
[234] Ibid.

A COMMENT ON DEFINITION

Within the expository mode, the agent looks at particular events pertaining to justice ('what justice is'), while within the censorial mode the agent looks at 'what any action ought to be (in relation to a universalized or perfected notion of justice)'. Normally a definition by differentia and genus would employ a universalized notion of the thing to be defined, since it is this universalized notion that holds the properties essential to the thing to be defined. And therefore it seems we should be looking for the elements of a definition of 'justice' within the censorial, more universalized mode. But since justice, being a highly abstracted conception (has no superior genus), cannot be properly defined by genus and differentia, and we have to resort to 'paraphrasis' in order to define it, we should ask in which of the two modes of enquiry will we be able to find the terms adequate for a definition of 'justice'? It seems that since a generic conception superior to 'justice' is hard to find, the advantage of working within the censorial mode in seeking a definition for 'justice' is diminished, and we might be better off looking for the terms defining 'justice' within the expository mode. And since within the expository mode we deal with the particular manifestations of justice ('what it is'), and we already know that justice can be manifested primarily by means of adjectival terms (modalities, dispositions, seemingly accidental properties) it would appear that the definition of justice, will be sought after within the expository mode of enquiry, and will be constructed of adjectival terms representing modal and dispositional properties. And generally, because the conceptions we seek to define in these three essays (method, justice, right) are highly abstracted conceptions, and require a definition by 'paraphrasis', it would seem that much of our work (at least in respect of definition) would take place within the expository mode, or as I like to call it, the 'non-prescriptive mode'. In other words, because of the nature of the things we seek to define, and the new definition of 'definition' it requires, the emphasis of our enquiry as a whole would have to shift towards the expository mode of enquiry, and with it to a less 'prescriptive' attitude when it comes to legislation and justice[235]. Adopting a less prescriptive mode would mean spending less time assuming a universalized notion of 'justice' and more time dedicated to the 'adjectival' manifestations of justice in action, speech, and belief [thus providing us with a vocabulary of modalities of action, speech and belief (dispositional terms)]. Our habitual manner of theorizing in politics - from the school of 'ought to be' practicalities - has to retreat into a non-prescriptive, more philosophical (almost meditative) state of attendance. Our skill of listening to *how* we speak becomes useful again (as different from habitually attending to 'what we say'). In other words, since the definition we seek (the definition of 'justice') lies in a seemingly

235 Shifting to a less prescriptive attitude when it comes to legislation and justice, would generally produce an a-typical political theory, since most political theories we are acquainted with perform 'prescriptively' – as theory-based suggestions put into practice - and seek to establish their validity by real world practice (as prescriptions); here, with a 'non-prescriptive' approach we seem to have fallen back on the kind of political theory that gets its sense of authority from a more private notion of 'judgement' – more from 'conscience' than from 'reputation'. And in this less prescriptive environment the significance of 'choosing the right method' becomes more evident.

'non-substantive' ('adjectival'), 'non-prescriptive' kind of discourse, the meaning we have habitually attributed to the words in our language must change in order for us to gain access to the definition we seek (and our definition of 'definition' must change as well)[236].

SECURITY AND EQUALITY – THEIR OPPOSITION or "WHEN SECURITY AND EQUALITY ARE IN OPPOSITION, THERE SHOULD BE NO HESITATION: EQUALITY SHOULD GIVE WAY." (SO MUCH FOR 'EQUALITY' AS A FOUNDATIONAL PRINCIPLE).

In *Principles of the Civil Code*. Jeremy Bentham. Part 1. *Objects of the Civil Law*. Chapter 11. *Security and Equality---Their Opposition*:

> "In consulting the grand principle of security, what ought the legislator to direct with regard to the mass of property which exists? He ought to maintain the distribution which is actually established. This, under the name of justice, is with reason regarded as his first duty: it is a general and simple rule applicable to all states, adapted to all plans, even those which are most opposed to each other... the supreme principle of security directs the preservation of all these distributions, how different soever their natures, and though they do not produce the same amount of happiness. For how shall a different distribution be made, without taking from some one what he possesses? how shall one party be stripped, without attacking the security of all?"[237]

And Bentham's answer:

> "When security and equality are in opposition, there should be no hesitation: equality should give way. The first is the foundation of life---of subsistence---of abundance---of happiness; every thing depends on it. Equality only produces a certain portion of happiness: besides, though it may be created, it will always be imperfect; if it could exist for a day, the

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236 In the above, the 'prescriptive' mode of discourse is being associated with 'substantive' terms, which can be misleading, since 'prescriptive-substantive' talk only occurs as a response to the question 'what ought to be done' and not in response to the question 'how it ought to be done'. To many of us, the difference between 'what ought to be done' and 'how it ought to be done' might seem insignificant, because the distinction between 'what we do' and 'how we do it' is rarely manifested in real practice: 'what we do' is on most occasions synonymous with 'how we do things'. When it comes to 'action' and 'speech', 'what we do or say' and 'how we do or say it' are often indistinguishable. But still, you would not be able to learn the meaning of the word 'walking' from me starting to walk faster, since the term 'faster' pertains to 'how we walk' and not to 'what we do' (which would be 'walking'). The distinction between 'what one does' and 'how one does it' becomes crucial when we are engaged in learning the meaning of words, and when trying to properly distinguish the 'substantive' (the 'what') from the 'adjective' (the 'how') terms. The prescriptive discourse can refer to 'how we do what ought to be done' as well as to 'what ought to be done'. The prescriptive/non-prescriptive distinction seems thus to be limited in terms of its grammatical reference, or is impervious to the grammatical distinction between 'adjectival' and 'substantive' terms. It can thus only have limited value for our present enquiry, which is in fact defined by the distinction between 'adjective' and 'substantive' terms.

237 Bentham, Jeremy, *Principles of the Civil Code*, digitized from volume 1 of the 1843 Bowring edition of Bentham's works.

revolutions of the next day would disturb it. The establishment of equality is a chimera: the only thing which can be done is to diminish inequality."

And an even more stern warning: "But if property were overthrown with the direct intention of establishing equality of fortune, the evil would be irreparable: no more security---no more industry---no more abundance; society would relapse into the savage state from which it has arisen."[238]

"Such is the history of fanaticism"; Bentham associates the overthrow of existing regimes, for the purpose of a 'redistribution' of properties, with political and legislative 'fanaticism'. Equality at all cost, as, "this pretended remedy, so gentle in appearance, would thus be found to be a deadly poison. It is a burning cautery, which would consume every thing till it reached the last principles of life. The sword of the enemy, in its wildest fury, is a thousand times less to be dreaded. It only causes partial evils, which time effaces and which industry repairs." So much for 'equality' as a 'foundational' principle.

And Bentham concludes: "What an apparatus of penal laws would be required, to replace the gentle liberty of choice, and the natural reward of the cares which each one takes for himself? The one half of society would not suffice to govern the other."[239]

[In *Principles of the Civil Code*. Jeremy Bentham. Part 1. *Objects of the Civil Law*. Chapter 12. *Security and Equality---Means of Reconciliation*:]

> "We may observe, that in a nation which prospers by agriculture, manufactures, and commerce, there is a continual progress towards equality... The ages of feudality are not long since passed by, in which the world was divided into two classes---a few great proprietors who were every thing, and a multitude of slaves who were nothing. These lofty pyramids have disappeared or have been lowered, and their debris has been spread abroad: industrious men have formed new establishments, of which the infinite number proves the comparative happiness of modern civilization. Hence we may conclude, that security, by preserving its rank as the supreme principle, indirectly conducts to the establishment of equality; whilst this latter, if taken as the basis of the social arrangement, would destroy security in establishing itself."[240]

So much for 'equality' as the basis of the social arrangement.

BENTHAM'S 'DICTUM'

If the principle of utility has always been considered as a 'sure-fire' prescription, then 'Bentham's dictum' didn't lag far behind (as a prescription of sorts). And hasn't Bentham's somewhat mysterious

[238] Ibid.
[239] Ibid.
[240] Ibid, Ch.12.

'dictum' been associated in the minds of scholars with a 'numerical' or 'quantitative' value? J. S. Mill considered the 'dictum' to function as some kind of an explanation for the principle of utility. I found a version of the dictum in Bentham, which shows that if anything, the idea formulated as what we here call 'Bentham's dictum' was considered by Bentham himself to be part of a description of the limitations of the principle of utility. Whereas it seems that for Mill the 'dictum' had meaning as a 'prescription' of sorts, in Bentham the 'dictum' seems not to be so much a 'dictum' – a prescription – but a warning sign indicating a certain dead-end on the road to happiness (more in the vein of the warnings printed on cigarette boxes). But first we examine the various existing interpretations of what is known as the 'dictum'.

Consulting "*Methods of Ethics*"[241]: Sidgwick discusses Bentham's 'dictum' in the context of the distinction, which Sidgwick deems unnecessary, between the Intuitional and the Utilitarian systems:

> "For though Benevolence would perhaps be more commonly defined as a disposition to promote the Good of one's fellow-creatures, rather than their Happiness (as definitely understood by Utilitarians); still, as the chief element in the common notion of good (besides happiness) is moral good or Virtue, if we can show that the other virtues are---speaking broadly---all qualities conducive to the happiness of the agent himself or of others, it is evident that Benevolence, whether it prompts us to promote the virtue of others or their happiness, will aim directly or indirectly at the Utilitarian end."[242]

Sidgwick explains that, "though Utilitarianism and Common Sense may agree in the proposition that all right action is conducive to the happiness of some one or other, and so far beneficent, still they are irreconcilably divergent on the radical question of the *distribution* of beneficence."[243] And he adds:

> "Here, however, it seems that even fair-minded opponents have scarcely understood the Utilitarian position. They have attacked Bentham's well-known formula, "every man to count for one, nobody for more than one," on the ground that the general happiness will be best attained by inequality in the distribution of each one's services. But so far as it is clear that it will be best attained in this way, Utilitarianism will necessarily prescribe this way of aiming at it; and Bentham's dictum must be understood merely as making the conception of the ultimate end precise---laying down that one person's happiness is to be counted for as much as another's (supposed equal in degree) as an element of the general happiness---not as directly prescribing the rules of conduct by which this end will be best attained. And the reasons why it is, generally speaking, conducive to the general happiness that each individual

[241] Henry Sidgwick, Book IV, chapter III, '*Relation of Utilitarianism to the Morality of Common Sense'*.
[242] Ibid.
[243] Ibid.

should distribute his beneficence in the channels marked out by commonly recognised ties and claims, are tolerably obvious."[244]

THE 'DICTUM' AND 'IMPARTIALITY': SINCE THE 'DICTUM' EMPHASIZES THE NOTION OF IMPARTIALITY, IT ALSO, UNNECESSARILY PERHAPS, BRINGS TO THE FORE THE 'QUANTIFICATIONAL' NOTION OF IMPARTIALITY, THE 'CONTRACTARIAN' NOTION OF IMPARTIALITY.

Kodama[245] writes:

> "This implication, in the first principle of the utilitarian scheme, of perfect impartiality between persons, is regarded by Mr. Herbert Spencer (in his *Social Statics*) as a disproof of the pretensions of utility to be a sufficient guide to right; since (he says) the principle of utility presupposes the anterior principle, that everybody has an equal right to happiness. It may be more correctly described as supposing that equal amounts of happiness are equally desirable, whether felt by the same or by different persons. This, however, is not a presupposition; not a premise needful to support the principle of utility, but the very principle itself; for what is the principle of utility, if it be not that "happiness" and "desirable" are synonymous terms? If there is any anterior principle implied, it can be no other than this, that the truths of arithmetic are applicable to the valuation of happiness, as of all other measurable quantities".

Kodama actually uses a similar argument as a proof of the principle of utility:

> "The only proof capable of being given that an object is visible, is that people actually see it. The only proof that a sound is audible, is that people hear it: and so of the other sources of our experience. In like manner, I apprehend, the sole evidence it is possible to produce that anything is desirable, is that people do actually desire it. If the end which the utilitarian doctrine proposes to itself were not, in theory and in practice, acknowledged to be an end, nothing could ever convince any person that it was so."[246]

P. J. Kelly [in *Impartiality: A Philosophical Perspective*] says: "the ideal of impartiality is not the peculiar prerogative of the contractarian tradition. One important strand of such thinking is the impartial spectator theories deployed by utilitarians but derived from Adam Smith's Theory of the Moral Sentiments." Kelly's comment brings to light the fact that the notion of impartiality seems to be a common link between contractarian theories and utilitarian (typically non-contractarian)

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[244] Ibid.
[245] [http://plaza.umin.ac.jp/~kodama/ethics/wordbook/mill_utilitarianism.html]
[246] Ibid.

theories. Kelly says:

> "The crucial idea, similar to that found in Kant's contractarian universalisability test, is that the moral point of view is the impartial point of view free from immediate passions, private interests and partiality. And, "It should be pointed out that it was not a device adopted by the two most important classical utilitarians, Jeremy Bentham and John Stuart Mill, however it has come to be associated with the utilitarian tradition."[247]

I find this point very revealing as to the nature of Bentham's utilitarianism and its difference from Kant's moral theory. Kant must have assumed, for the purpose of defining the categorial imperative, the existence (and validity) of an objective observer's point of view. In my view, according to Bentham's philosophical method such a point of view is impossible (or in Bentham's language, 'meaningless'). It can be shown that because the constructs and terms of Bentham's method are typically 'logico-semantic' (as distinguished from 'logico-metaphysical'), a notion of the existence of a 'third', 'objective' point of view is impossible, since the only interpersonal or intersubjective terms possible within such a system are derived from the positions of speaker and listener (no third kind of participant in speech available).

> Diana Mertz Hsieh comments on the distinction between moral and legal equality:
> "…Mill's third argument for impartialism, namely the equal moral worth of all persons. Mill cites Bentham's dictum "everybody to count for one, nobody for more than one" as "explanatory commentary" on the principle of utility (Mill 336) … however, there is a difference between the legal and the moral equality of persons. Although all individuals might meet the requirements of legal equality (e.g. reason, free will, self-responsibility, etc.), that indicates little about the proper standard of morality."[248]

Bentham's 'dictum' is being widely referred to in the literature on justice, but its interpretation always hinges on the interpretation of the principle of utility, which many times does no justice to Bentham's definition of the principle. In this sense the 'dictum' can indeed be seen as an explanation of the principle; but since the 'dictum' emphasizes the notion of impartiality, it also, unnecessarily perhaps, brings to the fore the 'quantificational' notion of impartiality, the 'contractarian' notion of impartiality. In this sense the 'dictum' seems to confuse matters more than settle them.

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[247] P. J. Kelly, *Impartiality: A Philosophical Perspective*.

[248] Mertz Hsieh Diana, *The Bias of Impartialism*, Apr 4th, 97, Forum: *Washington University in St Louis, Classical Ethical Theories class*. (more of the discussion of the 'dictum' and the individuation of persons in Essay Three).

BENTHAM'S NOTION OF 'IMPARTIALITY' IS NOT BASED ON THE POINT OF VIEW OF AN 'OBJECTIVE' OBSERVER, BUT ON THE LOGICO-SEMANTIC CONSTRUCT OF SPEAKER AND LISTENER, WHICH DOES NOT ALLOW FOR SUCH AN EXTERNAL THIRD.

The dictum easily becomes a symbol of Bentham theory of justice, because it seems to address the issue of distribution of goods and rights. Since it seems to represent a notion of impartiality possibly understood as 'external' or 'objective' impartiality, a notion that easily translates into equal quantificational distribution, such as contractarians or critics of utilitarianism would adhere to. But the 'secret' seems to be that Bentham's notion of impartiality cannot be understood as grounded in 'externality' – it is not compatible with an 'external', 'objective' point of view, a point of view beyond the two basic participants in discourse (speaker listener, etc.). Since within Bentham's method or system there is no such external third point of view, the dictum must be interpreted in 'internal' or 'subjective' terms – the terms of the point of view of a particular participant in discourse – and for that matter (as the dictum tries to represent), ANY particular participant. The dictum simply expresses the idea that the theory as a whole is based ('internally') within the particular individual as a participant in the intersubjective, in life; a particular participant whose notion of justice is expressed in the modalities of his action, speech and belief (intention), - not in a definition of 'justice' as an external 'substantive' principle. Because the dictum 'tracks back' to the principle of utility (Bentham's version of it) and evokes the notion of 'justice' (again, Bentham's notion of justice), it (the dictum) might be viewed, less as an explanation of the principle of utility, and more as a principle in need of an explanation.

The 'secret', perhaps, to interpreting the dictum is in avoiding the quantificational denotation of the terms 'count' and 'one', and in paying attention to the simple fact that Bentham's notion of 'impartiality' is not based in the point of view of an 'objective' observer, but in the logico-semantic construct of speaker and listener, which does not allow for such an external third.

The problem in interpreting the dictum has an aspect of 'the eye of the beholder'. For example, when Rawls, or Mill, for that matter, set out to interpret Bentham's 'dictum', they bring to their analyses the quantificational terminology and the assumption (which to them is self-evident) that 'impartiality' means (and necessitates) 'the existence of a third, 'objective' point of view, a point of view from which the 'equality' of distribution or 'impartiality' can be judged. The internal, qualitative, quality of 'judgement', which drives Bentham's theory, even in matters seemingly quantitative, seems to escape the attention of Mill, Whewell and Rawls.

The Benthamite notion of impartiality or egalitarianism has little in common with the contractarian notion of impartiality or equality, since it is governed, not by the category of 'substance' but by the categories of modality. To explain this categorial difference further one would have to turn to Ogden's *Bentham's Theory of Fictions*, where one can find some of the relevant

methodological material.

Mill, of course, complicates matters, employing Bentham's dictum in the context of his (Mill's) discourse on social inequalities:

> "The equal claim of everybody to happiness in the estimation of the moralist and the legislator, involves an equal claim to all the means of happiness … All persons are deemed to have a *right* to equality of treatment, except when some recognised social expediency requires the reverse[249]. And hence all social inequalities which have ceased to be considered expedient, assume the character not of simple inexpediency, but of injustice…"[250] (my emphasis).

Mill literally drags Bentham's expression into a field of discourse laden with the terms of 'equal distribution' similar to Rawls's. The whole point of Bentham's theory is, that the assessment of the realm of social justice must come from a principle internal to a person – it is a principle of judgement in its purest form – not an external principle of calculus.

A somewhat similar view of the nature of the misinterpretation of Bentham's method is presented in Warke's *A reconstruction of Classical Utilitarianism*:

> "My next contention regarding Bentham's utility concept concerns his method of resolving conflict between psychological and ethical hedonism — his method of designating right conduct among acts with non-zero extent, affecting agents whose interests conflict due to their differing intensity responses to the relevant pleasures and pains. In my view, Bentham's greatest happiness principle as a means of rank ordering such acts is distinguished by its egalitarian interpersonal weighting rule: "Everybody to tell for one, nobody for more than one." Any different interpersonal weighting rule (as, for example, John Rawls would impose) generates a different ethics."[251]

Warke finds, just as I have, that the problem with many of the interpretations of Bentham's method and theory of justice, whether pertaining to Bentham's dictum or to his definition of the principle of utility, is in the categorial divide (the difference of 'kind') between the method of the critic (such as Rawls') and the method criticized-analyzed-interpreted (Bentham's).

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249 It is significant here that Mill is using the term 'right' in the 'substantive' form: "all persons are deemed to have *a* right" (my emphasis), something Bentham would not have done, since for Bentham the appropriate use of the term 'right' would have been in the 'adjectival' form ('it would be right to do behave in this manner', etc.)

250 Mill, *Utilitarianism*, V.

251 Warke, *A reconstruction of Classical Utilitarianism*, the UCL Bentham Project.

WHAT SEEMS HERE (IN *RATIONAL OF REWARD*[252]) TO BE A REFLECTION OF BENTHAM'S 'DICTUM' SHEDS LIGHT ON THE CONTEXT IN WHICH BENTHAM PRESENTS IT: MORE OF A LIMITATION THAN AN EXPLANATION OF THE PRINCIPLE OF UTILITY

Bentham here approaches, what can called, with some modification, 'Bentham's dictum':

> "True it is, that take any man for example, it may with propriety be said, that the public has a right to his services, has a right to command his services, for that the interest of any one man ought to give way to the interest of all. But if this be true as to any one man who happens to be first taken, equally true is it of any other, and so in succession of every man. On the one hand, then, each man is under an obligation to submit to any burthen that shall be proposed; on the other hand, each man has an equal right to see the burthen imposed, not upon himself, but upon some other. If either of these propositions be taken in their full extent, as much may be said in favour of the one of them as of the other. In this case, if there were no middle course to take, things must rest in status quo, the scale of utility must remain in equilibrio, one man's interest weighing neither more nor less than another's; the burthen would be born by nobody, and the immunity of each would be the destruction of all. But there is a middle course to take, which is, to divide the burthen, and lay it in equal proportion upon every man."[253] (my emphasis)

What is commonly referred to as Bentham's dictum: "every man to count for one, nobody for more than one" has been for generations more an enigma than the explanation of the principle of utility that Mill meant it to be. From the above passage it can be seen how in Bentham the idea of "one man's interest weighing neither more nor less than another's" is, to begin with, made in respect of a man's interest, - an aspect which takes us to the principle of the artificial identity of interests. But more significantly is the context here, in which the expression is presented not as something that ought to be, but as a possible undesirable given situation in which, because of the seeming 'equal' weight of one man's interest versus another's, the burthen of obligation is not met properly – "the burthen would be born by nobody". And it is this impasse that requires the burthen to be divided among the participants – the "middle course" to be taken. The whole discussion takes place under the umbrella of considerations of 'interest' and the influence of reward and punishment on each man's interest and its fulfillment, - such fulfillment always being weighed against other men's interests, including the interest of government.

