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### Electronic version

URL: <https://journals.openedition.org/etudes-benthamiennes/603>

DOI: 10.4000/etudes-benthamiennes.603

ISSN: 1760-7507

### Publisher

Centre Bentham

### Electronic reference

Xiaobo Zhai, "Bentham's Natural Arrangement Versus Hart's Morally Neutral Description", *Revue d'études benthamiennes* [Online], 10 | 2012, Online since 01 February 2012, connection on 20 May 2021. URL: <http://journals.openedition.org/etudes-benthamiennes/603> ; DOI: <https://doi.org/10.4000/etudes-benthamiennes.603>

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## AUTHOR'S NOTE

This paper has benefited tremendously from my countless conversations with Michael Quinn and Philip Schofield. Two earlier versions have been presented at the Bentham Seminars of University College London on 23 March 2011, and at L'Ecole de Droit of SciencesPo in Paris on 25 November, 2011. I would like to thank Gianfranco Pellegrino, Guillaume Tusseau, Malik Bozzo-Rey, and Ioannis Papadopoulos for their comments. Philip Schofield and Michael Quinn read the whole draft, and gave me many valuable suggestions. I am grateful to Oliver Harris, Tom Ue, and Catherine Pease-Watkin for their help with my written English.

## Introduction: Bentham and Hart

- 1 Bentham 'found the philosophy of law a chaos, he left it a science.'<sup>1</sup> Both John Stuart Mill and Henry Brougham agreed that Bentham was the first English legal philosopher.<sup>2</sup> Over 100 years later, Hart indicated not only that Bentham's thought marked 'the beginning of wisdom' in the elucidation of legal words, but also that he regarded Bentham as 'the greatest English legal philosopher.'<sup>3</sup> Bentham was a rich and profound source of insight throughout Hart's intellectual life. Simpson even suggested that Bentham was Hart's 'principal philosophical mentor.'<sup>4</sup> Having made 'quite a song and dance about Bentham' in his inaugural lecture,<sup>5</sup> Hart devoted most of his last 20 years to editing and analysing Bentham's works. His unduly neglected *Essays on Bentham*,<sup>6</sup> 30 years after its publication, remains the most insightful discussion of Bentham's universal expository jurisprudence (hereafter UEJ), as well as a development of his own

legal philosophy. Bentham's UEJ as interpreted by Hart remains dominant among contemporary legal philosophers.

- 2 Legal theory is divided by Bentham into expository and censorial branches. The part that ascertains what the law ought to be forms censorial jurisprudence or the art of legislation; in contrast, expository jurisprudence investigates what the law is. Law as it is varies widely in different countries. In order to be universal, Bentham's UEJ has to confine itself to terminology, dealing with the import of words that are equivalent or correspondent to one another and that refer to nearly the same things, such as law, duty, obligation, right and power.<sup>7</sup> Hart identifies his legal philosophy as following and advancing Bentham's project of UEJ. In Hart's view, Bentham's UEJ contains a group of ideas, the most important of which include the following:
  1. The conceptual analysis thesis, that is, Bentham emphasizes the vital importance of 'a purely analytical study of legal concepts.'<sup>8</sup>
  2. The morally neutral description thesis, that is, Bentham insists that a morally neutral vocabulary should be deployed in the discussion of law and politics,<sup>9</sup> or more exactly, in the description of the foundations of a legal system.<sup>10</sup>
  3. The artefact thesis, that is, Bentham asserts that laws are things made by men.<sup>11</sup>
  4. The separation thesis, that is, Bentham exhorts people to distinguish law as it is from law as it ought to be.<sup>12</sup>
  5. The command thesis, that is, Bentham thinks that a law is essentially a command.<sup>13</sup>
- 3 These propositions, according to Hart, opened the positivistic tradition of jurisprudence, and established Bentham as the founding father and a prime exponent of legal positivism.<sup>14</sup> Hart asserts that theses (2) and (4) are closely linked. He notes that Bentham's insistence on 'a precise, morally neutral vocabulary for use in the discussion of law and politics' is 'part of a larger concern to sharpen men's awareness... of the distinction between what is and what ought to be.'<sup>15</sup> However, according to Hart, theses (1), (4) and (5) (and also, arguably (3)), are separate and distinct doctrines.<sup>16</sup> A great weakness of Bentham's jurisprudence, he argues, is his imperative theory, which must be discarded, because it dictates a cramping framework and distorts important aspects of law.<sup>17</sup> Nevertheless, the other four theses are valuable and wise features, which could and should be retained.<sup>18</sup> Hart also suggests that Bentham's legal positivism is logically independent of his utilitarianism, and that the latter often 'gets in the way of the former.'<sup>19</sup>
- 4 This paper will examine and challenge Hart's morally neutral description thesis (hereafter MND). In his *Postscript to The Concept of Law*, Hart claims that his legal theory therein is descriptive. It is 'descriptive in that it is morally neutral.'<sup>20</sup> Regarding Bentham's UEJ, Hart says:
 