What is unique to this situation is that the 'burthen' is always individual, and that "there are

[252] Bentham, *Rational of Reward*, beginning p. 193 of volume VII of the Bowring edition 1837 of *Bentham's Works*.
[253] Ibid., p. 207.

many cases in which the individual burthen cannot be divided." Bentham continues:

> "An expedient sometimes practised in these cases, is, instead of distributing the burthen of the office, to lay it on entire upon some one person, according to lot. This prevents the injustice there would be in laying it upon any one by design: but it does not correct the inequality. The mischiefs of partiality and injustice are obviated; but not so the sufferings of him upon whom the unfortunate lot falls. The principle of utility is in this case only partially followed. It is one of those instances in which the principle would seem to have given occasion to a wrong conclusion. According to this principle, it is said that the interest of the minority ought to be sacrificed to that of the majority. The conclusion is just, if it were impossible to avoid a sacrifice; palpably false, if it is. But to charge this as a defect upon the principle itself, is as unreasonable as it would be to maintain that the art of book-keeping is a mischievous art, because entries may be omitted."[254] (my emphasis)

So it becomes quite clear that J. S. Mill's employment of the expression "every man to count for one, nobody for more than one" in *Utilitarianism* is not so much part of his effort to further explain the principle of utility, as it is part of his effort to undermine Bentham's original theory. In the above Bentham shows the requirement that "the scale of utility must remain in equilibrio, one man's interest weighing neither more nor less than another's" to lead to a division of labour, or to "lay it entire upon some one person", and "in this case" the principle of utility to be "only partially followed". In other words, the expression known to us, via Mill, as 'Bentham's dictum', appears in Bentham as part of "one of those instances in which the principle of utility would seem to have given occasion to a wrong conclusion". Is it then a coincidence that this same 'every man to count for one' is employed so coyly by Mill as a pretended explanation of Bentham's principle of utility (as part of what Bentham presents 'censorially', as 'what ought to be') - a misrepresentation to be used by future generations as a valid interpretation of Bentham's principle of utility. Some might argue that presenting a 'non-prescriptive' expression as a 'prescriptive' one would not, in itself, constitute a misrepresentation. I beg to differ: Mill encourages us to think that the 'dictum' is an explanatory comment "written under the principle of utility", making it in effect a 'prescriptive' substitution case for the definition of the principle – we would be expected to view the prescriptive (censorial) meaning of the principle of utility in light of the 'dictum', thus making the 'dictum' part of the operational requirements of the principle when applying it. Even though the 'dictum' is represented in Mill as an 'explanation' (and as such, part of 'analysis' – the non-prescriptive aspect of the principle), Mill's use of the 'dictum' (via the context) posits it as part of the prescriptive-operational side of utilitarianism. We have seen, from Bentham's comments in the *Rational of Rewards* how the so-

[254] Ibid.

called 'dictum' is merely an expression of Bentham's own frustration with the occasions on which the principle of utility cannot be brought full term. It is for Bentham, it seems, a flaw, and as such definitely not a 'prescription'.

> Here is Mill's full wording concerning the 'dictum':
> "Those conditions being supplied, Bentham's dictum, "everybody to count for one, nobody for more than one", might be written under the principle of utility as an explanatory commentary. The equal claim of everybody to happiness in the estimation of the moralist and the legislator, involves an equal claim to all the means of happiness, except in so far as the inevitable conditions of human life, and the general interest, in which that of every individual is included, set limits to the maxim; and those limits ought to be strictly construed."[255]

Mill's words do reflect the limitations which the 'dictum' represents in respect of "the inevitable conditions of human life, and the general interest, in which that of every individual is included," but his wording merely trivializes, what in Bentham is clearly presented as making the choice between the least harmful of two options:

> "if there were no middle course to take, things must rest in status quo, the scale of utility must remain in equilibrio, one man's interest weighing neither more nor less than another's; the burthen would be born by nobody, and the immunity of each would be the destruction of all. But there is a middle course to take, which is, to divide the burthen, and lay it in equal proportion upon every man."[256]

Bentham's discussion of his version of what Mill calls the 'dictum' occurs in the context of Bentham's study of Security versus Equality, and the giving of precedence to Security. Mill in effect turns the tables on Bentham by introducing a somewhat abbreviated formulation of the same idea as 'a dictum', as a means (and a prescription) for achieving Equality: "The equal claim of everybody to happiness..."[257] So much for old friends and contemporaries left to interpret a man's work.

'CONSTRUCTION' OR 'WORLD-MAKING' STARTS HERE:
THIS THEORY OF JUSTICE STARTS WITH THE FORMING OF A READER NOT YET IN EXISTENCE, "THE SPECIES OF READER FOR WHOSE USE IT WAS REALLY DESIGNED...IS THE LEGISLATOR: THE SPECIES OF LEGISLATOR WHO AS YET

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[255] Mill, *Utilitarianism.*
[256] Bentham, *Rational of Reward*, p. 207.
[257] Mill*, Utilitarianism*.

REMAINS TO BE FORMED."[258]

Reading in *Rational of Judicial Evidence*, Bentham introduces a clear goal for his analysis and theory of evidence: the benevolent reader. The goal seems to be not merely that of informing an existing reader on the subject, but taking the necessary discursive steps to actually define and 'produce' the reader, thus making the theory of evidence a means for transforming any reader into that desired reader (and a legislator at that)[259]:

> "Should it happen to this work to have readers, by far the greater part of the number will be composed of those to whom... justice and injustice, truth and falsehood, would be objects of indifference. The class of men for whose use it is really designed, is a class composed as of yet of those, among whom a personal or other private interest, hostile to that of the public, will prevent it, if not from finding readers, from finding other than unwilling and hostile readers... The species of reader for whose use it was really designed, and whose thanks will not be wanting to the author's ashes, is the legislator: the species of legislator who as yet remains to be formed: the legislator, who neither is under the dominion of an interest hostile to that of the public, not is in league with those who are."[260]

Bentham's theory of justice starts its construction not in the talk *about* justice – the kind of discourse which we would normally perceive of as providing the content or 'substance' of the theory – but with the defining and prepping of a new kind of legislator, a legislator who is defined primarily as a new kind of *reader* – a reader who listens not only to 'what is being said' but also to 'how it is being said' – a benevolent reader. The search for, and the midwifery of, a new kind of reader is the origin of Bentham's theory.

THE DISTINCTION BETWEEN 'SUBSTANTIVE' AND 'ADJECTIVE' LAW:
"THE EXCLUSIVE RULES RELATIVE TO EVIDENCE BELONG TO THE ADJECTIVE BRANCH OF THE LAW." (DUMONT[261])

'Evidence' is the means by which juridical justice can be achieved, since without the proper evidence any judge, even the wisest judge would be 'blind' to the circumstances, details, and intent of participants, relating to the case brought before him. It is therefore that Bentham's view of 'juridical

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[258] In Bentham, *Rational of Judicial Evidence*, Published by Hunt & Clark, London, with a preface by J.S. Mill and edited by Dumont, in *Evidence*, Book I, Ch. I, (*On Evidence in General*)

259 The two conceptions, that of becoming the right kind of reader, and that of becoming a legislator, converge here to become one and the same. This convergence or identity proves the claim I made earlier, that in Bentham 'choosing the right method' (becoming the right kind of reader, if you will) and 'doing the right thing' (as in 'justice') are one and the same thing. This point also goes to the transformational nature of Bentham's theory of justice on the personal level: tell me what kind of reader you are, and I'll tell you *who you are.*

[260] Ibid.

[261] Ibid. (*Rational of Judicial Evidence*).

evidence' forms an integral part of his view of justice: "Evidence is a general name given to any fact, in contemplation of its being presented to the cognizance of a judge, in the view of its producing in his mind a persuasion concerning the existence of some other fact; of some fact by which supposing the existence of it established, a *decision* to a certain effect would be called for at his hands."[262] We have seen earlier (especially in Essay One) how much of Bentham's analysis and deliberation on the nature of Procedure Law had to do with Procedure Law being in fact part of the larger category of Adjective Law – the kind of laws meant as contributing to the sustaining of Substantive laws. It seems that the laws governing Juridical Evidence belong also to Adjective Law generally, as they are 'adjectival' by nature. Bentham says: "To give execution and effect throughout to the main, or substantive, branch of the body of the law, is, or ought to be, the main positive end or object of the other branch, viz. the adjective, or that which regulates the system of judicial procedure."[263] The editor (Dumont) directs the reader to page 5 of the text: "The exclusive rules relative to evidence belong to the adjective branch of the law: the effect of them is to frustrate and disappoint the expectations raised by the substantive branch. The maintenance of them has this effect perpetually: the abolition of them, even though by the judicial power, would have no such effect, but the contrary." And Dumont adds (in a footnote on the same page):

> "The terms, *adjective* and *substantive*, applied to law, are intended to mark an important distinction, first pointed out to notice by this author; viz. the distinction between the commands which refer directly to the ultimate ends of the legislator, and the commands which refer to objects which are only the means to those ends. The former are as it were the laws themselves; the latter are the prescriptions for carrying the former into execution[264]. They are, in short, the rules of procedure. The former Mr. Bentham calls the substantive law, the latter the adjective. - E*ditor*."[265]

The distinction between adjective and substantive law is grounded in an analogy to the grammatical distinction between 'adjectival' and 'substantive' nouns. In *The Works of Jeremy Bentham*, Part VII, in the introduction to *Principles of Judicial Procedure*, Bentham writes:

> "By procedure, is meant the course taken for the execution of the laws, viz. for the accomplishment of the will declared by them in each instance. Laws prescribing the course

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[262] Ibid., p. 24.
[263] Ibid.
264 This comment about 'adjective laws' being 'prescriptions' can raise the question whether 'adjective laws' are in themselves 'prescriptive' ('prescriptive' in the 'censorial' sense of 'what ought to be'). I believe that the property 'prescriptive' can be attached to 'adjective law' only in a very limiting sense, - referring to the role of adjective laws as prescribing the manner in which substantive laws are to be executed. Adjective laws cannot be considered as 'prescriptive' otherwise, since they carry no 'prescriptive' power as concerning 'what ought to be executed'. Thence the prescriptive power of 'adjective laws' is limited to their secondary role as to the aims of substantive laws.
[265] Ibid., p. 5.

> of procedure have on a former occasion been characterized by the term adjective laws, in contradistinction to those other laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, substantive laws. For in jurisprudence, the laws termed adjective, can no more exist without the laws termed substantive, than in grammar a noun termed adjective, can present a distinct idea without the help of a noun of the substantive class, conjoined with it."[266]

THE RELATION BETWEEN THE 'MODAL' OR 'ADJECTIVAL' NATURE OF THE TERMS DEFINING JUSTICE AND THE NEW DEFINITION OF 'DEFINITION'.

or THE RELATION BETWEEN 'ADJECTIVE LAW' (AND THE 'ADJECTIVE TERMS' DEFINING 'JUSTICE' AS A TRANSFORMATIVE NOTION) AND HOW THE ADJECTIVE TERMS THEMSELVES UNDERGO A TRANSFORMATION TO BECOME MORE 'SUBSTANTIVE' IN THEIR EMPLOYMENT AS THE TERMS OF A DEFINITION (THE DESIRED DEFINITION OF 'JUSTICE')

If 'justice', as I suspect, is defined in Bentham, not by means of 'genus and differentia' (possibly due to the highly abstracted nature of the concept of justice), and the terms actually available for a proper definition of 'justice' would then have to be terms we usually consider 'non-essential' or 'modal' terms, - if that would be the case, then the 'proximity' of our discussion of the definition of 'justice' in Bentham to the analyses in Bentham of Adjective Law (including Procedure Law and Evidence law, it seems), this proximity or contingency or overlap is not an accident, and I would suggest that we identify the terms of Adjective Law in Bentham with the terms employed for the desired definition of 'justice' in Bentham's work. I suggest we learn to recognize (when it comes to 'justice') the dispositional and modal terms employed to define objects and procedures in Evidence Law, for example, as the terms ('paraphrastic' terms, if you will) to be used in our definition of 'justice', thus letting the nature of the 'terms of definition' shape the kind of definition employed (a definition by 'paraphrasis'). The role and nature of the terms used for the definition of 'justice' might seem 'trivial' or merely 'instrumental' at first, when in fact it marks the transformative nature of the concept of 'justice' at work here. One of my conclusions concerning the notion of 'justice' in Bentham would then be, that the seemingly 'trivial' processes involved in the transition from one form of definition to another, soon enough become an integral part of the definition of 'justice', making 'justice' an engine of transformation by definition.

Bentham, when "stating the dispositions of the English Jurisprudence on the subject of evidence,"[267] is indeed describing 'dispositions' pertaining to laws of evidence. And when we add to this the fact that "evidence is a word of relation" ("it is of the number of those which, in their

[266] *The Works of Jeremy Bentham*, Part VII, in the introduction to *Principles of Judicial Procedure,* p. 6.
[267] Ibid., p. 4.

signification, involve, each of them, a necessary reference to the import expressed by some other"), as Bentham writes when discussing "evidence in general,"[268] we can see how the dispositions discussed are dispositions pertaining to a 'relation' – forming a peculiar grammatical construction of attributing modal properties (dispositions) to modal properties (relation). This raises the question we might encounter in Bentham time and again: is there anything truly 'substantive' about the definitions of 'method' and 'justice' we try to extract from Bentham's work, as the predicational expressions available to us for constructing such definitions are 'modal properties of modal properties' (or 'dispositions of dispositions'). The point I have been making repeatedly throughout the first and second essay has been that this is a 'proof-in-the-pudding' situation as concerns the definition of abstracted entities such as 'justice'. Essentially, one takes terms and properties which normally have little 'substantive' value, and as one employs them in relation to, and in combination with, other seemingly 'non-substantive' terms (such as the dispositions mentioned earlier) and with a definition of justice in mind (a definition pertaining to 'how we do things' and to 'doing the right thing') these very terms and properties become the building blocks of the newly constructed definition of 'justice', and as such, are being transformed in themselves (at least to the extent that we can identify 'use' with 'meaning') into 'substantive' terms.

THE EXISTING SYSTEM IN RELATION TO JUSTICE:

"DISPOSITIONS OF THE ENGLISH JURISPRUDENCE ON THE SUBJECT OF EVIDENCE" AND THE FIRST DISPOSITION IS, "THAT THE SYSTEM, TAKEN IN AGGREGATE, IS REPUGNANT TO THE ENDS OF JUSTICE..."[269]

Bentham states the "dispositions of the English jurisprudence on the subject of evidence". And the first disposition is, "that the system, taken in aggregate, is repugnant to the ends of justice: and that this is true of almost every rule that has ever been laid down on the subject of evidence."[270] (my emphasis) This is a very clear statement implying that the definition of 'justice' must, for Bentham, be accompanied by a corresponding (and appropriate) system of evidence laws. This also means that the definition of 'justice' emerging here will be constructed of laws of evidence and procedure and the dispositional terms defining 'procedure' and 'evidence'. This would mean that 'providing evidence', 'carrying out a law', 'doing the right thing' ('justice'), and 'choosing the right method', amount to the same thing.

If, as Bentham claims, "the system [of evidence law] taken in aggregate is repugnant to the ends of justice," then arriving at a system that is not repugnant to the ends of justice would require a systemic – and thus methodological and fundamental change. One could interpret Bentham's claim

[268] Ibid., p. 19.
[269] Ibid., p. 4.
[270] Ibid., p. 4.

here as using the terms ('repugnant', 'system taken in aggregate', and 'justice') instrumentally or trivially, but I would encourage the reader to treat Bentham's comments here, not as 'instrumental' but as 'constructive'; this description (concerning the systemic failure of evidence laws in England at the time), as generalized as it may be, nonetheless means that only a fundamental restructuring of the rules of evidence, requiring a change of method, could bring about systemic harmony (health). And this is why Bentham's second 'proposition' concerning laws of evidence pertains to 'consistency': "that it [the system] is inconsistent even with itself," and the third proposition pertains to 'history': "that this inconsistency has place, not only as between rule and rule, but as between period and period."[271] (my emphasis) The internal or systemic consistency required is not limited to the system (in aggregate) at any given time (a methodological consistency), but is of historical proportions, - it pitches the rules of evidence formulated during one cultural period against the rules formulated at an earlier or later period, thus forming a consistent body of evidence-law, a body which not only functions beneficially at any given time (when applied to present-day events) but also works to provide a clear historical and methodical view of the subject.

These claims made by Bentham, help us see how the lack of methodological consistency can cause systemic failure in a system as vulnerable as the system of rules of evidence, - vulnerable because the terms (or properties, if you will) by means of which such rules are defined consist almost exclusively of modal and dispositional expressions, and by nature, modal and dispositional properties (terms) are more vulnerable to a change in attitude by the legislator ("the English jurisprudence on the subject of evidence"). Dispositional terms defining laws of evidence would naturally be easily affected by any changes in the dispositions of members of the legislative body and the society they represent.

INTERIM CONCLUSION

As we have seen, earlier in the present essay and in Essay One, 'theory construction' and 'world-making' are closely linked in Bentham. And this is achieved by primarily two strategies: (1) By positing the highly abstracted conception of 'justice' as the subject (grammatically and narratively) the terms of the enquiry cease to function merely in the usual 'instrumental' (or 'trivial') manner, and become 'constructive' (as in 'world-making'). One manifestation of this phenomenon can be seen in Bentham's tendency to test the principles pertaining to justice within the discourse itself, and not in the 'real' world. The reason for this is of course that 'justice' exists in itself primarily on the discursive level (in the realm of speech, - the realm of judgement, the intersubjective) and less so in the world of substantive objects (Bentham would say that it is a fictitious entity). (2) as we have seen in the *Rational of Judicial Evidence* Bentham is concerned with the forming of a kind of reader not yet in

[271] Ibid.

existence: “the species of reader for whose use it was really designed...is the legislator: the species of legislator who as yet remains to be formed.”

The transition from the mere 'instrumental' function of the terms in Bentham's theory to a more 'constructive' role, goes hand in hand with the emphasis on 'adjectival' terms. And as our reading in Bentham progresses we are bound to see how the transition from the 'instrumental' use of the terms to a 'constructive' use, causes (or sometimes it seems, occurs at the same time as) the transformation of the 'adjective' terms used in the study of 'justice' into the terms of a proper definition of 'justice' (the 'adjectival' terms seem to have been transformed into 'quasi-substantive' terms).

We have further seen that, since the adjectival terms employed here to define justice, are primarily modalities of 'speech', 'action' and 'belief', - that these terms can also be used in the definition of 'soul', which strongly suggests that once embarked on a sincere study of 'justice' the benevolent reader will be undersoing a transformation of self, both on account of becoming the newly formed reader sought by Bentham, and on account of the adjectival terms defining the person (soul) of the one conducting the enquiry being transformed as part of the enquiry being conducted.

We have also seen evidence to support the claim that in Bentham the conceptions of 'justice' and 'method' are almost identical, suggesting that 'choosing the right method' and 'doing the right thing' amount to almost the same thing.

I opened this essay with the expression 'to do the right thing', as a typical representation of 'justice', and I will use the same expression as a way of allowing this second essay to segue into the essay on 'right'. - In 'doing the right thing' we use the word 'right' in a manner Bentham would have sanctioned – as an adjectival term - as a modality of 'doing' (a modality of 'action') and not as a term denoting a substance. And this, in a nutshell, will also be the point of the next essay.

END

[Bibliography - see Essay Three]

Arnon Ben-David

Essay Three:

BENTHAM'S CONCEPTION OF 'RIGHT'

My thesis concerning Bentham's view of 'natural rights' is closely linked to the discussions in essays One and Two. The issue of 'natural rights' goes to the 'mode' or 'method' of the inquiry and to the nature of its terms. It also goes to 'what justice is' – the definition of 'justice'. It boils down to the question whether 'natural rights' exist or not, - a question which with Bentham is transformed into the question whether the term 'natural rights' is meaningful or not. Bentham chooses to employ the term 'right' in its adjectival form, for the most part, and limits the 'substantive' employment of the term to 'political rights', thus depriving it of the substantivity we need if we wish to argue that 'natural rights' exist.

My thesis, in this third essay will be, that when viewed using the 'philosophical language' (or 'method') developed by Bentham, the more 'metaphysical' talk about 'rights' and 'natural rights' indeed becomes 'nonsense on stilts'. I will argue that whether we view 'natural rights' as 'real' or as 'nonsense' depends on our understanding of philosophical method. And I will conclude that only within Bentham's 'method' (and in relation to his definition of 'justice') can the term 'right' be used meaningfully. My thesis, therefore, will be that the only 'kind' of theory allowing for a meaningful conversation about 'method', 'justice' and 'rights' is the kind of method exemplified in Bentham's work, and that run-of-the-mill 'metaphysical' and 'epistemological' enquiries fall short of any serious insight into the nature of 'justice' (or 'right', for that matter). In other words, I will argue, that if we truly want a comprehensive philosophical method and definitions of 'justice' and 'right' to be available to us, we need to turn to Bentham. Not Bentham as the prescriber of political solutions, but Bentham as the benevolent philosopher, whose 'method' reveals itself only to the benevolent reader (the one sensitive to the principles of method exemplified in the text itself). The requirement that we change the *way we read* is just another requirement in a series of transformational requirements leading to an understanding of 'method', 'justice', and 'right'.

The more fascinating aspect of the theory of rights to be unearthed in Bentham' is, in my view, the connexion between the conception of 'right' and the conception of 'person'. Some of the contemporary criticisms waged against utilitarianism attack it precisely on its alleged failure to provide a proper individuation of persons. And I hope to show that besides the usual tendency of critics of utilitarianism to bundle up Bentham and Mill's theories as one for their purposes (and erroneously so), the attributing of a neglect of individuation of 'person' to Bentham is mistaken, and reflects badly on the ability of said critics to understand the issues of philosophical method involved.

Just as we have seen the conception of 'justice' being formed in a manner almost identical to

'choosing the right method', in essay Two, so, here, we will see that the conception of 'right' (and of the conception of 'person' connected to it) become meaningful (and useful) when employed within the right mode of enquiry (the right method). Approaching Bentham's theory in metaphysical or even epistemological terms fails to reveal its inner workings, and adds on unusual and unnecessary contradictions. Understanding the conception of 'right', 'law' and even 'principle' in Bentham, depends therefore on the mode of enquiry used. Asking 'how-questions' would take us much further then repeating the 'what' question again and again. It is a theory of meaning after all, "logic as semiotic" as Peirce would say[272], not a logic of existents.

THE DEFINITION OF 'RIGHT':
THE DIFFERENCE BETWEEN 'POLITICAL RIGHT' AND 'NATURAL RIGHT'.