[A]mong Bentham's many claims to be an innovator none is better founded nor, I think, more important than his insistence on a precise and so far as possible a morally neutral vocabulary for use in the discussion of law and politics. This insistence, though it may seem a merely linguistic matter, was the very centre, and I would say the sane and healthy centre, of the legal positivism of which Bentham may be regarded as the founder. It accounts for many important themes in his general theory including the form of his own definition of law. The terms that Bentham uses to define law are all flatly descriptive and normatively neutral...<sup>21</sup>
- 5 In his statement of the nature of his own theory and his exposition of Bentham's UEJ, Hart clearly considers Bentham's UEJ as the same as his MND. My question is: is Hart's

interpretation correct? This raises another two further questions: what is the true nature of Bentham's UEJ? and what does Hart mean by MND?

## Universal Expository Jurisprudence and Natural Arrangement

- 6 When criticizing Blackstone's eulogy of common law, which is disguised as an explanation, Bentham offered a compact but comprehensive account of the distinctions between expository and censorial jurisprudence. The expositor 'explain[s] to us what, as he supposes, the Law is', principally occupies himself in 'stating, or in inquiring after facts', and shows 'what the legislator and his underworkman the judge have done already.' In contrast, the censor 'observe[s] to us what he thinks it ought to be', occupies himself in 'discussing reasons', and 'suggest[s] what the legislator ought to do in future.'<sup>22</sup> The censor addresses, or seeks to influence, the volitional or pathematic faculty, and 'holds some intercourse with the affections', because he usually finds occasions to annex sentiments of pleasure or displeasure to his objects. The expositor, however, applies himself to the intellectual faculty, i.e., the understanding, and deploys the faculties of 'apprehension, memory and judgment.'<sup>23</sup>
- 7 The function of expositor includes that of history and that of simple demonstration.<sup>24</sup> To 'represent the law in the state it is for the time being' is the business of simple demonstration, which consists of 'arrangement, narration and conjecture'<sup>25</sup>:

Matter of narration it may be called, where the law is supposed to be explicit, clear, and settled: matter of conjecture or interpretation, where it is obscure, silent, or unsteady. It is matter of arrangement to distribute the several real or supposed institutions into different masses, for the purpose of a general survey; to determine the order in which those masses shall be brought to view; and to find for each of them a name.<sup>26</sup>
- 8 Narration and interpretation treat chiefly of particular institutions and, consequently do not interest Bentham. The business that he was determined to grapple with was that of arrangement, which he identified as 'the most difficult and the most important of the functions of the demonstrator.'<sup>27</sup> Here lies Bentham's most original contribution to legal elucidation, and the very kernel of his UEJ, and it is only in relation to this central idea that many crucial themes in his legal philosophy can receive adequate explanation.
- 9 There are two ways of arranging legal materials: technical and natural. To mark out and denominate the principal heads according to technical nomenclature which only makes sense to persons trained in particular professions, such as lawyers, is to arrange them technically, whereas a natural arrangement characterizes the materials according to the properties which men in general are, 'by the common constitution of man's nature, disposed to attend to', and which engage or fix men's attention 'naturally', 'readily' and 'firmly', and which are 'most easy to be understood and remembered.'<sup>28</sup>
- 10 Natural arrangement presents objects 'according to their most striking and interesting qualities.'<sup>29</sup> Their interesting properties are their tendency toward, or divergence from, pleasure or pain, which are real entities, and for the meanings of which a man need not consult a lawyer.<sup>30</sup> The tendency to produce a positive balance of pleasure over pain is utility, whereas the opposite tendency is mischievousness. The interesting features of all entities, including legal materials, are simply those which impact on the experience

of the sensations of pleasure and pain by human beings (and more broadly, all sentient beings).<sup>31</sup> To point out to a man, directly or indirectly, the utility or the mischievousness of legal materials is 'the only way to make him see clearly the property of them which every man is in search of; the only way, in short, to give him satisfaction.'<sup>32</sup> Bentham's natural arrangement comprises several sophisticated steps, which will be illustrated by way of his exposition of law.

- 11 The first job of natural arrangement is 'to distribute the several real or supposed institutions into different masses, for the purpose of a general survey; to determine the order in which those masses shall be brought to view.' The distributing and ordering of things are highly complex operations of the human mind, and they depend on language as the instrument not only of communication, but also of thought. Without language, especially its system of designations, none of the faculties of the human mind, perception excepted, can be used 'with any considerable advantage or to any considerable extent.'<sup>33</sup> Things without names cannot be fixed in the mind, expressed and communicated, and hence cannot be thought of continually and productively. However, 'the business of giving them names has always been prior to the true and perfect knowledge of their natures.'<sup>34</sup> Bentham was deeply sensitive to and concerned by the imperfections of ordinary language.
- 12 First, the fundamental flaw of ordinary language is that the way that names are used suggests that they represent things which really exist, when in fact many names refer to things which do not exist. Nouns substantive represent either real or fictitious entities, of which only real entities exist. Names of fictitious entities do not correspond to objects in the physical world, and owe their 'impossible yet indispensable' existence only to language.<sup>35</sup> For historical and psychological reasons,<sup>36</sup> ordinary language unavoidably confuses names of real entities and those of fictitious entities. This confusion is a frequent source of persistent errors.
- 13 Second, ordinary language in the field of law is mysterious, ambiguous and jargonized. It is full of words without any meaning, and of words with plural and even opposite meanings, which are used indiscriminately without any indication of which meaning is intended. The import of words is 'commonly neither determinate nor uniform.'<sup>37</sup> An inference relying on one sense of a word is often drawn from a premise using it in a very different sense. Different objects are frequently treated as the same, and vice versa.<sup>38</sup> The greatest absurdity is that the proximity in importance and quality between two things is the very cause of the aversion to extending to the one the name given to the other.<sup>39</sup> Failing to mark the similarities and differences which are interesting and important to us, ordinary language often blurs and conceals the lines and issues really at stake.
- 14 Third, ordinary language is full of dyslogistic and eulogistic expressions, and lacking in neutral names.<sup>40</sup> Eulogistic appellatives mark objects with approbation, and dyslogistic appellatives present objects with disapprobation. Neutral appellatives describe objects simply with neither approbation nor disapprobation. A particular action or motive may be only accidentally or contingently undesirable, and designating it with a dyslogistic appellative operates as an indiscriminating, ineludible and comprehensive condemnation of a whole group of corresponding actions or. When a eulogistic name is given to a certain action or motive which may be only contingently desirable, all the mischievous effects that are liable to be produced by the corresponding group of actions or motives are covered up and kept out of sight.<sup>41</sup> Bentham labels dyslogistic

and eulogistic names as 'impostor terms', because, in their question-begging way, they short-circuit investigation and close down argument because, in their question-begging way, they short-circuit investigation and close down argument with 'the greatest effect, and least risk of detection.'<sup>42</sup> A man falls into fallacy of this kind 'but too naturally of himself.'<sup>43</sup> The propositions containing these terms as subjects, which actually demand evidence, are only asserted and affirmed. The process of proving merely consists of giving bad or good names, which themselves are 'instruments of deception.' By employing these impostor names, intentionally or unintentionally, the author secretly incorporates into, or banishes from, his definition and description his own prejudiced conclusions on the one hand, and blinds himself to the real nature of the objects under study on the other.