[In *Works*, Vol. III, pp. 217-19, as quoted in *Ogden's Bentham's Theory of Fictions*, p. 119]

> "If I say a man has a right to this coat or this piece of land, meaning a right in the political sense of the word, what I assert is a matter of fact; namely, the existence of the disposition in question as above. ["namely, of a disposition, on the part of those by whom the powers of government are exercised, to cause him to possess...the benefit to which he has a right." (same page, earlier)][273]
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> "If I say a man has a natural right to the coat or the land – all that it can mean, if it mean any thing and mean true, is that I am of opinion he ought to have a political right to it; that by the appropriate services rendered upon occasion to him by the appropriate functionaries of government, he ought to be protected and secured in the use of it..."[274]

Bentham links the confusion resulting from the difficulty to understand the above difference to an imperfection existing in the English language (but not in the French):

> "In the English language, an imperfection, perhaps peculiar to that language, contributes to the keeping up of this confusion. In English, in speaking of a certain man and a certain coat, or a certain piece of land, I may say that it is right he should have this coat or this piece of land. but in this case, beyond doubt, nothing more do I express than my satisfaction at the idea of his having this same coat or land. This imperfection does not extend itself to other languages. Take the French, for instance. A Frenchman will not say, *Il est droit que cet homme ait cet habit*: what he will say is, *Il est juste*[275] *que cet homme ait cet habit. Cet*

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[272] *Logic as Semiotic: The Theory of Signs*, in *Philosophicl Writings of Peirce*, ed. by Justus Buchler, Dover Publications, 1955.
[273] In *Works*, Vol. III, pp. 217-19, as quoted in *Ogden's Bentham's Theory of Fictions*, p. 119
[274] Ibid.
275 In the endnote #350 to I*ntroduction to the Principles of Morals and Legislation,* Bentham goes over the

apparatient de droit a cet homme."[276]

The employment of the word 'right' is justified, according to Bentham, when used in such contexts as 'to do the right thing' where the word 'right' could be substituted with the word 'justice' (or 'just'), just as in the example Bentham provides from the French: *"Il est juste que cet homme ait cet habit."* When we discussed the definition of 'justice' in essay two, we saw that the 'adjectival' use of the various terms of 'justice' is compatible with the adjectival nature of the Bentham's principles of justice and with the principle of utility. We also noticed the connection between the adjectival nature of the terms and the principles of the theory and the need for a new definition of 'definition' (paraphrasis).

The expression 'I have a right' is thus justified when referring to a 'political right', but not when referring to a 'natural right'. Again, the distinction between a political right and a natural right is easy to miss ('misread' would be more appropriate): "If I say a man has a natural right to the coat or to the land – all that it can mean, if it mean anything ...is that I am of opinion he ought to have a political right to it."[277] The claim to having or having acquired or of deserving a natural right is an empty gesture, since it merely (and barely) expresses the fact that the one making the claim (the one making the statement) believes that he or someone else ought to have this or that political right, or that he or someone else believe that a disposition exists by government, on behalf of that person, to grant them certain privileges.

The term 'natural rights' therefore is just a disingenuous way of assigning a political right without the 'matter of fact' context in which statements assigning political rights must usually be made.

Bentham further explains this difficulty to grasp the relation between the terms 'natural right' and 'political right':

> "Now, in the case of alleged natural rights, no such matter of fact has place [the matter of fact the existence of which is being asserted, and which is a disposition, on the part of those

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terms used in various languages for the abstract and the concrete senses of the word 'law': "In Latin, for example there is *lex* for the concrete sense, *jus* for the abstract... in French, *loi* and *droit*... in German, *gesetz* and *recht*. The English is at present destitute of that advantage. In the Anglo-Saxon, besides *lage*, and several other words, for the concrete sense, there was the word *right*, answering to the German *recht*, for the abstract as may be seen in the compound *folc-right*, and in other instances. But the word *right* having long lost this sense, the modern English no longer possesses this advantage." Notice that in the above, "*Il est juste*..." the word 'juste' is used in the French for 'right'. On that occasion the term is used as an adjective, whereas in the said endnote the word "jus" refers in the Latin to 'law', as a substantive term. This etymological coincidence ('Jus' standing in the Latin as a substantive term for 'law' and 'juste' employed in the French as an adjective term for 'right') suggests that the term 'just' can be substituted for the term 'right' in the English, but we must bear in mind the 'substantive' origin of 'jus' in the Latin for the abstract sense of 'law', thus making the substitution of 'just' for 'right' carry with it the connotation of both the substantive use and the abstract sense of 'law'.

[276] Ibid.

[277] Ibid.

by whom the powers of government are exercised, to cause a person to possess the benefit to which he has a right] -nor any matter of fact other than what would have place supposing no such natural right to have place. In this case, no functionaries have place; or if they have, no such disposition on their part, as above, has place: for if it have, it is a case of a political right, and not of a merely natural right. A man is never the better for having such natural right; admit that he has it, his condition is not in any respect different from what it would be if he had it not."[278]

The reader of these lines of Bentham concerning the difference between 'political' and 'natural' right, would be justifiably mystified by the wording of the difference. I believe that trying to describe the difference the way Bentham does it here is cumbersome, since the terms used to define the difference are still the terms of the real social and political environment in which the difference would be manifested.

If we apply the distinction Bentham makes elsewhere, as concerns Law or Grammar, - the distinction between 'substantive law' and 'adjective law', or by analogy, the distinction between 'substantive nouns' and 'adjective nouns', we can see how the difference between 'political rights' and 'natural rights' follows the lines of the distinction between the employment of the term 'right' as a 'substantive' term or an 'adjectival' term: it seems that when we talk about alleged 'natural rights' we tend to use the form 'a right', but when we talk about 'political rights', since such rights are defined by the 'disposition' of 'functionaries' towards the individual person, our use of the term 'right' would also be 'adjectival', in the form Bentham presents in the French: "Il est droit que cet homme ait cet habit" (it would be just or right that this man will have this coat). If we look at things in this manner, we must still notice that Bentham employs the form 'a right' when speaking about 'political' rights, which might give the impression that he treats of 'political rights' in a grammatically 'substantive' way[279].

THE 'PRINCIPLE OF THE ARTIFICIAL IDENTITY OF THE INTERESTS OF GOVERNORS AND GOVERNED' IS THE FRAMEWORK WITHIN WHICH POLITICAL RIGHTS (THE ONLY MEANINGFUL FORM OF RIGHTS) CAN EXIST - "WHEN THE

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[278] Ibid.

279 The fact that 'political rights" when referred to using the 'substantive' form, are in themselves defined by 'dispositional' properties – properties normally not conferring substantivity – gives us a glimpse of how the terms of the enquiry of justice as a whole undergo a transformation: since we employ the dispositional terms in referring to 'right' substantively, this usage of the dispositional terms in a substantive role, brings about a change in the meaning of the terms themselves, thus transforming the originally dispositional terms into substantive terms of sorts. This process or procedure is typical of the transformation the terms used in the definitions of highly abstracted terms such as 'justice', 'method' and 'right' undergo. And this change of the use of terms as a vehicle of the change of the meaning of the terms (to the extent that 'meaning = use') marks the transformational nature of this (and any genuine) theory of justice. You never come out of the study of 'justice' the same as when you entered it. and this is not a figure of speech or a metaphor.

GOVERNED HAVE NO RIGHT, THE GOVERNMENT HAS NO MORE."[280]

Bentham is aware of the role that the term 'natural rights' has in the history of politics, but he stands fast by his assessment that the term has no real place in legislation:

> "It may, however, be said, to deny the existence of these rights which you call imaginary ['natural rights'], is to give a cart blanche to the most outrageous tyranny. The right of a man anterior to all government, and superior as to their authority to every act of government – these are the rampart, and the only rampart, against the tyrannical enterprises of government. Not at all – the shadow of a rampart is not a rampart; a fiction proves nothing; from that which is false you can only go on to that which is false. When the governed have no right, the government has no more. The rights of the governed and the rights of the government spring up together; - the same cause which creates the one creates the other."[281]

The message is clear: the principle of the artificial identity of the interests of governors and governed cannot be maintained when using the term 'natural rights'[282]. And this also means that 'political rights' only exist (can only be meaningful) within the framework of what Bentham calls 'the principle of the artificial identity of interests of governors and the governed.' And this is not a trivial matter, since the construct by means of which both Adam Smith's principle of the natural identity of interests and Bentham's principle of the artificial identity of interests are have been defined, belongs to the logic of language and speech, and not to the logic of existents (metaphysics). It is therefore the case that the simple fact of 'political rights' having meaning or validity only within the framework of the principle of the identity of interests, assigns the study of this subject exclusively to the logico-semantic mode of enquiry. It so turns out that Bentham's comment: "When the governed have no right, the government has no more," leads eventually to the assignment of the proper category (or method) within which our study of 'just' and 'right' could take place. It goes to the kind of theory' it is.

TO HAVE A RIGHT

> "If the coat I have on is mine, I have a right by law to knock down, if I can, any man who by force should attempt to take it from me; and this right is what in any case it can scarcely be

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[280] Ibid.
[281] Ibid.
282 The expression "natural rights" refers to 'rights' which precede the formation of government, and therefore cannot respond to any formulation under the term 'government' – such as the principle of the identity of interests of governors and governed. But since the principle governing 'political rights' – 'government as the identity of interests of governors and governed' – is based on a grammatical-semantic construct, the relation between 'acting' and the 'acted upon' ('speaker' and 'listener'), a relation occurring *naturally* in speech and language, it is in this sense that 'political rights' are grounded in a 'natural' construct – in a construct occurring 'naturally' in the use of language. The conception of 'political rights' can thus be founded on constructs occurring naturally in human speech since the same constructs (grammar generally) are also employed in defining 'politics' and 'government'.

> but that a man looks to when he says, I have a right to a constitution, to such or such an effect – or a right to have the powers of government arranged in such a manner as to place me in such or such a condition in respect of actual right, actually established rights, political rights."[283]

Again we see that what Bentham calls a 'political right' is the right "to have the powers of government arranged in such a manner as to place me [him] in such or such a condition in respect of... actually established rights, political rights."[284] It can be seen that the expression 'having a right' would apply only to political rights, and would mean that one does not have 'a right' in the 'substantive' sense, but that one "has the powers of government arranged in such a manner" as to place him in relation (a condition) to an actual (political) right. The 'having' of a right is thus defined by properties of 'relation', 'place', and as Bentham says, a disposition on the part of government functionaries (another 'dispositional' property). We should only bear in mind that all such 'relational' and 'dispositional' properties are 'adjective' or 'modal' terms.

Since a 'political right' is defined by a disposition – the disposition of governors to cause the governed to possess a benefit to which they have a right – and since a disposition is defined by adjectival terms – by modalities of speech, action and belief (all modal properties grammatically speaking) – one could argue that 'political rights' are defined by modal or accidental properties (grammatically speaking). We have already seen that the terms of 'reputation', 'authority' and 'justice', are modal properties strictly speaking, not 'substantive' or 'essential' properties. Would it be accurate to say that in Bentham the conception of 'right' is best expressed by using 'adjectival' terms, since the modalities of speech, action and belief are essentially all 'adjectival' terms?

We have seen in essay two how in the definition of 'justice' the properties defining 'justice' start out as 'adjective' terms, and acquire in the process the capacity to define 'justice' as a substance of sorts, thereby being transformed (the adjective terms, that is) into quasi-substantive terms. This transformation of the terms defining 'justice' would also take place in the case of the definition of 'right', since 'right' starts out (when understood as 'political right') as a 'disposition' – an adjectival or modal property transformed into a quasi-substantive property defining 'right' as a substance of sorts. Obviously, both 'justice' and 'right' are strange substances, since they are substances whose definitions cannot be arrived at under the aspect of 'substance' (or by what are traditionally referred to as 'differences and genus'), and can be properly defined only by means of the transformation of otherwise 'modal' or 'dispositional' properties into 'essential' ones – a transformation which affects a similar transformation of the enquiry as a whole. In fact, the right way in which to use the term 'right' is as a substitute for the term 'just', such as in our earlier example, the expression 'do the right thing'.

[283] Ibid., p. 120
[284] Ibid.

It might seem strange, that the terms responsible for representing our deepest sense of humanity and divinity – 'justice' and 'righteousness' – cannot be defined under the category of 'substance', but are defined under the categories of modality. And, adding insult to injury, the feat of defining these 'entities' exposes them as purely transformational substances[285], not even 'unities' per se, but 'things made of two' - such as the image of the weighting scale so well conveys ['judgement' or 'justice' is in essence a comparison of two elements (a judgment), an identity, and as such, not a unity]. Things that cannot be defined as unities in themselves, represent, by definition, transformation. Such is 'justice' generally, and such is the principle of utility with its division into the expository and the censorial senses. It is the transition from the expository mode of enquiry to the censorial mode of enquiry that defines the principle of utility - a movement defining a political principle. And so is justice. And 'right' as an adjectival substitute for 'just' is the adjectival form of 'righteousness' or 'virtue'

THE GRAMMAITCAL INTERPRETATION OF 'HAVING A RIGHT'

What does it mean to 'have a right'? 'Right' is a peculiar substance, - in itself a disposition, an attitude more than a thing. What, then, would it mean to 'have rights' or to 'have *a* right'? Obviously our discursive habits contribute to the added use of substantive terms in talking about 'right': we often and instrumentally use the expression 'a right' to refer to what is merely a disposition by a government functionary who has the authority to grant us what is ours – such and such a political right. But since such political rights are defined primarily by these dispositions on our behalf, any such right does not really deserve to be referred to as 'a right' since the 'a' denotes a substantive of sorts. Now to 'have' a right poses an additional problem, since grammatically speaking 'having' means 'having a property', and 'having' is in this sense a name for the combination of grammatical subject and predicate. We normally apply the term 'having' to our ownership of solid objects or goods of various kinds, and we extend this habit to our treatment of 'rights' as something to be owned by us. *And it is precisely this connotation of 'ownership' in the term 'have' that makes it so easy to confuse the grammatical 'having' of 'a right' with the alleged ownership of a right, and its arrogant step-child – the ownership of rights as 'natural'* – the term 'natural' connoting 'original ownership'. It can thus be shown, even summarily, how losing the grammatical meaning of the term 'have' leads unavoidably to whole landscapes of shabby political theory based on the alleged ownership by nature of rights, the rights we have grown accustomed to calling 'natural rights'. Bentham gives his own explanation to why the term 'natural rights is bogus', but I think that this simple grammatical

285 'Transformational substances' – substances defined by their capacity to change as a result of having been posited as the subject of a philosophical enquiry (object of enquiry). This is not as strange as it sounds: as we attend to 'justice', for example, as the object of enquiry, 'justice' itself (our conception of it) is starting to change, - and that is due primarily to the transformation occurring in the terms defining it (the terms themselves transforming from 'modal' terms to 'essential' or 'substantive' terms).

explanation is more comprehensive and of more universal meaning.

We tend not to experience our own discourse on the grammatical or predicational level, at least not consciously. We also normally choose to use the terms of our discourse 'instrumentally' and not 'constructively' [this also has to do with our need to use language 'automatically' (habitually) or 'intuitively', and leave the awareness of the use of language to linguists]. But as we have just seen, the retreat to the grammatical relations between the terms we employ, as we employ them, opens the door to immediate insight to the definition of some of the most abstracted notions of our culture, such as 'right' here. 'Having a right' then becomes meaningful only when 'right' is to be understood as the name for a disposition on our behalf by someone of governmental authority. And any attribution of substantivity to the term 'right' in the form of 'substantive ownership' (the misinterpretation of the grammatical 'have') will fail automatically. The retreat to the grammatical level of significance would work as a 'fail-safe' device, designed to prevent us from attributing substantivity in places where none exists.

MORE ON THE CASE OF NATURAL RIGHTS

[In Ogden's *Bentham's Theory of Fictions*, Part II (*Special problems*), p 118, we find a quote from *Bentham's Works*, Volume III, pp. 217-219, illuminating Bentham's view of 'rights'.]

Bentham simply argues that the word 'right' can be used meaningfully only when employed to convey an obligation. 'Normally' and confusingly, according to Bentham, the word 'right' has been employed with adjectives 'political', 'natural' and 'moral'. But only when the adjunct 'political' is attached to it, does the word 'right' have "any determinate and intelligible meaning" – as denoting an *obligation*.

On the occasion of a 'political' obligation, when it is mentioned as a 'right', the matter of fact asserted is a *disposition* – a disposition on the part of government, to cause the governed "to have the faculty of enjoying, the benefit to which he [the governed] has a right."[286] Having a right is thus a matter of 'a disposition of government to provide (or enable) a service (or capacity) benefiting the governed'.

This also makes the case for 'natural rights' weak, since no agent (such as the government in the case of political rights) to whom such a disposition can be attributed, exists: "In this case [the case of 'natural rights'], no functionaries have place; or if they have, no such disposition on their part, as above, has place."[287]

Bentham argues that "In the English language, an imperfection, perhaps peculiar to that language, contributes to the keeping up of this confusion. – This is "causing men to accede in words

[286] In Ogden's *Bentham's Theory of Fictions*, Part II (*Special problems*), p 118, we find a quote from *Bentham's Works*, Volume III, pp. 217-219, illuminating Bentham's view of 'rights'.
[287] Ibid. (*Bentham's Theory of Fictions*), p. 119.

to positions from which they dissent in judgment." It is peculiar to this circumstance that when political rights are denied, a man retreats to arguing that the rights in question are 'natural rights': "And if he can manage so as to get you to admit the existence of this natural right, he has, under favour of this confusion, the hope of getting you to acknowledge the existence of the correspondent, political right, and your assistance in enabling him to possess it."[288]

Bentham's point goes to the 'logico-semantic' or 'semiotic' construct involved in the conception of 'right' [I use the term 'logico-semantic' to refer to logical constructs responding to the *meaning* of the objects of inquiry, not their existence]: "When the governed have no right, the government has no more. The rights of the governed and the rights of the government spring up together; - the same cause which creates the one creates the other."[289] I call this a 'logico-semantic' construct because it defines the interdependence – relation – of 'governed' and 'government', in a manner analogical to the relation in speech between 'speaker' and 'listener'. For Bentham the constructs regulating or defining the fundamental features of 'government' are typically 'identities of interest' – constructs of 'cooperation between 'acting' (agent) and 'being acted upon' (patient) – such as is the construct defining the 'principle of the artificial identity of interests of governor and governed', - again a construct, defined by dispositional terms, defining a principle of justice.

Bentham's idea of 'right' is thus defined by the relation between the dispositions of 'acting' agent (governor) and patient 'acted upon' – a typically grammatical or predicational construct originating in the dispositions (and modalities) of 'speech', 'action' and 'belief'. This construct emerges both as fundamental in the definition here of 'right' and in the definition of the 'principle of the identity of interests'. In both, the term 'natural', whether as in 'natural rights' or as in the 'principle of the natural identity of interests', seems to add only confusion to the respective definitions, since the political mode preserves the relation between 'agent' and 'patient', while the natural mode provides no such 'dimensionality'; and this is perhaps why the principle of the identity of interests' is presented by Bentham as the 'principle of the *artificial* identity of interests of governor and governed'. The 'political' is the 'artificial' – a product of the give and take of 'speech' – of 'combination' ('predication'). The realm of speech, is, in this sense the realm of the artificial, of 'combination', and so is the 'intersubjective' (the 'public', if you will). And it is within this realm, and employing the terms produced within this realm, that Bentham defines both 'rights' and 'identity of interests', and generally, 'justice'.

It is this necessary adherence to a certain mode of enquiry, under categories of modality and not categories of substance that sets the tone for everything Bentham. G. Postema adds to our understanding of this approach:

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[288] Ibid., p. 121
[289] Ibid.

G. POSTEMA ON BENTHAM or BENTHAM'S CRITIQUE OF NATURAL RIGHTS AS A CRITIQUE OF THE *RHETORIC* OF NATURAL RIGHTS.

G. J. Postema reminds us that Bentham's view of 'natural rights' is not so much a critique of natural rights as it is a critique of the *rhetoric* of natural rights.

> Postema writes (in *Bentham's Utilitarianism*):
>
> "Bentham's critique of natural rights, like his criticism of justice more generally, is at bottom a critique of the rhetoric of rights and justice. In his view, the problem with these important moral notions is that, in moral and political discourse, they are cut off from the one context in which they could be given rational content, namely consideration of community happiness or well being. In less polemical moods, rather than simply rejecting talk of justice and rights, Bentham tended to think of justice as a *species* of overall utility, concerned with especially important resources necessary for the protection and promotion of community welfare, for example, security of action and of means of subsistence and well-being."[290]

And: "However, Bentham's way of making his peace with the rhetoric of rights and justice by assimilating them and by treating them as species of utility leaves Bentham's public philosophy vulnerable to a very common criticism. It has often been argued that utilitarianism fails to take rights or individual persons, seriously"[291].

The distinction between a critique of 'rights' and a critique of the 'rhetoric of rights' marks the real difference between Bentham's philosophical method and that of most other political philosophers - a difference in category. This distinction is also the distinction between 'what we talk about' and 'how we talk about it', which corresponds to the difference between 'substantive' and 'adjective' terms, a grammatical distinction which defines much of Bentham's enquiry, as we have seen in essay one and two. And this distinction between the rhetoric employed in talking about something and the thing talked about also evokes the distinction Bentham makes between fictitious and real entities (and the impossibility of 'talking about nothing'). And of course the relation of all this to the need for a new form of definition – 'paraphrasis', which would allow us to talk sense about fictitious and highly abstracted entities such as 'justice' and 'rights' (and 'method', for that matter).

The additional point mentioned in the above quote from Postema, and which I will discuss later, is the relation of Bentham's utilitarianism to the individuation of 'persons', - a seeming discrepancy ("...that utilitarianism fails to take rights or individual persons, seriously").

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[290] Postema G. J. *Bentham's Utilitarianism*, in *A Guide to Mill's Utilitarianism*, H. R. West, ed., London: Blackwell Publishers, 2006, pp. 26-44.

[291] Ibid.

PLEASURE AND PAIN VIEWED AS DISPOSITIONAL TERMS RATHER THAN PARTICULAR QUALITIES OF EXPERIENCE or "THE ATTITUDE CONCEPTION" OF PLEASURE AND PAIN [POSTEMA].