- 15 In Bentham's view, these imperfections are mainly the product of the sinister interest of the 'ruling few', and the prejudices and intellectual weakness of the 'subject many.'<sup>44</sup> They in turn form the most fertile sources for the perverse association of ideas, fallacious arguments and delusive nonsense. Thanks to these imperfections, the 'ruling few' are able easily to obscure and conceal the true state of the law. These few fill into the brains of the public numerous enervating delusions, which pervert public understanding, blind subjects to their true interest, transform them into timid and admiring pupils, and inculcate among them abject and indiscriminating homage to sham laws, thereby leaving them in total darkness as to real laws. Bentham bitterly complains about the 'tyranny' or 'shackles' of ordinary language which is 'the work of popular caprice.'<sup>45</sup> He warns us not to confine ourselves to the language most in use; otherwise, our propositions will be repugnant to truth, and thereby adverse to utility.

- 16 Here lies the fundamental paradox: disorder in language and errors in thought are apparently like the chicken and the egg. Terminology can only be improved by clear and correct thought. It is impossible, however, to think clearly and correctly, while words are seriously defective.<sup>46</sup> There is no easy way out of this dilemma.<sup>47</sup> Bentham himself admits that complete success is unattainable:

Striving to cut a new road through the wilds of jurisprudence, I find myself continually distressed, for want of tools that are fit to work with. To frame a complete set of new ones is impossible. All that can be done is, to make here and there a new one in cases of absolute necessity, and for the rest, to patch up from time to time the imperfections of the old.<sup>48</sup>

- 17 The important lesson to be learnt from the abject state of ordinary language is that names and their ideas in current use are only the starting points: they cannot and should not be guides, still less standards. Bentham does not think that there is any reliable or accurate standard in the current usage of names.
- 18 Language is a basic medium by means of which we deal with the world. We habitually treat of things by help of their names. In order to understand and arrange things, we may have to start with the relevant names. However, we must 'pierce through' the words before we can understand clearly 'the real state of things.'<sup>49</sup> As mentioned earlier, ordinary language unavoidably confounds names of real entities and those of fictitious entities. For Bentham, the distinction between real and fictitious entities is 'the comprehensive and instructive distinction'.<sup>50</sup> When facing a noun substantive, the first question that needs to be asked is whether it stands for a real entity or a fictitious entity. In the case of the latter, the correct way to understand, expound and determine its idea is to retrieve the relation between its name and relevant real entities, because the only objects that exist are real entities which are 'the real source, efficient cause, or

connecting principle'.<sup>51</sup> The process of retrieving involves Bentham's techniques of famous archetypation (etymologation), phraseoplerosis and paraphrasis. If these operations prove impossible, then the noun substantive in question is 'a mere nothing',<sup>52</sup> a meaningless sound, and any proposition which includes it is nonsense.<sup>53</sup> If it succeeds, then we enter the field of real entities or things.

- 19 Having entered the field of things, we should leave behind the initially helpful but perhaps misguiding and imposturous name, the fate of which has to await the ultimate verdict of the investigation of things. Logically, only after the nature of things is known can a proper nomenclature be formed for them.<sup>54</sup> The original name itself and its meaning may be discarded, re coined, modified, or refixed. When exploring things, before embarking on any conscious research, a man must, although often subconsciously, choose the things that he conceives to be *interesting*, i.e. having to do his pleasure or pain. Only after making this choice can he start the effort of understanding the things.
- 20 To understand a thing is to know its properties. In order to understand its interesting properties, a man must be acquainted with its differences from, and similarities to, other things.<sup>55</sup> The only way to do this is by bipartition, i.e., '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.'<sup>56</sup> Bipartition, i.e., bifurcation and hence exhaustive division, applying logic to legal materials, can produce a complete knowledge of the interesting properties of real things. At the current period of science, writes Bentham, to pursue bipartition strictly to its utmost length would be too fatiguing for the author and disagreeable for the reader;<sup>57</sup> however, people should be encouraged to carry this 'eminently instructive'<sup>58</sup> method into 'whatever length it is capable of being followed.'<sup>59</sup> This method is so important for Bentham that he declares that he owes all his new and original insights to it.<sup>60</sup> With this operation, objects which agree in important features can be classed together, and be distinguished from objects which are really different.
- 21 Being familiar with the properties of the thing in question, we have a clear and exact idea of it. In order to fix and express this idea, we must give it a name.<sup>61</sup> The name must suit the idea that we intend to bring to view,<sup>62</sup> and should therefore refer to nothing other than the distinctive qualities of that idea. For this reason, it should aspire to be as neutral as possible. Bentham stresses that 'the only novelty' of his methodology of naming 'consists in the steady adherence to the one neutral expression, rejecting altogether the terms, of which the import is infected by adventitious and unsuitable ideas.'<sup>63</sup> However, finding out or making up more apposite denominations to express new ideas of things is extremely difficult.<sup>64</sup> Ideally, the nature of the things should be the only guide, and every real and interesting difference should have a different denomination. This implies, however, that a new, hence unusual, language should be invented: '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.'<sup>65</sup> It is neither practicable nor even expedient to destroy ordinary language altogether.<sup>66</sup> Bentham's strategy is, first, to treat of things 'as much as possible under their accustomed names.'<sup>67</sup> Second, if this proves impossible, new names have to be invented or fabricated. In most cases, given the desire to avoid the inconvenience of fabricating words that are absolutely new, the way of inventing them consists of bringing two or three existing words together.<sup>68</sup> However, in both cases, the author has to 'enter into a long discussion, to state the whole matter at large, to