Postema also raises the question of the character of pleasure and pain as the basic values in Bentham's enquiry:

> "He [Bentham] frequently took great pains to point out the vast diversity of things in the world that people seem to take pleasure in (see Bentham, 1996, Ch. 5-6), and he acknowledged that there may be no single, discrete felt quality common to all of them. Sometimes he embraced a very different conception of pleasure. In an unpublished manuscript he wrote, "I call pleasure every sensation that a man had rather feel none than feel" (Dinwiddy, 2004, p. 27). Bentham suggests here that what is common to all pleasurable experiences is not some discrete, felt quality, but the fact that people like to have them and pains are experiences people would like to avoid. Pleasure, on this view, picks out an attitude of persons towards certain experiences they have – their wanting the experience, and wanting it to continue – rather than any particular discrete quality of the experience."[292]

This 'dispositional' interpretation of 'pleasure' in Bentham is important because we have seen how Bentham's implied conception of 'justice' can be defined by means of 'dispositional' properties or 'adjectival' terms, and not so much by the usual 'substantive' terms. And this again relates to the new definition of 'definition' – paraphrasis – a definition that seems to employ adjectival terms rather than substantive terms.

> And Postema adds:
>
> "Which conception of pleasure and pain did Bentham endorse? Both, I think, but he put the attitude conception in the foreground of his moral theory. He made the respective roles of these two conceptions clear in an unusual discussion in his late work called *Deontology*. The discussion is noteworthy because in it Bentham relies on a distinction between the *quality* and the *quantity* of pleasure, which calls to mind Mill's famous discussion of the quality of pleasure."[293]

THE INFERENTIAL NATURE OF THE ATTITUDE CONCEPTION OF PLEASURE IS COMPATIBLE WITH OUR EARLIER DISCOVERY OF THE INFERENTIAL NATURE OF THE PRINCIPLE OF UTILITY (BY MEANS OF THE ANALOGY BETWEEN THE SYLLOGISTIC AND THE PRINCIPLE OF UTILITY IN ESSAY ONE).

"Pleasure understood in this way [the 'attitude' conception of pleasure as distinguished from the

[292] Ibid., p. 18.
[293] Ibid.

'quale' conception] is more likely to be publicly available. At the same time, it is no longer a matter of immediate experience – it is "inferential" rather than ontologically of the first order, as Bentham thinks of these things." (p. 19, ibid.)

Postema's point here about the attitude conception of pleasure (which Postema argues is being brought to the foreground of Bentham's moral theory) is compatible with the concluding passages of my first essay – the comparison between the syllogistic and the principle of utility, and with the conclusion I drew from that comparison: that the principle of utility functions, not merely as a principle of action (pertaining to or applied to immediate experience), but primarily as a form of inference – a construct (a logical construct at that) which can be applied to any issue or object of enquiry for the purpose of analyzing them, defining them, and transforming them from 'what they are' to 'what they ought to be' (the transition from the expository to the censorial mode). Qualifying the 'attitude' conception of pleasure as 'inferential' highlights the inferential nature of the principle of utility.

"...LED ASTRAY BY THE METAPHYSICS OF INALIENABLE NATURAL RIGHTS" (CRIMMINS)

James E. Crimmins writes (in *Bentham's Philosophical Politics*):

> "Bentham's radicalism was profoundly rooted in a general philosophy in which utility functioned as a connecting link between, on the one hand, his materialist metaphysics with its attendant empiricist epistemology and nominalist science of meaning and, on the other hand, his various prescriptions for improvement over a vast range of social, juristic, political, economic, and religious questions."[294]

I am not sure I agree with the various characterizations Crimmins here throws at Bentham's work – neither 'empiricist epistemology' nor 'nominalist science of meaning' would adequately define, what in Bentham is neither an 'epistemology' nor a 'nominalist science'[295] - but I agree with Crimmins that

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[294] Crimmins, *Bentham's Philosophical Politics*, The Harvard Review of Philosophy, Spring 1993

295 Bentham's work has often been referred to as 'nominalist' by philosophers who have mistaken Bentham's emphasis on 'naming' and the proper definition of the terms of enquiry for a nominalist approach. But as C. K. Ogden has commented (in his introduction to *Bentham theory of Fictions*), it would be a mistake to use the 'nominalist/realist' distinction in reference to Bentham's work, since that distinction is a 'metaphysical' distinction, whereas Bentham's work is a theory of 'meaning'. What Crimmins terms as "a nominalist science of meaning" is simply a perversion of what 'science of meaning' would mean in Bentham. It is also common among scholars to describe his work as an epistemology, and since this is not the place to discuss this issue, it will suffice to say, I hope, that Quine suggested that Bentham's work is neither a 'metaphysics' nor a straight-forward 'epistemology', but a kind of 'conceptual or conceptualized brand of epistemology. This distinction made by Quine, is of course an a-typically clumsy distinction, since it doesn't take much to realize that a theory of meaning doesn't need to be an 'epistemplogy' (nor does it need to be a 'metaphysics', for that matter). [a metaphysical theory is a theory concerned with defining the conditions necessary for things to 'be' or 'exist'; an epistemological theory is a theory dealing with the conditions necessary for us to know things, and a theory of

"what we find in these manuscripts is an analytical methodology which is unequivocally "radical" (in the adjectival sense of that term), and 'the systematic nature of the relationship between Bentham's analytical "methodological radicalism" and his social' legal' economic, and political prescriptions..."[296]

To our subject here, of Bentham's relation to 'natural rights", Crimmins says:

"This essential relationship between philosophy and politics in Bentham's thought is clearly displayed in his distaste for natural law discourse. He attacked the American revolutionaries (and subsequently their French counterparts) not because they were inherently evil, but because they had been led astray by the metaphysics of inalienable natural rights ("fictions" of the political imagination providing a tendentious foundation for a new state). Once exposed as hollow and dangerous rhetoric, utilitarian doctrine demanded that natural rights theory be rejected."[297]

BENTHAM AND THE FRENCH DECLARATION OF RIGHTS. BENTHAM'S *CRITIQUE OF THE DOCTRINE OF INALIENABLE, NATURAL RIGHTS*[298]. [From Jeremy Bentham, *Anarchical Fallacies*, vol. 2 of Bowring (ed.), Works, 1843.]

Bentham here refers to the French Declaration of Rights of 1791. He describes it as "a work of such extreme importance with a view to practice, and which Throughout keeps practice so closely and immediately and professedly in view, a single error may be attended with the most fatal consequences."[299]

This relation between the exposition of what is and the 'view to practice' as 'what ought to be' defines the two senses of the principle of utility, and is applied here, from the start, by Bentham, to his analysis of the French declaration of rights.

Bentham argues that "here, then, is a radical and all pervading error – the attempting to give to a work on such a subject the sanction of government..."[300] And in this Bentham applies the framework of the 'principle of the identity of interests of governors and the governed' to his critique of the declaration of rights (by mentioning the 'sanction of government').

So within the first two passages of his Critique Bentham has introduced the two senses of the principle of utility and the framework of the 'principle of the identity of interests'.

In the third paragraph Bentham introduces the third 'criterion' of his criticism – the

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meaning is a theory attending to the conditions necessary for things to be meaningful. Each of these three kinds of theory operate within (or under) a different category.]

[296] Ibid., p. 3.

[297] Ibid.

[298] Bentham, *Critique of the Doctrine of Inalienable, Natural Rights*, From *Anarchical Fallacies*, vol. 2 of Bowring (ed.), Works, 1843.

[299] Ibid.

[300] Ibid.

preservation of Security (security over equality): “in justifying past insurrections they plant and cultivate a propensity to perpetual insurrection in time future; they sow the seeds of anarchy broadcast: in justifying the demolition of existing authorities, they undermine all future ones, their own consequently in the number.”[301]

For Bentham the ‘assassination of the Prince’, the violent change of regime is nothing but an offense against Security. And when it is being justified by the rhetoric of natural rights, the damage is systemic and longlasting:

> “They imitate in their conduct the author of that labled law, according to which the assassination of the prince upon the throne gave to the assassin a title to succeed him. '*People, behold your rights! If a single article of them be violated, insurrection is not your right only, but the most sacred of your duties*.' Such is the constant language, for such is the professed object of this source and model of all laws – this self-consecrated oracle of all nations... what has been the object, the perpetual and palpable object, of this declaration of pretended rights? To add as much force as possible to these passions, already but too strong.”[302]

“This declaration of pretended rights” by imbuing the erroneous conception of naturally given rights with the appearance of methodological adequacy (or some consistent reasoning) causes the greatest longlasting damage, especially since it operates outside of any relation with government.

And the reason why “the selfish and dissocial passions” are “the great enemies of public peace”[303] is not their representation of 'self-interest' in one of its forms, but because such self-interest is expressed by these 'dissocial passions' outside the framework of the identity of the interests of governors and governed. For Bentham, it seems, self-interest can be a positive force in legislation and in morals only when it is defined and understood in terms of the logic of speaker and listener – the logico-semantic construct on which the identity of interests of governors and governed is founded. You have to participate, generally in the 'intersubjective' realm of speech and action, and particularly in the relation between governors and governed (be part of 'governing and being governed’) in order to count – to have validity politically.

The 'security' aspect of Bentham's political and moral world, is attended to, not by means of the distribution of goods (equal or not) nor by the adherence to direct and pronounced equality of access to resources such as 'law' or 'system'. Security is protected as founded in the logical and semantic (grammatical, if you will) construct of the relation between the interests of governors and the governed, and generally between the alternating roles of interested speakers and benevolent

[301] Ibid.
[302] Ibid.
[303] Ibid.

listeners set like gems in one logico-semantic design. The positions, the roles, the terms, and the laws, of the political in Bentham, are founded in grammatical constructs. And the players in the political realm gain their significance primarily from their positions within an intersubjective realm of speech, action, belief, and, above all, 'responsibility' to one's speech, actions and intentions. There is nothing 'selfish' about this utilitarian brand of self-interest. But to the lay philosopher this system of legislative and moral philosophy may seem 'unruly' – missing a metaphysical or epistemological framework – when in fact the framework is a semantic logic, a semiotics, if you will, governed by the basic tenets of language, an invisible net of rules, terms and method, which normally are treated as 'instrumental' in run-of-the-mill philosophical enquiries (part of the 'form', not part of the 'content'). But to understand Bentham's philosophical method, and his approach to 'justice' and 'rights', it is necessary that we trace this very light footprint that the grammatical and semantic constructs leave behind unassumingly (without us attributing to them any contribution to the 'substance' of any given philosophical method). But in Bentham 'method' becomes subject-matter more often than not, and when our attention is turned to the conceptions of 'right' and 'just' we can see how the terms used in defining 'right' and 'just' are almost the same terms defining 'method' (primarily what Bentham would call 'adjectival' terms).

Few commentators have paid attention to the fact that Bentham's objection to the French Declaration of Rights is based in Bentham not only in his rejection of the rhetoric of 'natural rights', but is formulated as a moral objection: “The logic of this is of a piece with its morality: - a perpetual vein of nonsense, flowing from a perpetual abuse of words.”[304] The connexion of 'morality' to the 'proper use of words' is not a trivial one in Bentham. “A perpetual abuse of words” works at the same level as does the morality of the declaration and its logic. Read again, these few lines make the relation between the linguistic, the semantic, the logical and the moral, abundantly clear (and not in a trivial way). And the logical and methodological connexion between 'the political' and 'the moral' in Bentham's theory of rights in respect of the individuation of 'persons', can be found here as well: since the moral and the political spring from the same logical and semantical source – grammar (or predication, if you will), there is no lack in definition of 'person' here, since clearly, the moral and political person is defined primarily by his participation in speech – 'person' individualized by the capacity to be alternatingly a speaker and a listener (a person participating in the proper use of words).

The 'utilitarian' person is individualized only within an 'intersubjective' realm, a realm producing principles such as the 'principle of the artificial identity of interests of governors and governed'. In this kind of methodological environment, the only manner in which an individual can 'have' a 'right' is in the grammatical form – as the 'having of a property'. 'I have a right' (a 'political

[304] Ibid.

right' at that) means 'I have the property 'right''. And since by definition 'right' (even if we insist upon the validity of 'natural rights' for the sake of argument) is a term of 'relation' or 'disposition' (a term denoting an obligation or authorized privilege of some kind), it is obvious that 'right' can be employed, grammatically speaking, only as an adjectival term – a modal property of sorts – and not as a 'substantive' term (or an 'essential' property, for that matter).

So the 'person' is individuated by his unique position as either speaker or listener in a particular speech situation (there is no way of participating in non-particular speech) coupled with the meaning of his or her speech and action (again an individuating element) – defined by the modalities of particularized speech, action, and intention (disposition). And it is within this intersubjective realm of participation in speech (where non-individuation in respect of 'person' cannot occur in principle) that the political – the political represented as an array of individuated positions in speech, action and belief – acquires (or produces) the moral meaning of both 'person' and 'deed'. The moral thus originates as a highly individuated point of view grounded in the 'internal' conversation associated with moral judgement and 'conscience', only to materialize into the pronounced moral view expressed publicly – vis-a-vis a real listener, a listener who in turn expresses his individualized position on the matter.

It is on this methodological background (which is only implied in Bentham, not fully pronounced) that Article II of the declaration sounds even more problematic: "The end in view of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression."[305] Why would the purpose of a political association be the preservation of the rights of man, if it is the political association that produces the only kind of valid rights – political rights – in the first place? What needs be protected is the political association of man, not any rights allegedly preceding the political realm. The proper use of the terms of the intersubjective and political realm is what needs to be protected, so as to make 'political rights' available to individuals. ["More confusion – more nonsense ...That there are such things as rights anterior to the establishment of governments."[306]]

Typically a 'political right' would be defined by the individuated perspective of a participant in an intersubjectve realm, thus making the definition of such a right and amalgam of the points of view of participating individuals[307] and all other agents within the field, at different positions of

[305] Ibid.
[306] Ibid.
[307] The definition of said political right is never one 'substantive' term or entity, since, as concerns its definition, it always represents the individuated point of view within the logico-semantic construct defining it, and has differences and similarities in comparison to other individuated points of view, not merely similarities or 'communalites' as we are used to in traditional definitions. Once an analogical construct is employed in the comparison between individuated points of view (the only manner of comparison valid in a logico-semantic realm) the 'amalgamated' nature of the conception of 'right' can never settle into a more 'substantive' entity since the terms defining it are adjectival and dispositional by nature and the category under which it can be

proximity to the first participant. When, in these circumstances we then try to assess the validity of judgments made by participants, the perspectives of the individual citizen and of the judge or jurist seem to have overlapping areas. They all are defined – as individuated persons and as political creatures – by their positions within the same field, which is the field of life rationalized by the terms of political participation – the intersubjective. There are no true 'objective' observers in this situation, only participants[308].

THE ROLE OF THE JUDGE, NORMALLY AN 'INSRUMENTAL' ROLE (CARRYING OUT THE LAW, ETC.) BECOMES 'CONSTRUCTIVE' (AND 'DEFINITIVE' AS PER THE DEFINITION OF 'RIGHT') ONCE WE HAVE GIVEN UP THE NONSENSICAL ILLUSION OF 'NATURAL' RIGHTS AND DEAL STRICTLY WITH 'POLITICAL' RIGHTS.

When 'rights' are viewed as 'naturally given', the judge's perspective can merely contribute to the behavior surrounding the right. But when we talk about 'political rights', the judge's perspective becomes a defining factor in 'right', since the relation between 'judge' and 'citizen' (or defendant or litigant) represents the same relation as the relation between 'governors' and the governed and the principle of the identity of interests. The difference between alleged 'natural' rights and 'political' rights is in the nature of the perspectives of the participants involved (in the legal situation), whether defendant, plaintiff or judge. With political rights, since they are defined by the relations of authority and interest within 'governing' ("namely, of a disposition, on the part of those by whom the powers of government are exercised, to cause him to possess...the benefit to which he has a right."[309]) the judge's position is no longer a merely 'instrumental' position – one similar to directing the traffic on a busy street – but his task becomes one of actual 'constructive' power, the power to take part in defining the right in question: the judge, being part of the framework of the 'principle of the artificial identity of interests of governors and governed', and representing the 'judicial' branch of government,

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defined is not 'substance' but 'relation' or 'modality'. [In this respect, the idea of 'political right' is much closer to the idea of 'language game' as described by Wittgenstein in Philosophical Investigations – another occasion of definition based in analogical comparison. The seeming lack of 'substantivity' in 'language-games' as much as in 'political right' rubs metaphysicians and epistemologists the wrong way for no other reason than their own method (mode of enquiry) which is incompatible with either 'language-game' or 'political right' as subject (object of enquiry)].

[308] The absence of the 'objective' observer's position in this realm is, in and of itself a humbling experience, an experience of moral significance. The choice of the right method (mode of enquiry) has led us to the employment of the right constructs and terms, enabling an environment that actually produces 'humility'. This is where the 'semantic' or 'semiotic' logic associated with this method meets, or better said, transforms into, the moral principle of the theory: man can define his relation to a perfected conception justice, but not define 'justice' itself (not when employing the 'substantive' terms he is used to employing for such purposes). One finds himself, therefore, a humble or humbled participant in a primarily intersubjective realm defined by a theory of meaning and its modal and dispositional terms. The moral mindset is being produced here directly by logical and grammatical constructs.

[309] Ibid.

in fact helps define and redefine the rights associated with the cases brought before him, in a way that contributes to the definition of these rights[310], - as these rights are defined, to begin with, by the relation of authority between governors and the governed, or strictly by "a disposition, on the part of those by whom the powers of government are exercised, to cause him [the governed – in this case the litigant] to possess...the benefit to which he has a right."[311] The act of judging actually 'carves out' the definition of each particular political right as it is being discussed in court in association with particular cases. The act of judging and the modalities defining it (the modalities representing the intentions and dispositions of the 'law' and the government) become a live part of 'justice' as an actuality in the making – the transformative process it was meant to be. And the state 'apparatus', of which the judge and the judicial are part, here works in a newly found 'constructive' manner, instead of the usual 'lagging behind the curve' which the courts founded on a notion of 'natural rights' have grown accustomed to do.

It is the acknowledgment of the linguistic inadequacy of the term 'natural rights' that leads to the recognition of the principle of the identity of interests of governors and governed, and to the recognition of the 'constructive' nature of the 'speech', 'action' and 'disposition' of all involved in governing and being governed. This is truly a theory 'of the people, by the people', since the sense of entitlement permeating through it is always tied to a conception of authority founded on the widest range of universal and particular interests, represented at every step, and on all levels of society.

The initial awareness of the necessary linguistic and grammatical adequacy of the terms of justice takes all proceedings in a society as a whole as close as humanly possible to 'doing the right thing' at every level and from any participant's point of view. And 'doing the right thing' is synonymous with 'doing the just thing' (excuse the 'substantive' language).

FORTHCOMINGNESS AND NONFORTHCOMINGNESS OF RIGHTS

In *Principles of Judicial Procedure*, chapter XVIII – *Means of Execution* (the section on Forthcomingness, p. 98) – Bentham writes:

> "In other words, what are the obtainable – and of those obtainable, what the most apt, and thence desirable, pledges for the defendant's compliance with such decree as it is in the contemplation of the judge to issue? Forthcomingness in relation to the fictitious entities termed *rights* – forthcomingness in the physical and proper sense, - actual forthcomingness, cannot have place: not so in the improper, but not the less necessary sense – not so that

[310] The way 'political rights' are defined 'in judging' here must be distinguished from the kind of 'judging' that has produced the large body of disjoined and arbitrary laws (common law) in England – one of Bentham's main targets of criticism. The sense in which the judge helps define 'justice' goes purely to the definition of 'justice', not to the definition of 'law' per se (not producing a precedent as such, but the principle by means of which to judge – contributing to the conception of a principle of principles ('justice').
[311] Ibid.

which may be termed virtual forthcomingness. As to the mode in which forthcomingness with relation to these fictitious, but not the less valuable objects or subject-matters is capable of being employed to effect in the most beneficial manner: these are as follows, - 1. In the case of such as are transferable, - eventually employing the right in the character of matter of satisfaction. 2. In the case of those which are transferable, - employing them as instruments of punishment: for in so far as abstracted, in that character may the matter of good in this as in any other shape be employed. 3. So the employing them in the character of instruments of constraint and restraint."[312]

The first issue that the above text brings to mind is the nature of 'rights' generally - their essentially fictitious nature. We saw earlier that the expression 'natural rights' appeared to have little if no meaning. We must also remember that as meaningful as the term 'rights' can be (especially when used in the context of 'political rights'), still 'right' in itself is a fictitious entity, which makes defining it properly by means of difference and genus impossible, and brings about the necessary shift to a definition by paraphrasis. Perhaps this is why Bentham says that "forthcomingness in the physical and proper sense, - actual forthcomingness, cannot have place..." It can have place (forthcomingness, that is) in the "improper, but not the less necessary sense... that which may be termed virtual forthcomingness."[313] So, at least in this context, the context of the discussion of forthcomingness, 'virtual forthcomingness' would be, according to Bentham, the appropriate term to be used when talking about 'rights' (in the context of our response to any decree issued by the judge).

Bentham talks about three kinds of nonforthcomingness - nonforthcomingness of persons, of persons and things, and of rights: "Nonforthcomingness of rights. In this case, no other cause can nonforthcomingness have, than the nonpossession of that authority by which rights are maintained or annihilated at pleasure. In the case of rights, forthcomingness, then, is a state of things which can never fail to have place – nonforthcomingness, a state of things which never can have place."[314] (my emphasis)

Since only 'political rights' can have meaning, and they derive their meaning (as we have seen earlier) from the authority of a government functionary to provide an individual with access to such rights, then 'forthcomingness' "is a state of things which can never fail to have place" - a state of the possession of that authority by which rights [political rights] are maintained.

'RIGHTS', FIRST, AS 'GRAMMATICAL SUBJECT MATTER', SECOND, AS 'OBJECT OF

[312] P. 98, *The Works of Jeremy Bentham*, Part VII (ed. Bowring) , *Principles of Judicial Procedure*, chapter XVIII – *Means of Execution* (the section on Forthcomingness).
[313] Ibid.
[314] Ibid., p. 99.

ENQUIRY', AND THIRD, AS 'SUBSTANCES' OF SORTS.

In the above Bentham refers to 'rights' as "these fictitious, but not the less valuable objects or subject-matters". Rights, though fictitious entities, are still meaningful terms, and they therefore fulfill the role of 'object of enquiry' and 'subject-matter', or better said 'grammatical subject'. By referring to 'rights' as 'subject-matter' Bentham reminds us that the primary role of 'rights' is a grammatical one, as 'subject'. The secondary role of 'rights' is as 'object' (object of enquiry – again 'that which is the case'). And only thirdly comes the role of 'rights' as 'existents' or 'substances' – as the fictitious entities that they are from a metaphysical point of view. This seemingly reversed order of the categorial affiliation of the term 'rights' – its primary standing in respect of 'meaning', its secondary role as 'object' and thirdly its consideration as 'substance' (fictitious entity) - is typical of other abstracted conceptions such as 'justice' or 'method'. Since such abstracted entities lack in substantivity, and we have to resort to dispositional and modal properties for their definition, our way of 'communicating' with these abstracted entities (and of communicating their meaning to others) is to develop a transformational theory of meaning, a theory which requires that we expect the terms of out enquiry to transform while, and as, we use them. So while we are asking 'what are rights' and how to best use the term 'right', we cannot assume that the answers will be formulated in 'substantive' terms[315].

"IF THE RIGHT BE ON THE PURSUER'S SIDE", "SUPPOSING HIM TO BE IN THE RIGHT", - THE ACTUAL USES OF THE WORD 'RIGHT'.

The expressions 'he is right' and 'the right is on his side' show how a person is 'in the right' when he 'is right'. 'To be right' then would seem to mean that a person not only 'has' the property 'right', but that he also 'is on a certain side' of 'justice' or vis-à-vis a judge. And since the judge represents the general public interest in justice, 'to be right' then also means 'to be on the right side of justice as defined from the public's point of view, as represented by the judge'. It becomes clear, then, that 'to be right' always includes the public's point of view, and that the conception of 'right' could not be defined in terms of what belongs exclusively to the individual.

THE MEANING OF THE TERM 'RIGHT', AND THE DEPENDENCE OF THE DEFINITION OF 'RIGHT' ON THE POINT OF VIEW OF THE 'RIGHTEOUS' (THE 'RIGHT THING DONE' TO YOU OR BY YOU TO OTHERS SERVES AS A STANDARD FOR ALL).

315 Expecting the answer to the question 'what are rights' to be formulated in traditionally 'substantive' terms, would amount to the expectation that 'rights' be entities distinctly separate from 'us' (the ones conducting the enquiry). But the terms of Bentham's enquiry do not allow for such a separation, since the same terms used to define 'right' are the terms defining the one conducting the enquiry. To put this crudely: 'doing the right thing' defines the agent as much as 'the thing done'.

So far, we have seen how less and less emphasis is put on the substantive use of the term 'right' and how its adjectival uses flourish, in Bentham's work. And the occasions where 'right' is employed as 'a right' refer to 'political rights', which depend on the authority of government functionaries to grant the benefit of such rights to the governed. Besides the fact emerging here, that the framework for the adequate and meaningful employment of the term 'right' is the formula of the identity of the interests of governors and the governed, it can also be seen that a multi-dimensionality of perspectives operates when it comes to 'rights', and that these various points of view are mutually dependent: we have the individual person, whose awareness of his or her political right constitutes a personal perspective of what 'right' means. But since 'political right' is by definition something made available by legislative disposition (government authority), it seems that the personal point of view is only part of the definition of right, as the point of view of the government functionary involved is also an integral part of what defines 'political right'. And it is a peculiarity of this primarily 'political' situation that in it, not only 'rights' are defined by a multi-dimensionality of perspectives, but also the participants, whether individual citizens or government functionaries, are being defined in the process. In this realm, the realm of 'political rights', there is no separation from the actual right granted at any point to any of the participants in the scene – there is no immunity from partaking in the 'definition' of 'rights' – a definition constituted merely by the participation of all involved in 'rights'. No wonder, then, that all those seeking a definition of 'rights' in 'substantive' terms are disappointed, since such a definition would require a logical and semantic distancing of the one defining 'right' from 'right' (from the thing defined). But no such distance exists, by definition.

COULD THE PRESERVING OF 'SECURITY' (WHICH TRUMPS THE PRESERVING OF 'EQUALITY') BE CONSIDERED A FORM OF THE PRESERVATION OF 'POLITICAL RIGHTS'? Isn't it the case that the authority of governance – the authority of government functionaries to avail one to one's political right – the same on the occasion of preserving or protecting 'security' as it is on the occasion of preserving one's 'rights'?

"SECURITY... AS THE SUPREME PRINCIPLE INDIRECTLY CONDUCTS TO THE ESTABLISHMENT OF EQUALITY."

Bentham attacks the advocates of 'equality at any cost' or 'equality as a foundational principle' in *Principles of the Civil Code*: "Hence we may conclude, that security, by preserving its rank as the supreme principle, indirectly conducts to the establishment of equality; whilst this latter, if taken as the basis of the social arrangement, would destroy security in establishing itself."[316] (Part 1. *Objects*

[316] Bentham, Jeremy, *Principles of the Civil Code*, digitized from volume 1 of the 1843 Bowring edition of Bentham's works *Principles of the Civil Code*. Jeremy Bentham Part 1. *Objects of the Civil Law*. Chapter 12. *Security and Equality – Means of Reconciliation.*

of the Civil Law. Chapter 12. *Security and Equality – Means of Reconciliation*).

THE PRECEDENCE OF 'SECURITY' OVER 'EQUALITY' HELPS FORMULATE A NOTION OF EQUALITY WHICH DEPENDS ON SECURITY. HOW DOES THIS CONCEPTION OF EQUALITY AFFECT THE CONCEPTION OF 'RIGHT'? Perhaps one could say that, since in this system 'impartiality' is the product of the identity of interests (a relation between the interests of governors and the interests of the governed), the 'right' to participate in such an identity would be a fundamental political right bestowed by the political functionaries (who represent the power of the state), and that in no sense can this 'right' be considered to be 'given naturally' prior to the establishment of 'government'. Since the only rights in this system emanate from the 'principle of the identity of interests' (which is a synonym for 'government'), no meaningful right can there be, which precedes government.

But this argument needs be modified, since the 'principle of the artificial identity of interests of governors and governed' as Bentham words it, was founded on Adam Smith's 'principle of the *natural* identity of interests of governors and governed', which in turn is based on the logico-semantic notion of the relation between 'sensation' and the 'thing sensed', and on the grammatical-semantic notion of the distinction between 'speaker' and 'listener' or 'speaker' and the 'thing said', - which makes the principle of the identity of interests, whether in Bentham or Adam Smith's version a principle grounded in naturally occurring constructs of 'speech', 'action' and 'belief'. And if this is so, then the principle in its 'artificial' and 'natural' form is not in itself a 'contract' between people, but a logico-semantic construct occurring naturally – part of language, action and disposition – and as such gets its 'authority' from grammar and predication and forms of speech, and not from the contractual nature of 'government' and 'governing'. This is a somewhat complicated way of saying that my previous comment, that 'the right to participate in such an identity of interests would be a fundamental political right bestowed by the political functionaries', that this comment is not accurate, to say the least, since the authority 'enabling' political rights – the authority of functionaries, comes from their own participation in the framework governed by the principle of the identity of interests, and that the 'authority of the principle itself comes from a different place altogether: the authority of the principle itself, as the framework enabling the participation of both 'governors' and 'governed', is primarily of a methodological nature – the kind of authority reminiscent of the authority some contribute to the Word of God, the authority of a naturally occurring logico-semantic framework governing all human interaction within a mode of enquiry – the only mode of enquiry compatible with the highly abstracted notions of 'method', 'justice' and 'right'.

So if I want to argue that 'impartiality' within this system is the product of the 'principle of

the identity of interests' I would also have to explain how this impartiality is the product of the choice of the right method (since it could not be attributed to the authority of any of the participants on their own). It might be easier to argue that both the 'principle of the identity of interests' and the 'authority' to participate in the principle have their source in a much simpler and universal framework or conception (but nonetheless, a truly authoritative one). Grammatical or political constructs seem to get their authority from beyond the construct itself, an authority residing beyond the constructs per se, - still 'within reach' or 'affiliated' with the construct, but manifested in a different category. One simple solution is to find the authority to participate in such naturally occurring constructs in the 'mode of enquiry' itself – in the method – since the relation between participants and the mode of enquiry the participants engage in (what defines the framework) exists in different categories: to take the case in hand as an example, if 'governor' would be 'first', and 'the governed' would be 'second', then the 'third' would be the framework itself – the principle.

Perhaps the entitlement to one's political right, within the framework of the principle, can be considered a feature of the framework, and the authority to make one's access to one's political rights possible, also part of the framework; *but the general sense of authority here is founded, not in the political per se, but in the grammatical*. When the political framework takes on (mimics) the features of a basic grammatical construct (the identity of the interests of governors and the governed, which is based on the relation between 'tormentor' and 'sufferer') it becomes too easy to forget that the authority – even the political authority – available does not originate in the political per se.

THE NECESSARY TRANSITION BETWEEN THE NON-PRESCRIPTIVE AND THE PRESCRIPTIVE MODES, AND THE ERROR OF ATTEMPTING TO GIVE A WORK ON RIGHTS THE SANCTION OF GOVERNMENT.

[In *Critique of the doctrine of Inalienable Natural Rights* (from *Anarchical Fallacies*, vol. 2 of Bowring (ed.), *Works*, 1843)] Bentham starts by pointing out that the wider the field of reference of a moral or political theory is, the more pronounced any methodological inexactitudes within its circumference would be ("the more ample the extent given to any proposition or string of propositions, the more difficult it is to keep the import of it confined without deviation, within the bounds of truth and reason."[317]), and "no sooner is the aberration pointed out, than (...) its pretensions to the appellation of truism are gone...". In works of "such extreme importance with a view to practice... a single error may be attended with the most fatal consequences"[318].

Clearly the horizon of practice, as it is related here to theory, evokes the distinction between non-prescriptive and prescriptive modes of discourse. The transition from legislative theory to

[317] Bentham, *Critique of the doctrine of Inalienable Natural Rights* (from *Anarchical Fallacies*, vol. 2 of Bowring (ed.), *Works*, 1843)
[318] Ibid.

practice must necessarily follow the path of the transition from 'understanding what something is' to 'what it ought to be'. We are dealing here with works of political theory which 'throughout keep practice so closely and immediately and professedly in view'. But since (and this is my view[319]) it is by this transformation from the non-prescriptive to the prescriptive mode that 'justice' is defined, - any approach or theory, which do not clearly define the distinction between 'what is understood to be' and 'what ought to be' cannot gather enough kinetic (methodological) energy to lift off the ground. I have voiced my doubts whether Bentham had made this distinction methodologically clear, and I still consider this distinction to be a good measure for the adequacy of theories of justice. In other words, the fact that theories of legislation are normally constructed "with a view to practice" doesn't make the methodological burden of having to properly define the distinction between the non-prescriptive and the prescriptive modes within the theories less necessary. And most theories of justice seem to have failed this methodological test (with the exception of Plato).

As concerns the Declaration of Rights of 1791 (in respect of 'justice') Bentham observes "a radical and all-pervading error - the attempt to give a work on such a subject the sanction of government; especially of such a government -- a government composed of members so numerous, so unequal in talent, as well as discordant in inclinations and affections." Bentham here introduces one criterion of 'justice' - having legislation performed by a single centralizing hand and not by a body made of numerous and discordant views: “Had it been the work of a single hand, and that a private one, and in that character given to the world, every good effect would have been produced by it that could be produced by it when published as the work of government, without any of the bad effects which in case of the smallest error must result from it when given as the work of government."[320]

One criterion of 'justice' then would be legislative theory (with a view to practice) as the projection of one private mind. Would that render Bentham an anti-democrat? Again we must think of this endorsement of the unification of theory within the private realm in terms of the distinction between the prescriptive and the non-prescriptive modes of discourse; is this requirement or criterion - this prescription - part and parcel of our understanding of 'what there is' and the process of 'discovery' it involves, or is the unified private hand a measure applied to the practice of legislation? And again this is not made clear by Bentham, thus producing the doubts about his democratic

[319] The definition of ‘justice’ is only implied (or exemplified) in Bentham’s work, but the transformative nature of ‘justice’ (as discussed in Essay Two) is produced by the transition from ‘non-prescriptive’ to ‘prescriptive’ discourse, a transition which corresponds with the distinction made between two methods - the two distinct modes of enquiry – the logico-semantic (or semiotic) and the logico-metaphysical. It becomes evident that in Bentham the terms ‘right’ and ‘just’ are defined in modal and dispositional terms which derive their meaning from the relation between two modes of enquiry, two modes of discourse. The view expressed is thus mine, but merely brings to the surface the relations and constructs present in Bentham’s theory, but not often mentioned by name.
[320] Ibid.

convictions (since as a means for producing the best theory clearly a single focused mind has the advantage, but in so far as the practice of public legislation is concerned the private mind idea wouldn't do).

THE LEGISLATIVE PROCESS IS SUPPOSED TO BE THE CAUSE OF POLITICAL CHANGE. IT IS NOT THE CASE THAT THE LEGISLATIVE PROCESS IS MEANT TO JUSTIFY THE REVOLUTION.

Bentham objects to this kind of legislative theory initially on the grounds that the revolution that created the recent political regime in France in effect turned the legislative procedure upside-down, employing it as a means for justifying the revolution instead of it (the legislative process) being the cause of political change:

> "The revolution which threw the government into the hands of the penners and adopters of this declaration, having been the effect of insurrection, the grand object evidently is to justify the cause. But by justifying it, they invite it: in justifying past insurrections they plant and cultivate a propensity to perpetual insurrection in time future; they sow the seeds of anarchy broadcast: in justifying the demolition of existing authorities, they undermine all future ones, their own consequently in the number. Shallow and reckless vanity![321]"

Bentham's critique of the rhetoric of natural rights constantly goes to the methodological issues and 'rules of method' violated by it. It thus seems that 'method' slowly takes over the theoretical tasks normally fulfilled by terms such as 'natural rights' and even 'justice': 'doing the right thing' (an adjectival use of the term 'right') has more and more to do with 'choosing the right method'. His objection to the common use of the term 'right' as a 'substantive' noun, is a matter of method, but 'method' not as an 'external' tool (an instrument), but as 'constructive' of the theory of justice – method as 'what the theory is about'.

THE OBJECTION TO THE CONTRACTARIAN LEGISLATIVE DISCOURSE IS FOUNDED IN RULES OF METHOD.

Bentham's objection to the contractarian legislative discourse represented by the Declaration of Rights is grounded in simple rules of method, rules which in his view have been violated here: (1) choosing the wrong idea as a foundational principle ('equality'), (2) the lack of a truly comprehensive legislative procedure, for which a so-called 'democratic' but obviously superficial procedure is to blame (the lack of unity in a plan conceived by too many participants), and (3) the exploiting of the legislative procedure for the purpose of justifying the insurrection, a justification of the cause by

[321] Ibid.

means of the Declaration, thus turning the legislative procedure on its head, rendering it meaningless. And of course, "The logic of it is of a piece with its morality: -- a perpetual vein of nonsense, flowing from a perpetual abuse of words..."[322] (4) on a public or social level (in respect of authority and responsibility) the error has been committed of "attempting to give a work of such a subject the sanction of government"[323]. The sanctioning of ill-founded theories is, of course, also a methodological error with devastating public and private consequences.

And here Bentham, perhaps predicting the future accusations waged against him for allegedly promoting a hedonistic theory of legislation based on selfish individual interests[324], states clearly: "The great enemies of public peace are the selfish and dissocial passions: -- necessary as they are -- the one to the very existence of each individual, the other to his security. On the part of these affections, a deficiency in point of strength is never to be apprehended: all that is to be apprehended in respect of them, is to be apprehended on the side of their excess. Society is held together only by the sacrifices that men can be induced to make of the gratifications they demand: to obtain these sacrifices is the great difficulty, the great task of government."[325] Clearly Bentham's 'hedonism' - a term which has acquired in today's spoken English mostly negative connotations, but has been used with great pleasure (pun intended) by contractarians everywhere in their indiscriminate critique of utilitarianism (indiscriminate because of the lack of distinction between Mill's work and Bentham's) - clearly Bentham's 'hedonism' is a sophisticated brand of hedonism which takes self-interest (as defined by the principle of utility) as a foundation for moral responsibility, benevolence private and public, and public institutional responsibility exerted by the state. When we read the actual texts in which Bentham studies these issues we find ourselves participating in a non-prescriptive philosophical inquiry of logico-semantic (methodological) dimensions. The (prescriptive) calculus of utility, a device that critics of utilitarianism have been using for decades as a way to belittle its philosophical merits, has little presence here.

"What has been the object, the perpetual and palpable object, of this declaration of pretended rights?"[326] asks Bentham, and the answer must not again be, by rote, the obvious but unsatisfactory one: freedom. Freedom, based on a sophisticated notion of justice, a notion totally dependent on the correct philosophical mode of inquiry or method, such freedom cannot be found in the primitive contractarianism of the Declaration of Rights. From Bentham's point of view,

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[322] Ibid.
[323] Ibid.
324 On one hand, Bentham's theory of justice has been criticized for promoting a selfish hedonism, but it has also been criticized for not providing sufficient individuation for 'persons' in respect of rights. Both kinds of criticisms are the result of 'metaphysicalist' readings of Bentham's work, attributing to both 'pleasure' and 'person' (and 'right' for that matter) 'substantive' properties these conceptions rarely have.
[325] Ibid.
[326] Ibid.

> "The logic of it [the declaration] is of a piece with its morality[327]: - a perpetual vein of nonsense, flowing from a perpetual abuse of words, -- words having a variety of meanings, where words with single meanings were equally at hand -- the same words used in a variety of meanings in the same page, -- words used in meanings not their own, where proper words were equally at hand, -- words and propositions of the most unbounded signification, turned loose without any of those exceptions or modifications which are so necessary on every occasion to reduce their import within the compass, not only of right reason, but even of the design in hand, of whatever nature it may be..."[328]

It is here that we see that Bentham's methodology is the methodology of a comprehensive theory of meaning and signification ['words and propositions of the most unbounded signification'] a semantic logic and not a metaphysical one.

I will at this time skip the rest of this text, with the exception of a short quote which has become famous:

> "In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights; -- a reason for wishing that a certain right were established, is not that right -- want is not supply -- hunger is not bread. That which has no existence cannot be destroyed -- that which cannot be destroyed cannot require anything to preserve it from destruction. Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, -- nonsense upon stilts."[329]

"THE LANGUAGE OF REASON AND PLAIN SENSE UPON THE SAME SUBJECT [RIGHTS]"[330] - IS THERE, AFTER ALL, A REAL DISTINCTION BETWEEN 'WHAT RIGHTS ARE' AND 'HOW WE TALK ABOUT RIGHTS'?

I will get back to this text in order to explore Bentham's answer to his own question: "So much for terrorist language. What is the language of reason and plain sense upon the same subject?"[331] Bentham keeps reminding us that his critique of natural rights is not a rejection of natural rights, but a rejection of the rhetoric associated with natural rights – in effect an effort to find out under what circumstances the terms 'natural rights' and 'right' can become meaningful (if at all). We must, nonetheless, remember that when it comes to highly abstracted conceptions such as 'right', the terms we use to talk about them – the 'rhetoric of rights' – and the terms we would use to define 'right' are

[327] Again, the relation between 'logic' and 'morality' – a necessary connection.
[328] Ibid.
[329] Ibid.
[330] Ibid.
[331] Ibid.

often the same terms, - which makes the distinction between 'rights in themselves' and 'the rhetoric of rights' impossible (and unnecessary). We have seen the same thing happen with 'method' and 'justice'.

THE DISTINCTION BETWEEN 'NATURE' AND 'ARTIFICE' IN BENTHAM'S PHILOSOPHY (REPEATING COMMENTS FROM ESSAY ONE) AND ITS RELATION TO BENTHAM'S RELUCTANCE TO USE THE EXPRESSION 'NATURAL RIGHTS'.

Certain relationships and principles are perceived by Bentham as being 'natural' in the sense that they are embedded in our forms of speech. It is for this reason that Bentham accepts Adam Smith's 'principle of the *natural* identity of interests of governors and governed' as valid, and further upgrades it to the 'principle of the *artificial* identity of the interests of governors and governed'[332]. Smith's version (the natural version of the principle) relies on a construct that is primarily a construct of 'speech' and 'action' - the relation between 'the acting' and the 'acted upon', the speaker and the listener, if you will - a construct *naturally* occurring in speech and action (I call it a 'semantic' construct). It is in this sense that Bentham accepts the 'natural' foundation of speech and action constructs that we normally take for granted since they are embedded in our grammar (or embedded 'as grammar') and employed 'instrumentally'. But I believe that he rejects the notion of 'having rights' as grounded in a 'natural' state of life almost for the same reasons, grammatical reasons. As we have seen earlier, it is only when we interpret the expression 'having rights' in the grammatical sense, that it becomes meaningful. But when we interpret the expression metaphysically or 'substantively' - as the possession of 'rights' defined in metaphysical terms - we lose the only valid meaning of the term 'right' - its meaning as a 'political right', a 'disposition' by definition (or strictly a relation to a disposition, or, the capacity to be affected by a disposition of an authoritarian source related to governance).

It is, as we have heard from Postema (and Crimmins), simply a matter of the 'rhetoric' of natural rights (as distinguished from 'natural rights' in themselves) that we have to deal with here.

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332 The term 'artificial' here means 'man-made' in the grammatical sense – a combination of predicate and grammatical subject as occurs in speech. And when this grammatical notion is being translated into the realm of human 'action' and 'disposition', the 'willingness' or 'disposition' to apply the 'principle of the identity of interests' in ways and circumstances beyond its 'natural' occurrence, fulfills the required 'artificiality' – as a 'man-made' act of applying the principle for the betterment of mankind. 'Artificial' therefore means here 'purposefully applied' as a manifestation of the 'philosophy of the will' Bentham talks about at the beginning of the *Introduction to the Principles of Morals and Legislation.* Politics must be also a product of reason and human intention for betterment, not merely a succumbing to the machinations of naturally occurring principles and constructs. And in this sense, a theory of the will must also be a 'constructive' theory of philosophy in which the terms are employed constructively, and not merely in an instrumental manner. It is as if Bentham were telling us that the constructive use of language (as distinguished from instrumental use) is an integral part of 'being human' and 'willing things to be better'. The highest form of 'politics' then is this kind of construction done at the level of the abstracted conceptions 'justice', 'right' and 'method', where even the simplest of terms becomes part of an architectonic.