confess, that for the sake of promoting the purposes, he has violated the established laws of language, and to throw himself upon the mercy of his readers.'<sup>69</sup>

- 22 The word 'law', according to Bentham, is used in widely different ways, referring to entirely diverse things, including common law, natural law and statutory law, etc. For Bentham, therefore, 'the idea of law has never been precisely settled,' and 'no one entire thing is as yet meant by a law.'<sup>70</sup> His business 'is therefore not to remind the reader what is meant by a law.'<sup>71</sup> Law or the law, 'taken indefinitely, is an abstract and collective term; which, when it means anything, can mean neither more nor less than the sum total of a number of individual laws taken together.'<sup>72</sup> Put another way, law or the law signifies a fictitious entity or logical whole. To make sense of the word law, we have to be acquainted with the real entities or physical wholes to which it refers, each of which constitutes an individual and entire law. The intellectual operation required is also called 'the individuation of a law', which means the description of 'neither more nor less than one entire law.'<sup>73</sup> By means of paraphrasis or individuation, Bentham finds that some symbol of the legislator's will imperating the subjects' behaviour is the archetype or real entity of the name law.<sup>74</sup> He then begins his investigation of things, ransacking human experience for the things sharing essential qualities with the archetype and classifying them.
- 23 Bentham finds that the things sharing essential qualities with the archetypal real entity of the name law include the expressions of will backed by the sovereign authority, whether they are immediately conceived or indirectly adopted, public (legislative, judicial, military, or executive), private or domestic, permanent or temporary, commanding or countermanding, statutory or customary, issued from an individual or a body, *propter quid* or *ex mero motu*. These various sorts of expressions of will, although men tend to deny many of them the appellation of a law for different reasons, share the same nature in every point with law's archetypal real entity, except the manner of appertaining to the sovereign (their immediate source).<sup>75</sup> These objects are so intimately allied and so frequently susceptible of the same propositions that it is necessary to characterize them with, or find for them, a common appellation. The 'least exceptionable'<sup>76</sup> one is the term 'law', which is also frequently used in this sense.<sup>77</sup> There are many competitors, and Bentham then explains carefully and meticulously, with reference to the ordinary usage of words, why the name 'law' is preferred to other appellations, thereby distinguishing his idea of law from all others.
- 24 Bentham is fully aware that 'the latitude he gives to the import of the word 'law' is rather greater than what seems to be given to it in common.'<sup>78</sup> He warns readers, by stressing the difference between his idea of law and that of legislation, that he has 'outstretched' the idea which common usage has annexed to the word law when he 'appropriate[s] the term law' to 'the large and comprehensive idea.'<sup>79</sup> In this way, Bentham annexes to the word 'law' a meaning or an idea which he thinks ought to be meant by it. This idea can serve as a pattern to which legal material can be reduced, and is the monad of which the vast universe of jurisprudence is composed.<sup>80</sup>

## Natural Arrangement and Morally Neutral Description

- 25 Having spelt out Bentham's UEJ with natural arrangement as its centre, let us turn to the question as to whether Bentham's UEJ can be characterized as one kind of Hartian morally neutral description.