And it is the misapplication of the term 'natural' – its combination with the term 'right' - that causes the problem. There seems to be a contradiction between 'what rights are in themselves' – the definition of 'right' – and the meaning (in this context of the expression 'having a right') of the term 'natural', since the term 'natural' is employed here to enforce a sense of original ownership of rights, when rights can only 'be had' in the grammatical sense, not in the metaphysical or 'substantive' sense. And since the whole point of the claim for the alleged validity of natural rights evolves around the need to show that one owns a right – purely in the substantive sense – there seems to be no merit to the common employment of the expression 'natural rights'.

THE RIGHTS OF ANIMALS:
RIGHTS WITHHELD FROM ANIMALS BY THE HAND OF TYRANNY. HOW DO WE ESTABLISH THE RIGHT TO HAVE RIGHTS – WHAT ARE THE CRITERIA?

In the *Introduction to the Principles of Morals and Legislation*, in the endnotes (or footnotes in some editions), #330 deals with the case of "*Interests of the inferior animals improperly neglected in legislation*". "What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps the faculty of discourse? And Bentham's answer: "the question is not, Can they *reason*? nor, Can they *talk*? but, can they *suffer*?"[333]

To crack this logico-philosophical puzzle, we only have to look at the term 'interests' in the title ("*interests of the inferior animals*..."), and at the term 'suffer' (in "can they suffer") to see how both terms play a role in the 'principle of the identity of interests': the relation between 'governors' and 'governed', upon which this principle is constructed, is also a relation between 'agent' and 'patient', between 'the one acting' (governor) and 'the one acted upon' (the governed). The example from Aristotle's *De Anima* will clarify this: Aristotle defines a series of faculties of 'soul', beginning with 'nutrition', 'sensation' and ending with 'thought'. The same construct defines all faculties of soul: it is the relation, within 'sensation' for example, between 'sensing' and 'the thing sensed' or 'being sensed' – between agent and patient. And Aristotle says that the 'acting' and the 'acted upon' are the same – they have the same meaning (they both mean 'action') though they are not the same in their essence. The identity here is an identity in respect of 'meaning', not 'essence'[334]. Aristotle would have answered Bentham's question by saying that since with animals, at the level of 'sensation' this relation or construct exists, animals would have 'soul'. Bentham seems to imply the same thing by saying that "the question is not, Can they *reason*? nor, Can they *talk*? but, can they *suffer*?"

At some level, this definition of 'animal' as 'soul' (especially when compared to the

[333] Endnote #330, Bentham, *Introduction to the Principles of Morals and Legislation,*
334 Just as in the definition of 'soul' in Aristotle (as the relation between 'acting' and 'the acted upon') so, with the principle of the identity of interests of governor and the governed, the relation between 'governors' and 'the governed' is an identity of 'meaning', since clearly 'governor' and 'governed' do not have the same essence, but both respond to the term 'government' as their name – a typical identity of meaning.

construct presented so clearly by Aristotle), whether as ‘nutrition’ or ‘sensation’, by means of a logical-semantic construct, allows us to accept animals as having the capacity to ‘have rights’ precisely in the logical- semantic sense of ‘having a right’. Strangely enough, it is at the level of the nature of the intersubjective relations defining ‘speech’, ‘action’ and ‘disposition’ that we find a commonality between animals and persons, - and a shared faith in respect of political rights. We thus learn from animals what it means to have political rights, since despite their more limited capacity for ‘speaking about’ the issues they nonetheless exemplify the logico-semantic relationship defining the intersubjective (the relation between ‘tormentor’ and ‘sufferer’). And it is the capacity we have for ‘speaking about’ things that tends to obstruct our view of the ‘adjectival’ terms defining our most precious possessions – the conceptions of ‘method’, ‘justice’ and ‘right’ (the adjectival terms pertain to ‘how’ we act, and less to ‘what’ we do, thus helping us avoid the talk about ‘what we do’, and allowing us to focus on ‘how we act’, thereby getting us closer to the true meaning of ‘justice’ and ‘right’).

AN IDENTITY IN RESPECT OF MEANING.

The relation between 'tormentor' and 'sufferer' is primarily a semantic relation, such as is the relation between 'a speaker' and 'a listener'. It is perhaps paradoxical that Bentham says on one hand “can they talk?” knowing well that animals do not speak the same way humans do, but at the same time Bentham employs the relation between 'tormentor' and 'sufferer', which is grounded in the grammatical or semantic level – in discourse. A relation also defining 'soul'.

It is peculiar to Bentham, that elements of his theory are compatible with those of Plato and Aristotle, insofar as the relation to forms of speech is concerned. Plato and Aristotle defined the quality of 'soul' or of 'having soul' as a construct based in grammatical and predicational forms, just as they defined their logic and their science. And when we look at their conception of 'soul', we can see its logico-semantic foundation in Aristotle on one hand (the definition of 'soul' in *De Anima*), and its analogy to the definition of 'city-state' in Plato (the definition of 'soul' in Plato's *Republic* – the proportionate divisions of the line). It is therefore revealing that Bentham chooses to describe the offense against the interests of animals in terms of their role in a 'tormentor/sufferer' relationship, the same construct as used by the Greek to define 'soul' and, by analogy, the state. Bentham thus places 'animals' as one faculty of soul – defined at the level of 'sensation', and the intersubjective relationship it entails (the relation of 'tormentor' and 'sufferer'). Since humans are defined by this relation, animals are as well, just on a different level of awareness or 'self-awareness'.

What makes all this possible is the key term 'interests', as in the title, “interests of the inferior animals improperly neglected.”[335] Bentham's foundation for his discussion of the subject is the term

[335] Ibid.

'interests', not 'rights'. And this is for the simple reason that no such rights exist or are meaningful prior to the participants entering into the logico-semantic 'contract' – their participation in speech, or in the intersubjective realm of agent and patient[336].

'SHARING A NAME' AND THE GENERALIZED FORMULA OF FORMULAS.

It is a contract based on the willing participation of essentially unequal forces ('governors' and 'governed') in a formula of identity – an identity of meaning, as both sides respond to the same umbrella term 'government' ('governors' and 'governed' respond to the same name 'government'). And it is for this reason that both in Plato and in Bentham the bulk of the theory (and the text) is dedicated to the scrutiny of the terms, with an emphasis on the terms used as names. It is in the names that the link between 'participant' and the 'conception participated in' takes place, such as the relation between 'participant in the form of Justice' and 'the Form participated in (Justice')' in Plato. This is called in Plato 'sharing a name'. Obviously the concepts I have just discussed here in comparison to the Greek philosophers are not always as clearly defined in Bentham, as they are in Plato and Aristotle (but on the other hand, a clear formulation of the 'principle of the artificial identity of interests of governors and the governed' appears only in Bentham). The definition of these highly generalized formulas defining 'soul' and 'understanding' is not available in Bentham's work, but still, the major principles of his philosophy bear the mark of 'principles of principles', - such as the 'principle of the artificial identity of interests', which captures the general semantic construct (relationship) within 'government', or the 'principle of utility', which, as we have seen in essay one, surprisingly resembles Aristotle's syllogistic and Plato's use of 'proportionate analogy', thus making the principle of utility a generalized formula of formulas (a principle by which to measure other principles – and a formula of inference at that). It can now be clear why in this philosophical environment there is no room for the term 'natural rights' – only for 'political rights' or generally, 'rights'. It can also be understood why 'right' being a fictitious entity has little bearing on the discussion (or the theory) when we use the logico-semantic terminology provided above, since the term 'fictitious' merely registers the 'logico-semantic' quality of 'right' or 'political right' – its lack of 'logico-metaphysical' or what we normally call 'substantive' presence. We might remember that most of this discourse of Bentham deals in 'adjectival' terms.

The beauty of it is, that the formulae suggested in the above by Bentham and by myself (based on my reading of Plato and Aristotle) serve not only as constructs defining 'government' and a less substantive (adjectival, if you will) social contract, but also that these formulae serve as forms of

[336] This also can help us see how 'government' cannot simply be defined as a practical contract between citizens, but must be based on the 'semantic' logic of the relation between 'action' and 'the acted upon' (as in 'governing' and 'the governed'). We see how the relation between 'governors' and 'the governed' precedes all other relations and terms as the foundation of 'justice' and 'rights'. The state and the political rights it makes available are based not in 'law' but in 'grammar'.

inference in themselves, thus acting in real time as judgement machines of sort, clearing out all the theoretical philosophical and legislative weeds we might encounter.

Again, Bentham's seemingly trivial question, posited as the criterion for defending the interests of the inferior animals, "Can they *suffer*?" had proven to be of 'constructive' significance (or 'constructively meaningful').

A COMMENT ABOUT THE TERM 'RIGHT' AND ITS RELATION TO THE TERM 'LAW'.

"A Frenchman will not say, *Il est droit que cet homme ait cet habit*: what he will say is, *Il est juste que cet homme ait cet habit. Cet apparatient de droit a cet homme.*"[337]

In the endnote #350 to I*ntroduction to the Principles of Morals and Legislation,* Bentham goes over the terms used in various languages for the abstract and the concrete senses of the word 'law':

> "In Latin, for example there is *lex* for the concrete sense, *jus* for the abstract... in French, *loi* and *droit*... in German, *gesetz* and *recht*. The English is at present destitute of that advantage. In the Anglo-Saxon, besides *lage*, and several other words, for the concrete sense, there was the word *right*, answering to the German *recht*, for the abstract as may be seen in the compound *folc-right*, and in other instances. But the word *right* having long lost this sense, the modern English no longer possesses this advantage."[338]

Notice that in the above expression "*Il est juste*..." the word 'juste' is used in the French for 'right'. On that occasion the term is used as an adjective, whereas in the above endnote the word "jus" refers in the Latin to 'law', as a substantive term. This etymological coincidence ('Jus' standing in the Latin as a substantive term for 'law' and 'juste' employed in the French as an adjective term for 'right') suggests that the term 'just' can be substituted for the term 'right' in the English, but we must bear in mind the 'substantive' origin of 'jus' in the Latin for the abstract sense of 'law', thus making the substitution of 'just' for 'right' carry with it the connotation of both the substantive use and of the abstract sense of 'law' ('doing the right thing' worded as 'doing the just thing' would then have, to some degree, the added connotation of 'doing the right thing – the right thing in the eyes of the law – from the point of view of the abstracted sense of 'law').

WHAT IS THE RELATIONSHIP BETWEEN THE AUTHORITY OF A GOVERNMENT FUNCTIONARY TO BESTOW A POLITICAL RIGHT ON ONE OF THE 'GOVERNED', AND THE ETYMOLOGICAL CONNEXION BETWEEN THE TERM 'RIGHT' (AS 'RECHT') AND THE TERM 'LAW'. IN WHAT WAY IS THE AUTHORITY TO GRANT A

[337] Ibid.
[338] Ibid.

POLITICAL RIGHT SIMILAR TO THE AUTHORITY BY MEANS OF WHICH LAWS ARE APPLIED OR DEFINED?

It would seem that the authority of the government functionary to make the right due to a citizen available to such a citizen, - that this authority comes directly, not from the functionary himself, but from the position he occupies within the formula – within the 'identity of interests of governor and governed'. 'Having' the 'functional' authority to make political rights available to citizens does not mean that such authority is a property of the governor or functionary without the necessary context of the formula. Such authority is a function of the formula, and in this sense, the formula, or the 'principle of the identity of interests', is 'authoritative' without 'authority' becoming an issue of the direct relation between participants. The way the principle of the identity of interests is designed prevents any 'direct' contact in respect of authority between 'person in a position of power' and 'person subjected to power or imbued with such power' (outside the formula, that is), or in other words: any person 'acting as an authority' (a functionary of government) would be doing so, not as an expression of his or her personal power or authority, but merely as 'functionary' – a medium to the real power of the formula of the identity of interests itself[339]. And as such a formulation taps into the power beyond two unequal participants (governor and governed), it evokes the power on which it, the formula, is founded, the power or significance' of the 'mode of enquiry' beyond any two participants in an enquiry (speaker and listener for example)[340]. If we were to assign to 'governor' the number 'One', and to 'the governed' the number Two, then the number Three would have to be assigned to 'government' or to 'way of governing' - the best method (just as, generally, we would have to assign the number Three to 'mode of enquiry' when First - speaker - and Second - listener - are engaged in a conversation.

The fact that 'authority' comes, in this theory, not from the individual per se, but from the position and role of the individual person in both 'method' and 'government', makes the theory truly comprehensive philosophically, and universal, and prevents the abuse of power by definition (at the level of the definition of authority). This strengthens my earlier conviction that in this system of morals and legislation the main criterion of success is the choosing of the right method. (bear in mind the great similarities in the definitions of 'justice' and 'method').

The participants in Bentham's utilitarian state gain 'power', 'authority', or 'rights' from their respective roles in formulations of morals and legislation that are based in grammatical (logico-semantic) constructs. This helps explain the role of language in Bentham's theory; it is not merely

339 And since the formula represents the power of both participants (whose relationship defines the formula), when such authority is being exercised it represents the governed as much as the governor.

340 The power of the formula is represented in the case in hand primarily by the name 'government', which serves as the name for both 'governors' and 'the governed'. And it is only through this community of the name ('government') that the participation in the formula is possible, and it is only through this 'sharing of a name' that the participants can engage in the political, beyond the mere intersubjective experiences they have in speech and action.

that the linguistic pursuit pushes a semantic agenda, but that the theory is grounded in, and originates in, grammatical-predicational considerations. This is also why this theory is a theory of meaning: it starts with relations of signification at the ground floor of the distinction between 'adjectival' and 'substantive' terms, for example (not with the 'substantivity' of this or that item). And since the 'ground-floor' here is made of principles which can be considered 'principles of principles' or 'formulas of formulas', the principles of the theory reflect this generality and universality (as can be seen in the analysis of the principle of utility as a formula of inference – a formula of formulas – in Essay Two). The authority with which participants in public life are at times imbued by the logic of such an architecture (structures) has thus a universalizing meaning which other, more 'metaphysical' theories of justice do not carry.

THE *AMERICAN DECLARATIONS OF RIGHTS* AS AN EXAMPLE OF AN UNHAPPY OCCASION OF ATTEMPTING TO PREVENT THE MAKING OF BAD LAWS.

Bentham quotes from the 1776 Declaration of Independence: "We hold these truths to be self-evident: that all men are created equal: that they are endued by the creator with certain unalienable rights: that amongst those are life, liberty, and the pursuit of happiness."[341]

The American declarations of rights are, for Bentham, one of those "occasions affording an example of the difficulty as well as the importance" of the science of legislation "considered in respect of its form". Legislators are at present like an architect who cannot distinguish "a side-wall from a ceiling". (part of footnote 355, P. 396, *Introduction to the Principles to Moral and Legislation*, Dolphin Books, 1961 edition).

Bentham briefly quotes from the declaration of rights enacted by the state of North Carolina and from the 1776 Declaration of Independence, to lament "that so rational a cause should be rested upon reasons, so much fitter to beget objections than to remove them... nor is this the first instance in the world, where the conclusion has supported the premises, instead of the premises the conclusion."[342]

The first article in the North Carolina Declaration of Rights says (according to Bentham): "That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety." Bentham finds this wording to be counter-productive if not contradictory:

> "Not to dwell on the oversight of confining to posterity the benefit of the rights thus declared, what follows? That – as against those whom the protection, thus meant to be afforded, includes – every law, or other order, *divesting* a man of the *enjoyment of life or*

[341] Endnote 355, P. 396, *Introduction to the Principles to Moral and Legislation*, Dolphin Books, 1961 edition.
[342] Ibid.

liberty, is void... therefore, as against the persons thus protected, every order, for example to pay money on the score of taxation, or of debt from individual to individual, or otherwise is void: for the effect of it, if complied with, is 'to *deprive* and *divest him*', *pro tanto*, of the enjoyment of liberty, viz. the liberty of paying or not paying as he thinks proper..." (Ibid.)

A COMMENT ABOUT THE DIFFERENCE BETWEEN 'INFERENTIAL ENTITIES' AND 'FICTITIOUS ENTITIES' IN BENTHAM AND HOW THIS DISTINCTION AFFECTS THE DEFINITION OF 'SOUL' ('PERSON'). ***'SOUL' DEFINED AS AN 'UNREAL' ('FICTITIOUS') HUMAN INFERENTIAL ENTITY.***

Earlier I mentioned Aristotle's definition of the various faculties of 'soul' as an example of the employment of the 'action/acted upon' relation in defining 'soul'. But in Bentham the treatment of 'soul' is somewhat different, and how different is not immediately clear.

Bentham defines 'soul' as "a human inferential entity" (and an 'inferential entity' is an entity "Which... is not made known to human beings in general, by the testimony of sense, but of the existence of which the persuasion is produced by reflection – is inferred from a chain of reasoning."[343]).

On the next page, when defining Real Entities, Bentham writes: "Faculties, powers of the mind, dispositions: all these are unreal; all these are but so many fictitious entities."[344] On one hand Bentham defines 'soul' as an 'inferential entity', and on the other hand he defines 'faculties, powers of the mind, dispositions' as 'unreal' or 'fictitious' entities. Is this a contradiction?[345] Aristotle sees the various levels or kinds of 'soul' as Faculties of Soul, beginning with 'nutrition' and 'sensation', and leading to the highest faculty of soul: 'thinking' or 'understanding', or as he describes it, the mind thinking about 'mind'. Earlier we saw the similarity between Bentham's argument for the rights of animals and Aristotle's definition of soul as a series of faculties (as series of faculties each and all defined by the relation between 'action' and 'the acted upon'). Now we see that Bentham defines 'soul' as a human 'inferential entity', but at the same time says that "Faculties, powers of the mind, dispositions", all these are unreal. I guess the way to understand these two separate comments would be *to consider 'soul' as an 'unreal' ('fictitious') human inferential entity*. Bentham says at the beginning of this chapter of the *Theory of Fictions* that, "An entity, whether perceptible or inferential, is either real or fictitious."[346] And this means that 'soul', as the human inferential entity that it is, can also be fictitious.

'Soul' would then be defined, firstly as 'entity': "An entity is a denomination in the import of

[343] *Bentham's Theory of Fictions*, p. 8.
[344] Ibid., 10.
[345] It would be a contradiction if we conceive of 'soul' as a series of faculties.
[346] Ibid.

which every subject matter of discourse, for the designation of which the grammatical part of speech called a noun-substantive is employed may be comprised."[347]

Secondly, 'soul' would be defined as a human inferential entity: "A human inferential entity is the soul considered as existing in a state of separation from the body."[348]

And thirdly, as a possible 'faculty' or 'power of the mind', 'soul' is "unreal", a fictitious entity: "A fictitious entity is an entity to which, though by the grammatical form of the discourse employed in speaking of it, existence be ascribed, yet in truth and reality existence is not meant to be ascribed."[349]

'SOUL', 'PERSON', AND THE QUESTION OF INDIVIDUATION:

If, as we have seen in the discussion of the rights of animals, the relation between 'tormentor' and 'suferrer' (or the 'capacity to suffer') also defines the 'capacity to have rights' (same as 'the right to have rights'), then, *in order to show that individuation takes place in Bentham's theory of rights, all we have to do is show that in his theory 'individual person' is defined by the 'capacity to suffer'* (or 'the capacity to be a suferrer')[350]. And this last claim is almost self-evident in Bentham since 'pains' and 'pleasures' (or happiness and suffering) are the two aspects by means of which individual life is defined in utilitarianism.

"RIGHTS, UTILITARIANISM, AND THE CONFLATION OF PERSONS"[351] – HOW IS BENTHAM'S APPROACH TO 'RIGHTS' VIEWED BY LESLIE MUHOLLAND AND OTHER CONTEMPORARY CRITICS or IS PROPER INDIVIDUATION OF 'PERSON' POSSIBLE IN BENTHAM'S THEORY?

Muholland's aim is "to see whether utilitarianism contains an internal limitation that prevents it from providing a theory of rights."[352] And "the problem for the critics is to explain why utilitarianism fails to provide an adequate moral basis for a theory of rights by virtue of some intrinsic weakness in the logic of its position."[353] In his essay Muholland examines the attempts of Hart, Nozick, and Rawls to demonstrate an internal difficulty in utilitarianism as a theory of rights, and he presents an argument which he thinks "demonstrates that utilitarianism cannot provide the basis for a theory of rights."[354] Muholland argues "*that the utilitarian cannot adequately distinguish between the individual as the*

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[347] Ibid.
[348] Ibid.
[349] Ibid.
350 Referring here to the criticism that Bentham fails to properly define 'person' in the context of his theory of rights.
[351] In Muholland Leslie, Rights, Utilitarianism, and the Conflation of Persons, The Journal of Philosophy, Vo. 83, No. 6 (Jun., 1986), pp.323-340.
[352] Ibid.
[353] Ibid.
[354] Ibid.

subject of pleasures and pains and the individual as the subject of (i. e., the subject capable of exercising) judgment in conflicts concerning rights."[355] (my emphasis)

If, as we have seen in the discussion of the rights of animals, the relation between 'tormentor' and 'sufferer' (or the 'capacity to suffer') also defines the 'capacity to have rights' (same as the 'right to have rights'), then, in order to show that (sufficient) individuation takes place in Benhtam's theory of rights, all we have to do is show that in his theory 'individual person' is defined by the 'capacity to suffer' (or 'the capacity to be a sufferer'). And this last claim is almost self-evident in Bentham, since 'pains' and 'pleasures' (or happiness and suffering) are the two 'positions' by means of which individual life is defined in utilitarianism. It would thus be easy to show that Bentham's theory of rights provides for individuation of persons, and this can be shown even without any reference to the semantic nature of the terms and constructs involved. But it is after all the relation between 'tormentor' and 'sufferer' that puts us on track in solving this puzzle.

'INDIVIDUATION OF PERSON' POSES THE SAME CHALLENGE AS THE PROBLEM OF DEFINING THE 'INDIVIDUAL DIFFERENCE' ADDRESSED BY DUNS SCOTUS IN 1306.