- 26 Through his natural arrangement, Bentham fixes to the word 'law' what he thinks should be meant by the word 'law.' However, it would be a grave mistake to infer from this that he is proposing a purely stipulative definition. Nothing is clearer than that what Bentham's expositor arranges is the interesting properties of real legal materials. He is supposed to 'state facts', to show what legal officials have already done, and to 'represent the law in the state it is.' However, is Bentham's descriptive natural arrangement morally neutral? Any sensible answer to this question will depend on what 'morally neutral' means. The most common understanding is 'morally inert, indifferent or 'irrelevant.' Understood this way, Hartian MND would certainly make no sense to Bentham.
- 27 Mankind is 'under the governance of two sovereign masters, pain and pleasure.' Recognising this subjection, Bentham's principle of utility 'approves or disapproves of every action whatsoever,' depending upon the fact as to whether it tends to promote or to diminish 'the happiness of the party whose interest is in question'.<sup>81</sup> The science which recognizes our subjection to pain and pleasure, and follows the principle of utility, is named by Bentham as Eudaemonics, which is 'the pursuit of happiness' or 'the art of well-being'.<sup>82</sup> The central teaching of Eudaemonics is that well-being in different shapes, 'directly or indirectly,' is 'the subject of every thought, and object of every action' of every 'sensitive and thinking Being,' 'constantly and unpreventably'. '[N]or can any intelligible reason be given for desiring that it should be otherwise.'<sup>83</sup> A thing can claim man's regard, only because it is in different ways 'a source of happiness' or 'a security against unhappiness.'<sup>84</sup> Eudaemonics is 'the Common Hall or central place of meeting, of all the arts and sciences.... [E]very art, with its correspondent science, is a branch of Eudaemonics.'<sup>85</sup> Bentham's UEJ is just one chamber (if we must have a metaphor) his magnificent edifice of Eudaemonics.
- 28 As has already been said, Bentham's natural arrangement is a kind of factual description. What is important is not that Bentham describes facts, but what facts he is describing, and the way in which he describes them. Legal materials have numerous aspects, and can be given many different but equally true descriptions. For a blank mind, legal phenomena by themselves are total chaos. Observing and describing cannot start without a prior perspective, which cannot be separate from the observer's purpose. Purpose contains the germ of everything. Only with some purpose and perspective, can one decide what aspects of what materials are relevant, important or characteristic when describing. Revealing the truth of some aspects entails neglecting the remainder. This should not be regretted, because, of the particular subject under description, only some truths are interesting and deserve our attention.
- 29 Generally speaking, as discussed above, Bentham's UEJ is a division of Eudaemonics. Its ultimate purpose is the pursuit of happiness. This means that it only concerns itself with the interesting properties of real things, directly or indirectly. Confined to legal theory, it should be born in mind that UEJ is only a means which Bentham finds necessary for the end of accomplishing his project of 'rear[ing] the fabric of felicity by the hands of reason and of law'.<sup>86</sup> Bentham believed that legislation was the most important of all earthly pursuits, and he had a genius for it. Legislation is the branch of jurisprudence which 'teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is the most conducive to the happiness of the whole community, by means of motives to be applied by the legislator.'<sup>87</sup> It includes ascertaining the principles of right and wrong, applying them

to laws and modes of conduct, determining upon them the best laws, and then reforming existing laws accordingly.<sup>88</sup> Bentham took legislation as the 'great and only legitimate end of all political speculations',<sup>89</sup> and the completion of it the business of his whole life.<sup>90</sup> In order to complete this life-business of legislation, Bentham needs a 'good nomenclature',<sup>91</sup> which should make known and only make known all the interesting properties of real things, for example the logic of will influencing action, and thereby provide as many as possible sophisticated and powerful tools for the utilitarian legislator. One purpose of UEJ is to produce this good nomenclature.