The problem with the discussion of 'individuation' in Muholland (and in the respective studies of Rawls, Nozick and Hart) seems to be, not the subject matter (individuation) but the mode of enquiry (the philosophical method). It is strangely familiar to see these four metaphysicians of political thought struggling to define the 'individual difference' (excuse the mediaeval terminology) by means of 'existence' and 'number', and using those same terms to evaluate Bentham's theory of rights as inadequate (due to what they perceive to be a lack of a proper notion of individuation). But the proof is in the pudding, as any careful reader of Duns Scotus would know: the individual difference cannot be properly defined by number or by the terms of existence (quantificational terms) or by matter. The individuating difference in Scotus, considered under Porphyry's notion of difference, seems to be an entity intrinsic to the species, and not a separate entity, metaphysically speaking. It only appears to be a distinct entity insofar as it is considered under the aspect of predicability. In other words, the 'individual difference' can be distinguished 'formally', by means of the terms of predication, not 'metaphysically' by means of the terms of being. This is hard to grasp, since the 'individuating difference' according to Scotus, is a positive entity, a 'this'. But the distinction allowing us to define that individuating difference in itself would have to be a formal distinction, not a metaphysical one.

How is this relevant to the criticisms concerning proper individuation of persons in Bentham's theory? It allows us to see how the critics' approach to 'rights' and 'individuation of persons' employs a metaphysical terminology, while in Bentham the terms defining 'right' and

[355] Ibid., p. 324.

'person' (not always spelled out, but implied) are logical-semantic terms, and the distinction defining the individuating difference – a formal distinction based in predication, not in terms of essence. We have already seen how 'right' is defined in Bentham by means of dispositional and modal terms, terms which are typical of both modern theories of meaning and of mediaeval theories of meaning and signification such as Scotus'.

THE INDIVIDUAL DIFFERENCE IS MOLDED WITHIN THE LOGICO-SEMANTIC REALM or HOW TO APPLY THE LESSONS FROM DUNS SCOTUS' CONCEPTION OF THE INDIVIDUAL DIFFERENCE TO THE NOTION OF INDIVIDUATION OF 'PERSONS' IN BENTHAM

Mulholland writes:

> "Recently, discussion of the problem of human rights has centered on the conflict between the claim that certain individual rights should be protected regardless of expediency and the principle that individual rights of any sort may be overriden by the demand to further the gretest happiness of the greatest number. Largely at issue is the moral position that each theory assigns to the individual."[356]

The manner in which the issue of individuation of person enters the discussion in contemporary philosophy seems to be defined by the need to place the idea of human rights (and rights generally) within a theory of justice. The claims made on both sides evolve around the practicability or applicability of rights within a theory of morals and legislation. What, in my view, is the 'blind spot' the participants in this debate suffer from, is the question I have raised in the present paper from the beginning: are 'rights', as presented in contemporary philosophy in a somewhat crude 'metaphysical' garb, what Bentham means when he talks about 'rights'? And so far the evidence I have collected shows, I believe, that the talk of 'natural rights' is indeed 'nonesense on stilts' and that 'political rights' have a real position in a theory of justice once we allow for the adjectival use of the term 'right' and once we have realized that the abstracted conception of 'justice' associated with the term 'right' is defined by modal and dispositional terms.

Mulholland and the contemorary scholars he introduces on the subject of "rights, utilitarianism, and the conflation of persons" start their respective enquiries from the assumption that 'rights', whether 'natural' or not, are a sort of 'metaphysical' or 'epistemological' given – existents of some kind. But the term central to these discussions, the term 'right' is not being defined properly. The definition of 'right' is hastily bypassed by Mulholland here, in order to get to the 'real' issue: whether proper individuation takes place in utilitarian theories of 'human rights'. But the truth is, that

[356] Ibid., p. 323.

the debate presented by Mulholland is based to begin with on discrepancies and contradictions produced precisely by this hasty 'run on the bank' of traditional philosophical ideas' – this bypassing of a real definition of 'right'. This is to begin with a non-issue, especially if you read Bentham carefully. It also dosen't help that in such critiques of utilitarianism, the works of Bentham and other utilitarians such as J. S. Mill, are bundled together, as if they comprised one theory. In respect of philosophical method (and mode of enquiry) they are very different (categorially different).

I am using Mulholland's argument here as a foil to help bring out the similarity in the method of individuation implied in Bentham (based on his approach to the conception of 'rights') and another great philosopher's method of individuation – Duns Scotus. The comparison between the two theories, on this subject, helps emphasize the unique nature of Bentham's method, and for our purpose here, helps show the methodological continuity between Bentam's conception of 'rights' and the 'individuation of persons' at work in his theory.

In a manner perhaps similar to Bentham's, Duns Scotus, by making the distinction between the logical and the metaphysical in effect produced a new kind of philosophical category or method – a semantic logic, a semiotics if you will, quite similar in some of its features to Bentham's manner of doing philosophy. And not surprisingly, they both offer a refreshing approach to the question of the individuation of persons.

DUNS SCOTUS' IDEA OF INDIVIDUATION AND HOW IT CAN BE OF USE HERE IN THE DISCUSSION OF THE ADEQUACY OF BENTHAM'S THEORY OF RIGHTS.

Duns Scotus's six questions and answers[357] (a summary):

[1. Is a material substance individual or singular from itself - that is, from its nature?]

Reply: a material substance from its nature is *not* of itself a this.

[2. Is a material substance of itself individual through something positive intrinsic to it?]

Reply: it is necessary through something positive intrinsic to this stone, as through a proper reason, that it be incompatible with the stone for it to be divided into subjective parts.

[3. Is a material substance individual, or the reason for individuating something else, through actual existence?]

Reply: actual existence is posterior to the whole categorial hierarchy. It distinguishes ultimately but by a distinction outside the categorial hierarchy.

[4. Is a material substance individual or singular through quantity?]

Reply: it is impossible for substance to be individual through some accident.

[357] This summary of the 'questions' is based on, Duns Scotus, *Six questions on Individuation*, from his *Ordinatio*, in *Five Texts on the Mediaeval Problem of Universals* (translated and edited by Spade), Hackett 1994.

[5. Is a material substance a 'this' and individual through matter?]
Reply: Aristotle - the soul is the primary substance. Since matter belongs to the essence of the composite substance - it cannot be the essence of the form. - Matter is not the reason for individuation.
[6. Is a material substance individual through some entity that by itself determines the nature of singularity?]
Reply: yes.

It seems that the path to proving the adequacy of the conception of person in Bentham's theory of rights passes through Duns Scotus' definition of the individual difference, since this kind of definition is compatible with Bentham's method (mode of enquiry) – a brilliant precursor to Bentham's logico-semantic method.

This also leads to distinguishing Bentham's philosophical method from the rest (in this case, Rawls, Nozick Hart and Muholland) with one stroke of the analytical brush. And with this the dialectic reasoning of the present three essays seem to come to a close. We began with Bentham's method and the features distinguishing it, and we end with Bentham's method (as) in itself a distinguishing property of his theory of rights and his work as a whole (using the kind of method it is to prove the adequacy of his sense of individuated 'person' and of his theory of rights as a whole).

The two facets of Bentham's utilitarianism – the principle of the identity of interests and the distinction between the expository and the censorial modes – these two aspects are integrally related to the idea of 'individual person' implied in Bentham, and to the conception of 'rights' it employs.

It would seem that the relations an individual maintains within the realm of speech (and the grammatical-predicational constructs governing it) in effect are what define the individual (and the 'individuating difference') in the first place. And it is only within this realm and the relations it prescribes that we 'can have rights' at all. In any other context or realm (or mode of enquiry, for that matter) the question and the answer would remain meaningless.

THE DIFFERENCE BETWEEN PERSONS HAS, IN ITSELF, ONLY A FORMAL CONTENT

1. The individuating difference (if it indeed is a positive 'thisness' as Duns Scotus defines it) only has, for itself, a formal content. Being that positive thing which makes the individual individual, also means that this 'thing' has no 'content' of its own, beyond it being that which differentiates other things and makes them into 'individuals'. The individuating 'thisness' would therefore have only a *formal* content. Applying this observation to the present discussion of the individuating of 'persons' as part of a theory of rights, might suggest that the individuating of persons within Bentham's theory also relies on an element which in itself has only formal content, as would be expected in a theory of meaning such as Bentham's. The employment of 'adjectival' terms in the defining of 'rights' in

Bentham, instead of 'substantive' terms, also would suggest that whatever term is used to distinguish one person from another in respect of 'rights' would have no 'substantive' content of its own, only a formal content – defined by 'adjectival' terms.

SINCE THE DIFFERENCE BETWEEN PERSONS (THE 'INDIVIDUATING DIFFERENCE') DOES NOT HAVE IN ITSELF A SUPERIOR GENUS, WE MIGHT BE ABLE STILL TO DEFINE IT BY MEANS OF PARAPHRASIS.

2. A second point concerning the individuating difference is, that a definition of such an individuating difference, if indeed it is purely 'being' – a 'thisness' devoid of any substantive particular content beyond its formal role – a definition of that which differentiates one person from another, for example - such a definition would not be constructed of genus and differentiam, since 'thisness' transcends all genera ['Being' in its widest sense thus includes that which has extramental being and that which has intramental being, and it transcends all genera]. Applying this to the present problem, one could say that defining the element or term which is responsible for differentiation between persons in Bentham's theory of rights, could not make use of genus, since the differentiating element may not have a superior genera (such as 'pure being' does not have it). And this again might have something to do with Bentham replacing the traditional form of definition by difference and genus with definition by paraphrasis. When using paraphrasis, then, to define the individuating difference at work in Bentham's theory of rights, we can bypass the need to use genus and differentia, and we can still arrive at a proper definition of the individuating difference.

Bentham's theory of rights seems, then, to support his new definition of 'definition' (paraphrasis), at the same time that it supports an individuating difference for 'person' – a difference which in itself has only a 'formal content', a fact that again supports the definition by paraphrasis (a definition employing 'adjectival' terms – terms, which in themselves have no 'substantive' content).

THE ROLE OF ANALOGY:

THE ANALOGY OF INEQUALITY NECESSITATES A FURTHER ELABORATION SINCE THE METAPHYSICIAN WOULD CONSIDER THE ANALOGY TO BE OF AN EQUIVOCAL KIND, AND THE LOGICIAN WOULD CONSIDER THE ANALOGY TO BE OF AN UNIVOCAL KIND: THE LOGICIAN WOULD CONSIDER THE INTENTION OF THE NAMES, THE METAPHYSICIAN THE NATURE OF THE THING NAMED. Or WHY ONLY THE RIGHT KIND OF METHOD MAKES THE CONCEPTION (AND DEFINITION) OF 'RIGHT' AVAILABLE.

Scotus attributes the "thisness" of an object to the proportional unity the object acquires from the nature according to the primary entity the nature possesses in the intellect. It is the idea that the unity of the true being in the intellect and the unity of the true real extramental being are analogous. It is

an analogy of inequality, which necessitates further elaboration since the metaphysician would consider the analogy to be of an equivocal kind, and the logician would consider the analogy to be of a univocal kind.

In *The Logic of Analogy*[358], Ralph McInerny defines 'analogy of inequality' as follows: The term "body" is common to celestial and terrestrial bodies and the notion signified by the name is the same unless applied to either insofar as they are bodies. Things named in this way are said, by the logician, to be named univocally, although the philosopher would say they are named equivocally. The reason for the disagreement is that the former considers the intention of the names, the latter considers natures. Would it then be fair to say that Muholland, Nozick and Rawls, the metaphysicians that they are, when talking about the individuating of 'persons' within a theory of rights, refer to the nature of the things named, while the 'logician' or 'linguist', in this case Bentham, might be referring to the intention of the names?

Perhaps the wording here is not as clear as it could be, but the general point is that the metaphysician and the semanticist (or 'logician') have different points of view, and different methods at work. And it is this methodological distinction that makes the distinction of 'individual person' available to Bentham, but evades the spectrum of attention (and the terminology) of the metaphysician. It is this methodological divide that provides Bentham with a valid conception of 'person', while the metaphysicians observing his theory from the sidelines fail to see it at all. In philosophy, 'seeing' or 'noticing' something is always a function of one's mode of enquiry (method). You snooze you lose; - if you are not using the right method (mode of enquiry) the subject-matter (the object of enquiry) – in this case, the conception of 'person' – appears not to exist at all (or is merely a shadow of its 'semantic' or 'semiotic' self).

MUHOLLAND'S ARGUMENT

On page 336 of his essay Muholland presents his argument in summary:

> "The point I am arguing is that a system of rights has features that are governed by rules which cannot be determined by utilitarian considerations. Nevertheless, these rules must override utilitarian considerations, for they are required by the concept of such a system. They are the constitutive elements of any system of rights whether it furthers the greatest happiness of all or not."[359]

To me, this statement appears to be based on the 'metaphysicalized' utilitarianism of Mill, which

[358] P. 4, in, McInerny Ralph M., *The logic of Analogy*, University Of Notre Dame, Martinus Nijhoff, 1961.

[359] P. 336, in Muholland Leslie, *Rights, Utilitarianism, and the Conflation of Persons*, The Journal of Philosophy, Vo. 83, No. 6 (Jun., 1986), pp.323-340.

Rawls, for example, confounds with Bentham's utilitarianism. The idea of utility, which allegedly is not fully compatible with a theory of rights, does not come from Bentham. This of course depends on how one defines 'rights' and on how one defines 'utility'. One thing I can state with certainty: neither Mill's nor Rawls' conceptions of 'utility' and 'rights' are compatible with Bentham's'.

Muholland's further says: "the utilitarian, however, does not adequately attend to the point that a system of rights requires more than rules determining special advantages and the coercive forces to ensure that the population generally adheres to them."[360] The problem is of course that Muholland here represents Mill's conception of rights, not Bentham's, and he even paraphrases Mill's position: "Rights for the utilitarian are special advantages which individuals have by virtue of the fact that society deems it necessary to protect those advantages by force."[361] And, "Mill's utilitarianism allows for the separateness of persons so long as persons are considered as the natural subjects of sensory states. However, the utilitarian is compelled in his treatment of rights to emphasize the problem of rights only from the perspective of rules for the expedient protection of individuals and their property."[362]

This 'brand' of utility clearly has nothing to do with Bentham's conception of utility as defined by its two 'senses', the 'expository' sense and the 'censorial' sense: "principles of utility two" as Bentham puts it, and everything methodological emerging there from[363].

R. J. VINCENT'S TAKE ON NATURAL RIGHTS, INCLUDING BRIEF DESCRIPTIONS OF THE APPROACH OF HART, NOZICK AND RAWLS TO THE SAME.

In R. J. Vincent's *Human rights and International Relations*[364], I was hoping to find a representation of some of the leading contemporary views on 'rights', especially Hart, Nozick and Rawls', as they were mentioned earlier in Muhulland. It is obvious that little distinction is being made in the contemporary discourse of 'rights' between the allegedly 'non-prescriptive' philosophical mode of talking about 'rights' and the 'prescriptive' (practical in the immediate political sense) mode of talking about 'rights'.

Within the more prescriptive mode of discussing 'rights' it is common to treat the idea of 'having rights' as self-evident (and to be a valid philosophical expression). But when we get to the

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[360] Ibid., p. 335.
[361] Ibid.
[362] Ibid.
363 One of the great but persistent problems, hidden in plain sight is of course the lack of a proper definition of 'individual' in contemporary philosophy, especially the 'analytical' brand. It is too easy to forget that much of the discourse mentioned in this section (Muholand, Nozick and Rawls) makes 'instrumental' use of the term 'individual', a term allegedly referring to a conception of 'individuation' based in a primitive sort of metaphysics, which assumes the self-evident availability of a properly defined conception of 'individual', when in fact no such definition is offered by the work of said philosophers. To use a popular expression: it is a 'ponzy scheme', philosophically speaking.
[364] R. J. Vincent, *Human rights and International Relations,* Cambridge University Press, 1987.

'non-prescriptive' exposition of 'rights' this self evident 'existence' and 'ownership' of 'rights' is being more often than not put into question, since it is difficult to show 'what rights are' and 'what it means to have a right or rights'.

> [But back to Vincent's world] Vincent begins by stating that,
> "the idea that human beings have rights as humans is a staple of contemporary world politics... But it is not an obvious idea, however much its proponents may appeal to its supposed self-evidence as a way of entrenching it. As part of moral discourse, duty might seem more obvious, and is certainly more ancient, than right. Until quite recently, the utilitarian doctrine of the greatest happiness of the greatest number has been taken as a more obvious criterion of moral rectitude than the idea of individual rights."[365]

These comments by Vincent might reflect the fact that traditionally the Australian constitutional system integrated the influence of utilitarianism as it (utilitarianism) came upon the English scene by the end of the 18th century, while in America, the influence of Blakckstone's methodology continued to dominate, and we have seen the reaction to this development in America manifested in Bentham's critique of the various American declarations of rights.

> Vincent makes the distinction between the adjectival and substantive uses of the term 'right': "for there is not only the question of what right conduct is, but also of what a right is: right used as a noun as well as adjectively; a right as something one has as well as right as a description of a moral act."[366] And Vincent adds: "This idea of a right as a moral possession or as 'normative property' is the stock-in-trade of lawyers, and their work has been important in the definition of the concept."[367]

"It has been suggested " writes Vincent, "that the attribution of a right is meaningless without the possibility of a correlative duty resting somewhere...the number of exceptions spoil the tidiness of this doctrine..." Interestingly enough, Vincent gives room to "the question of the place of 'rights-talk' in contemporary western political thought".[368]

WHEN WE TALK ABOUT 'RIGHTS' USING PRIMARILY ADJECTIVAL TERMS WE END UP WITH A THEORY OF RIGHTS (OR A THEORY OF JUSTICE) THAT APPEARS NOT TO BRING ANY NEW 'SUBSTANTIVE' SYNTHESES TO THE TABLE. Could one say that the new theory brings a new 'formal content' to the table, pertaining to the 'kind of theory' it is,

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[365] Ibid., p. 7.
[366] Ibid., p. 8.
[367] Ibid.
[368] Ibid., p. 32.

more than to the substantivity of rights? And could one conclude that the 'substantivity' of 'rights' resides precisely in 'rights' being defined by the same properties we normally use to define the 'kind' of a philosophical theory (the terms we use to define its 'form', not its 'content')?

> Vincent makes a point of theoretical and historical significance when he writes:
> "What is striking about the place of natural rights thought in contemporary western political theory is not the achievement of some great new synthesis...but the extent to which positions, seemingly well enough established to be transcended, continue to be defended by reference to the tradition which established them. The marching is as much round and round as ever onward."

Vincent refers to "the continued taking of rights as a starting-place for political theory..."[369] I take this phenomenon, described by Vincent, also to be a 'symptom' of 'rights-talk', - a manifestation of the lack of 'substantivity' of 'rights' in the 'predicational-semantic' or 'predicational-grammatical' sense: since 'right' must be defined in 'modal' or 'adjectival' terms, any 'talk about rights' (any 'theory of rights') would lack the appearance "of some great new synthesis"[370]. And this is also the case with Bentham's 'theory of rights', and for that matter, also with his 'theory of justice'. And this is why Bentham's philosophy as a whole seems to slip between the cracks of the metaphysicalist-substantivist methodology of most scholars in the field of political philosophy; to them Bentham's theory appears not to bring anything substantively new to the table. One might say that *it is precisely the way (how) Bentham does not bring anything substantively new to the table*[371] *(when talking about 'rights' and 'justice') that distinguishes his theoretical efforts from the rest.* And what Vincent describes as "the marching...round and round" could be seen as a manifestation or a 'side-effect' of the transformation of the terms of the original enquiry 'in respect of kind' by the end of the enquiry about rights or justice. Such a transformation would manifest itself to a by-stander, not privy to the internal workings of the process, as a simple 'marching round and round' – somewhat like the Black Queen running in one place in *Through the Looking-Glass*. Some changes, - often the more significant and systemic transformations are of a 'formal' nature. We have seen earlier, when

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[369] Ibid., p. 32.

[370] One would expect a 'great new synthesis' to leave a 'substantive' footprint of sorts – something that can register as new content. But the transition between the two senses of the principle of utility, the expository sense and the censorial sense – the transition defining the principle of utility in Bentham – is of a methodological or 'adjectival' nature, and therefore barely registers as new content (as something 'talked about') and probably not as a 'great new synthesis'.

[371] Much of Bentham's work belongs to 'method' – even the definition of 'justice' implied in his work is comprised of mehtodological considerations. And it is typical of this kind of work, since it is primarily a discourse about formal distinctions, terms and entities, that it would present little if no 'substantive' content to the reader. Bentham's theory could be read as a discourse 'about' something only to the extent that a study about method would have 'substance' (when the subject of a study is method itself, the methodological or formal terms usually employed 'instrumentally' are now employed 'constructively'. And as the use of the terms changes, so is their meaning).

discussing the individuating difference in Duns Scotus, how the individuating 'thisness' would have only a *formal* content. With conceptions such as 'right' or 'justice' we seem to be dealing (when trying to define these conceptions properly) with entities which have only formal significance (exist only on the formal level, but still leave a 'footprint' worthy of a real entity), and it becomes paramount that in order to be able to attend to such 'entities' or subjects we must make categorial and methodological distinctions (distinctions as to the 'kind' of theory we are engaged in).

As much as the talk of 'rights' might seem 'not new', turning in circles, and perhaps less substantive than we would have expected, it is precisely this 'stillness' in respect of 'substantivity' – this 'adjectival' nature of the object and the terms employed to talk about it – that marks its 'foundational' effect on our faculties – the transformation of 'object' and 'self' that any such enquiry produces.

Vincent mentions another 'twist' of contemporary political theory:

> "Human rights are taken by some writers to be simply the contemporary expression for natural rights, corresponding to natural duties in the classical rendering of the law of nature. Human rights, in this context, have been said to express 'virtually all the requirements of practical reasonableness'... Human rights, in this account, not only belong in the tradition of natural law, but also, and more importantly, are part of the working out of the law of nature in the contemporary world. A theory of human rights can also be derived from H.L.A. Hart's much less ambitious idea of the 'minimum content of Natural Law'. Given a number of elementary generalizations about men and the world in which they live, says Hart, it is possible to deduce certain rules of conduct (the minimum content of natural law) without whose observation in some degree social organization would disintegrate."[372]

The assumption of some form of 'natural law' in Hart, as described by Vincent, sheds light on Muholland's approach to the question of 'rights' vis-à-vis Bentham: Muholland's aim is "to see whether utilitarianism contains an internal limitation that prevents it from providing a theory of rights." And Muholland argument is, "that a system of rights has features that are governed by rules which cannot be determined by utilitarian considerations. Nevertheless, these rules must override utilitarian considerations, for they are required by the concept of such a system. They are the constitutive elements of any system of rights whether it furthers the greatest happiness of all or not."[373] Muholland recruits Rawls, Nozick and Hart to his aid, and clearly, if Hart assumes a form of Natural Law, then his conception of 'right', and for that matter Muholland's, stand opposed to Bentham's approach, in which 'rights' are not taken to have a foundation in any form of natural rights or law, since to talk about any such form would be meaningless.

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[372] Ibid., p. 32-33.
[373] Muholland Leslie, *Rights, Utilitarianism, and the Conflation of Persons*

And obviously the conflation of 'human rights' with 'natural rights' doesn't help to make a clear and valid (and meaningful) conception of 'right' available to us. It is a logical-semantic flaw carried over (with enthusiasm) from 'expository', non-prescriptive enquiries into 'political-practical' prescriptive theories, usually with devastating results. People do to each other the most horrible things in the name of their alleged 'natural' rights, when the 'adjectival' form or definition of rights would have easily curbed the illusion of linguistic substantivity, and made it impossible to use quasi-natural rights as a foundation and justification for atrocities conducted against other humans, since the carrying out of such atrocities would have stood in stark contradiction to the modalities of speech action and will defining the logical and semantic framework of government. 'Doing the right thing' is a great substitute for 'I have a right', since it puts out the fire of 'ownership of rights' and the sense of entitlement that comes with it, before it has been lit. All one is left with is a series of modalities, which, since they are not 'owned by one person or another'[374] and do not precede one's immediate circumstances 'by nature', can only be employed universally[375]. Staying close to home - close to the universalizing effect of forms of speech as the regulators of the modalities of our speech action and belief - has a healing effect politically.

Vincent makes a distinction between, "a weak sense and a strong sense in which human rights may be said to have a part in this scheme of things. The weak sense consists simply in the application of the logic of legal language. If there is a rule against the use of violence, then the people to whom it applies can be said to have a duty to observe it, and also a right (in virtue of the existence of the same rule) not to be the victims of violence. But here the notion of right is not doing any work; it is merely a different way of expressing a rule."[376] This weak sense in which the notion of 'right' may be applied, reminds me of the 'adjectival sense' in which Bentham uses the term 'right', and even when using the term as a substantive noun, restricting its significance to 'political right', not allowing it to be employed as part of the expression 'natural right'.

Vincent refers to the sense in which the term 'right' is employed in Hart: "We may seek the strong sense of a right, in which it does do some pulling of its own, by pursuing Hart into his own qualifications of the doctrine of the minimum content of natural law."[377] Interestingly, by the standard of a weak and strong sense suggested here by Vincent, Hart's appeal to natural law, is still considered to be within the weak sense of natural law, though Bentham would have probably rejected

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[374] Modalities, as they are 'modal properties', are still 'owned' in the grammatical-predicational sense, as one 'has' such and such 'modal' properties. But this 'grammatical' entitlement cannot be used for the purpose of excluding similar modal properties belonging to other persons.

375 Modalities of 'action', 'speech' and 'belief' (intention or will) only 'belong' to one in the grammatical-predicational sense – a fleeting kind of 'ownership' limited to the actuality of speech, action and intent. In this sense, the expression 'doing the right thing' represents not merely the 'instrumentality' of 'doing justice' but also the definition of justice (and its transformative nature).

[376] Vincent, *Human rights and International Relations,* p. 33.

[377] Ibid.

it simply due to its reliance on a conception of 'natural law'.

Vincent makes another historical distinction of methodological significance when he distinguishes between 'human rights' conceptions which "appear in the theory as a subordinate part of a much larger whole, and thus assimilate with a tradition that predates the eighteenth-century theory of natural rights," and human rights conceptions that are closer to the eighteenth century "either in the sense that they start with rights, or in the sense that they take them to be something out of which a theory can be constructed – and not as simply the name for a function in a moral scheme defined by duties."[378]

It seems that the historical distinction between the role of the term 'rights' in pre-eighteenth-century theories and in post eighteenth-century theories, corresponds to some extent with the distinction between a more 'adjectival' employment of the term 'right' and a more pronounced use of 'right' as a 'substantive noun' in post-eighteenth-century philosophy. It seems as if only after the eighteenth century people started 'having rights' in the sense that we commonly attribute to the term nowadays (and erroneously so, according to Bentham).

"Robert Nozick's is a theory of the former kind ["in the sense that they start with rights"]. He takes the rights of individuals to be so strong and far-reaching as to put the state permanently on the defensive as to what it may do: political theory is for him a question of the room left to society by individuals."[379] Clearly this puts Nozick in the category of political philosophy employing the term 'right' in its strongest substantive form.

And as for Rawls, Vincent writes:

> "John Rawls's emphasis is importantly different from this in that while he ends up with a theory of individual rights, these did not constitute his starting-place. The theory of justice is first of all a theory formulating the principles for the structure of society, for social cooperation: justice as fairness. Rights are assigned 'to fulfill the principles of cooperation that citizens would acknowledge when each is fairly represented as a moral person.' So, for example, Rawls's first principle of justice, by which each person is to have an equal right to the most extensive liberty compatible with a similar liberty for others, is not a starting-place but a finishing-line: it is what rational people, deciding behind a veil of ignorance about their actual position in society, would agree on."[380]

Vincent concludes: "The list of objections to the idea of human rights seems formidable. There is no such thing as a human right. Worse, the idea of a moral possession on which it is based is mere

[378] Ibid., p. 33.
[379] Ibid.
[380] Ibid., p. 34.

nonsense."[381]

AGAIN, THE MYSTERIOUS CONNECTION BETWEEN THE TERM 'RIGHT' AND 'PERSON'.

For me the fascination lies in the point at which the conception of 'person' gets involved in the discussion of 'rights' (still in Vincent):

> "Every man the sole proprietor of his own person? It is as if, said Bentham, 'man were one thing, the person of the same man another thing; as if a man kept his person, when he happened to have one, as he does his watch, in one of his pockets. This is perhaps Bentham confusing a fiction with a falsehood, but even if they did make sense, rights start political theory in the wrong place: duty is the firm ground, or the principle of utility."[382]

Clearly the attribution of substantivity to the term 'right' – employing it as a substantive noun in conjunction with the term 'natural' produces this rift between 'person' and 'man'. And it is not Bentham's doing.

THE RELATION BETWEEN 'THE INDIVIDUATION OF PERSONS' AND 'THE PRINCIPLE OF UTILITY'.

Perhaps the connection between the terms 'right' and 'person' goes both ways: when the term 'right' is employed in the substantive form, the implication is that 'a right' is something that each person owns regardless of social and political circumstances. But when the term 'right' is employed in the adjectival form, denoting the *way* of doing things – a modality of action ('doing the right thing') – it becomes an easily shared term, as it denotes a way of doing things (either right or wrong) which can be shared by everyone, thus gaining a universalizing power over a community of participants in discourse.

But still, what does the issue of 'rights' or 'natural rights' have to do with the issue of 'individuation' and the definition of 'person'? We have seen earlier Mulholland argue that "the utilitarian cannot adequately distinguish between the individual as the subject of pleasures and pains and the individual as the subject of (i. e., the subject capable of exercising) judgement in conflicts concerning rights."[383] Muholland aims to show "that a theory of rights requires this distinction and that classical accounts of rights are nonutilitarian just because they see the need for the distinction."[384] I must therefore address the way Muholland frames the relation between

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[381] Ibid.
[382] Ibid., p. 35.
[383] Muholland, p. 324, *The Journal of Philosophy*, vol. 83, No. 6.
[384] Ibid.

individuation and utility, especially since this alleged conflict between the two conceptions seems unfounded to me (or founded on a bogus distinction).

My first intuition as to how to address this relation between utility and the individuation of persons was to seek the definition of individuation in Scotus, in order to re-establish that 'individuation' or the 'individual difference' must be defined within a semantic mode of enquiry – a mode of enquiry that distinguishes between the logical and the metaphysical aspect of the enquiry, thus allowing the underlying semantic and grammatical constructs to come to the fore. And once we re-acquainted ourselves with the idea that 'self', 'person', or simply, the 'individual', can only be defined properly in relation to forms of speech (the logico-semantic mode) and to 'the social' as such (the 'social' being the same as the intersubjective realm of speech – the public) we can proceed and define 'utility' or the 'principle of utility' also within the logico-semantic realm. One place to start would be Bentham's statement of the principle of utility as two - "principles of utility two" - utility defined by its two 'senses': the expository sense and the censorial sense – thus defining utility by means of the distinction between 'what is' and 'what ought to be'. It is easy to see how once we made the distinction between the expository mode and the censorial mode (within the principle of 'utility') we have crossed the point of no return, - the moment the door has opened for all the dispositional and modal terms defining 'what ought to be' to play a part in all proceedings utilitarian.

The point is, that once we have realized that the terms defining 'person' or 'individuated person' work primarily within a logico-semantic mode, and once I have shown that the same terms and the same 'kind' of enquiry are involved in defining the principle of utility, it will also become clear that the principle of utility (Bentham's version of it) is compatible with the procedures of 'individuation', whether of persons or of anything else. I strive to establish these theoretical notions as universally as possible; otherwise, it would have sufficed to show briefly how the arguments in Muholland (also the arguments of Rawls and Nozick as they are reflected in Muhollad) are based on inadequate terminology and method and on misinterpretations of Bentham's conception of utility.

The criticisms waged against utilitarianism in respect of its alleged failure to take the individuation of persons into account provide an opportunity for showing the comprehensiveness of Bentham's philosophical method – its continuous 'inclusion' of 'object of enquiry' (judgments concerning 'rights', for example) and the 'one conducting the enquiry' ('person') within one method, one mode of enquiry, and one comprehensive theory.

To follow Muholland's lead, concerning Hart he writes: "Hart is indicating that for classical utilitarianism the moral significance of the individual lies only in his being a possessor of sensory states that can add to or subtract from the general happiness... the individual is to be considered important only in so far as through his sensory states he affects this general happiness." Muholland answers to this concern of Hart's by saying: "the course of future happiness can be taken account of only through considering persons as persisting subjects with the potential for future experiences. So

the utilitarian quite easily can regard the individual living subject as being morally important apart from any experience he has at any given moment."[385]

I think that this last quote from Muholland makes the original argument at the basis of Muholland essay finally clear to me: "... as being morally important apart from any experience..." - *the criterion for 'individual' distinction for 'person' is, in this context, the capacity of the individual to make moral judgments.* The quote we read earlier falls into place now: "the utilitarian cannot adequately distinguish between the individual as the subject of pleasures and pains and the individual as the subject of (i. e., the subject capable of exercising) judgement in conflicts concerning rights."[386]

I can narrow this criterion down to what it means for Bentham for a person to make a moral judgment' or as the metaphysicians shooting blanks at him would put it, "*judgement in conflicts concerning rights"*.

Now, if we approach a conflict concerning rights while employing the term 'right' in its 'substantive' form, we can assume, right off the top, that some conflict between the jurisdictions of 'opposing' rights might be in play. But if we approach a conflict concerning rights while employing the term 'right' in its 'adjectival' form (or even in its quasi-substantive form as 'political rights'), we might find more common ground between the allegedly opposing rights, since neither one of the 'rights' involved would have a presence 'substantive' enough to interfere with the other – they would merely be like two ships passing in the night, sharing the same vast sea of modalities of speech and action and belief – the modalities by which both 'rights' involved are defined.

In other words, 'having a right' would easily create a conflict with another person 'having another right'. But 'being right about this or that', or 'doing the right thing' on two different occasions' or regarding the same circumstance, by two different agents, would not necessarily create the same severity of conflict (or seeming contradiction of terms), and most likely would pass for a case of 'contrariety' and not 'contradiction'[387]. The reason for this last scenario would be that when using the term 'right' in its adjective form, the word 'right' is not employed as a 'name' of a substance, but as a name of a 'property', and a 'modal property' at that. And the weight that names of modal or 'accidental' properties have in our speech is usually small: we indeed use the terms as names for such modal properties, but without the grammatical emphasis that we lay on terms normally used as

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[385] Ibid., p. 325.
[386] Ibid.
387 In fact, two persons 'doing the right thing' at the same time and even under the same circumstances would not interfere with one another. On the contrary, the universalizing effect of employing the term 'right' in the adjectival form, would allow for the actions of the two persons 'doing the right thing to overlap for the most part, leaving some variance at the fringes. In this manner any 'right' action would only be enhanced by another 'right' action, and the more persons choosing to do the right thing the more pronounced 'justice' will become. this is what happens when nations do the right thing, since doing the right thing is always defined primarily by individual judgment, and enhanced by the accumulation of many such individual judgments. The emphasis on the adjectival terms in Bentham's utilitarianism makes this universalized conception of justice possible, but lets us always remember that individual variation makes it possible.

the names of substances which are posited as the grammatical subject in a sentence. And when we use the word 'right' as the name of a 'substance' ('right' used substantively) there is the immediate added emphasis when by doing so we have also posited the term 'right' as the grammatical subject. Words generally tend to acquire a 'contradictory' sense when used as names pronounced (either names of properties or names of substances). When we only *think* about doing something or about certain objects or about how we feel (whether we are 'cold' or 'warm') we usually don't use the names of the objects, or properties involved. For example, when we are warm or cold, we experience it and might be aware of it, but we don't have to pronounce the words 'warm' and 'cold' - we do not use these words as the names of properties that they are. And in this realm, the realm of internal conversation, when actually experiencing the properties in question, the terms 'warm' and 'cold' have the presence of mere contraries - two terms representing different positions on the same continuous scale.

When pronouncing the word 'right' as the name for a corresponding substance or modality, we are already operating in the realm of pronounced speech, the realm in which the names of properties (properties used to define substances) have a contradictory relation (the names as such). And this contradictory nature of the relation between the names of properties or entities such as 'rights', when the term 'rights' is employed substantively, - this contradictory sense only serves to widen or reinforce the alleged opposition between the two occasions of 'right' (between the 'rights' attributed to different participants). But when we employ the term 'right' in its adjectival sense – as the name for a way of doing things – as a name of a modality of speech or action or belief, the added contradictory emphasis (due entirely to the fact that the names of the properties involved are being pronounced out aloud) can be, to some extent, avoided, and with it a more 'continuous' picture of the 'rights' involved can be maintained, basically avoiding the unnecessary conflict produced artificially by the forces of 'naming' and 'pronouncing', forces which have little to do with the occasion of allegedly conflicting modalities of speech, action or belief ('rights').

IT BECOMES CLEAR, AND SIMPLY SO, THAT FOR A PERSON TO 'HAVE RIGHTS' MEANS TO BE IN A LOGICAL AND SEMANTIC RELATIONSHIP WITH OTHERS, AS 'SUFFERER' OR 'TORMENTOR' (ONE BROUGHT INTO OFFICE BY OTHER 'SUFFERERS'). And in this context 'person' would mean the one defined by the logico-semantic construct (as 'soul' is defined in Plato and Aristotle) of the relation between 'action' and the 'acted upon' or 'speaker' and 'listener' or 'questioner' and 'the one answering' – a social-cultural 'intersubjective' relation to begin with. And the authority, therefore, of both 'law' and ‘right' resides, not in a natural form (existing) prior to 'society', but in the capacity to maintain the realm of discourse as constitutive of political life ('grammar' preceding the political), and in order to properly do so, to choose the right mode of enquiry (develop the ability to understand the terms involved

when they are presented in their adjectival form). And it wouldn't have been such a task to explain Bentham's conception of 'right' has it not been for the generations of scholars who have been trying to interpret it using the wrong mode of enquiry.

The way the issue of the individuation of persons insinuates its way into the discourse of rights with critics of Bentham is often misguided, since much of the criticisms against Bentham on this issue either rely on a bundling together of Bentham and Mill's work, or on the good old 'begging the question', when such critics assume that 'rights' are entities metaphysically or substantively distinct from 'persons'. It is easy to show, whether based on Bentham, or on previous theories of meaning (such as Plato's or Duns Scotus') that since 'individual person' and 'right' are defined by the same logico-semantic construct (the relation between 'action' and 'the acted upon') and the legislative authority it produces (the authority from which the notion of 'rightful allowance' emanates), 'right' and 'person' are mutually integrated conceptions, with hardly any 'substantive' difference. A well-known example of this level of conceptual integration can be seen in Plato's analogy between the definition of 'soul' ('person) and 'city-state' (the representation of al things political).

The idea of 'right' goes to the source of political authority, and to our conception of universality: under what conditions do our political principles apply to everything and everyone. Some philosophers chose to try and find the source of such principles and universality in the assumption of certain 'rights' which allegedly exist prior to the political realm (whether we call this realm 'government' or 'the intersubjective'), thus causing, unwittingly, the separation of 'rights' and 'person'. Other philosophers, such as Plato and Bentham (and perhaps Duns Scotus and Wittgenstein) find the source, authority and universality of political and moral principles in the nature of typically human (and therefore also in a sense 'artificial') constructs of speech and action – the realm where logic and semantics meet (or as Wittgenstein called it: grammar), thus providing for the integration of 'person' and 'rights'. It really all boils down to Bentham's critics on the issue of 'rights' having chosen the wrong kind of method or mode of enquiry ('wrong' here means 'incompatible with subject'). This methodological incompatibility between the critics and the thing criticized produces only so much philosophical clutter (the term ‘clutter’ is meant to describe the inefficiency and meaninglessness of such enquiries).

THE ROLE OF THE JUDGE, NORMALLY AN 'INSRUMENTAL' ROLE (CARRYING OUT THE LAW, ETC.) BECOMES 'CONSTRUCTIVE' (AND 'DEFINITIVE' AS PER THE DEFINITION OF 'RIGHT') ONCE WE HAVE GIVEN UP THE NONSENSICAL ILLUSION OF 'NATURAL' RIGHTS AND DEAL TRICTLY WITH 'POLITICAL' RIGHTS.

When 'rights' are viewed as 'naturally given', the judge's perspective can merely contribute to the behavior surrounding the right. But when we talk about 'political rights', the judge’s perspective becomes a defining factor in 'right', since the relation between 'judge' and 'citizen' (or defendant or

litigant) represents the same relation as the relation between 'governors' and the governed, and the principle of the identity of interests. The difference between alleged 'natural' rights and 'political' rights is in the nature of the perspectives of the participants involved (in the legal situation), whether defendant, plaintiff or judge. With political rights, since they are defined by the relations of authority and interest within 'governing' ("namely, of a disposition, on the part of those by whom the powers of government are exercised, to cause him to possess...the benefit to which he has a right."[388]) the judge's position is no longer a merely 'instrumental' position – one similar to directing the traffic on a busy street – but his task-duty becomes one of actual 'constructive' power, the power to take part in defining the right in question: the judge, being part of the framework of the 'principle of the artificial identity of interests of governors and governed', and representing the 'judicial' branch of governing, in fact helps define and redefine the rights associated with the cases brought before him, in a way that contributes to the definition of these rights, - as these rights are defined, to begin with, by the relation of authority between governors and the governed, or strictly by "a disposition, on the part of those by whom the powers of government are exercised, to cause him [the governed – in this case the litigant] to possess...the benefit to which he has a right." The act of judging actually 'carves out' the definition of each particular political right as it is being discussed (as it is being 'mentioned') in court in association with particular cases. The act of judging and the modalities defining it (the modalities representing the intentions and dispositions of the 'law' and the government) become a live part of 'justice' as an actuality in the making – the transformative process it was meant to be. And the state apparatus of which the judge and the judicial are part here works in a newly found 'constructive' manner, instead of the usual 'lagging behind the curve' which the courts founded on a notion of 'natural rights' have grown accustomed to.

It is the acknowledgment of the linguistic inadequacy of the term 'natural rights' that leads to the recognition of the principle of the identity of interests of governors and governed, and to the recognition of the 'constructive' nature of the 'speech', 'action' and 'disposition' of all involved in governing and being governed. This is truly a theory 'of the people, by the people' since the sense of entitlement permeating through it is always tied to a conception of authority founded on the widest range of universal and particular interests, represented every step of the way, and on all levels of society.

The initial awareness of the necessary linguistic and grammatical adequacy of the terms of justice takes all proceedings in a society as a whole as close as humanly possible to 'doing the right thing' at every level and from each and every participant's point of view. And 'doing the right thing' becomes synonymous with 'doing the just thing' (excuse the 'substantive' language).

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[388] Bentham, *Critique of the Doctrine of Inalienable, Natural Rights*, From *Anarchical Fallacies*, vol. 2 of Bowring (ed.), *Works*, 1843.

'JUSTICE' AS A 'CONSTRUCTIVE' ENDEAVOUR – A SOCIAL ARCHITECTONIC TAXING THE RESOURCES OF EVERY INDIVIDUAL WITHIN A REPRESENTATIVE SYSTEM OF GOVERNMENT.

'Justice' (and 'right') as a constructive endeavour – a logico-semantic architectonic demanding a transparency of the political to the grammatical, with the modalities of speech, action, and belief providing the means for such a construction (as distinguished from 'substantive' terms). It is a truly brave new world, - a world in which one's place and one's rights and duties are defined directly by the modalities of one's speech, action and disposition, with no real ('substantive') separation between the cause and effect of social and political existence, since one is 'constructively' defining 'justice' as one speaks, acts, and 'intends' or 'wills'. It is a world in which our awareness of '*how*' we speak, act, and will ('righteousness') is taking the place of the scrutiny of '*what*' we say, do or intend, - a world in which the 'substantive' terms of entitlement and authority make room for the 'adjectival' terms defining 'justice', 'method' and 'right', - a world in which all terms are 'constructive' because the grammatical subject of everything said, done or willed is 'justice' (or 'soul as consciousness', for that matter), - 'doing the right thing' before it comes back to haunt us.

END

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