- 30 Apart from furnishing a good nomenclature, UEJ has another cardinal purpose. A preliminary task for Bentham's project of legal reform is to clear the field of jurisprudence of irrational and oppressive rubbish, especially the fraudulent nonsense composed of common law and natural law. In order to instruct, Bentham has to 'undeceive' first.<sup>92</sup> One of his primary aims is the emancipation of the judicial faculties of the public from the shackles of corrupt and imposturous charlataneries. Before embarking on his project, he needed to 'pluck the mask of mystery from the face of jurisprudence'<sup>93</sup> and open people's eyes to the truth of laws, thereby cleansing their mind of all deceptive superstitions and breaking the sedative spell of the prevailing misconceptions. UEJ meets this expectation by telling important truths of legal practice, which alone can 'throw the light of day upon the dark den of Cacus.'<sup>94</sup> This is exactly the way that Bentham has 'prepared before expositor'.<sup>95</sup>
- 31 Bentham's UEJ is description of some kind. However, its purposes of producing a good nomenclature for utilitarian legislation and undeceiving the public's legal understanding require it to describe the interesting properties of real legal materials. As detailed earlier, for Bentham, the only universal, satisfactory and clear method of description is to point out with natural language (directly or indirectly) the most striking, interesting, and characteristic properties, i.e. the utility or disutility, of real legal materials which will serve to engage and fix the subjects' attention naturally and firmly. Only the properties which have a direct or indirect influence on human beings' pleasure or pain are entitled to our attention. A thing or property that has nothing to do with pleasure or pain is simply irrelevant to a human being for whom nothing matters but pleasure and pain. To point out the utility or disutility of real legal materials should not be confounded with to evaluate such materials morally. The utility or disutility here exists as a factual property. For instance, the essential ingredients of a law which Bentham highlights and describes are the subjects' acts and the legislator's will which imperates those acts in different modes.<sup>96</sup> These ingredients are the real elements of real laws, and exert great influence on human happiness and actions. They are vital to Bentham's project of utilitarian legislation, the knowledge of which allows the legislator to influence and change men's action in a utilitarian direction. However, to describe these elements is not to undertake their moral evaluation.
- 32 Bentham believes that his UEJ is enormously useful. Some of its uses have already been mentioned above. The following brief account is just for illustration. First, UEJ with a natural arrangement as its centre can serve for the jurisprudence of any country;<sup>97</sup> Second, with natural arrangement, 'the mischievousness of a bad law would be detected, at least the utility of it would be rendered suspicious, by the difficulty of finding a place for it in such an arrangement: while, on the other hand, a technical arrangement is a sink that with equal facility will swallow any garbage that is thrown into it.'<sup>98</sup> Cultivated in a natural way, 'the soil of jurisprudence would be found to repel

in a manner every evil institution.<sup>99</sup> Third, UEJ would also be a compendium of censorial jurisprudence, and thus serve to instruct the subjects, and to help, to correct or to check the legislator.<sup>100</sup> It is to legislation what anatomy is to medicine.<sup>101</sup>

- 33 It can be seen very easily from the above account that Bentham's UEJ is not morally neutral if it means 'morally inert or indifferent or irrelevant'. As Bentham himself says, the principle of utility 'preside[s] over and govern[s]' a natural arrangement,<sup>102</sup> and his UEJ is the fruit of 'a method planned under the auspices of the principle of utility.'<sup>103</sup> Hart's comment that Bentham's utilitarianism gets in the way of his analytical vision would certainly make no sense to Bentham. In contrast, Bentham's principle of utility governs his natural arrangement by requiring the latter to point out with natural language the interesting properties of real legal material, and only in this way can natural arrangement really serve the utilitarian project. So far as the relation between UEJ and morals is concerned, here might lie the true difference between Bentham's, and that of common lawyers and natural lawyers.
- 34 Bentham's UEJ is not morally indifferent, thereby not morally neutral. However, it does not necessarily follow from this that Hart is wrong when he interprets Bentham's UEJ as some kind of his MND, because the above common understanding of 'morally neutral' seems at odds with Hart's real purport when he claims that his account is 'descriptive in that it is morally neutral.'
- 35 First, Hart never thinks that 'morally neutral' means 'purposeless' or 'useless'. He indicates that the 'purpose' of his own 'morally neutral' theory is 'to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality',<sup>104</sup> and that this theory is 'an important preliminary to any useful moral criticism of law.'<sup>105</sup> For Hart, Bentham's 'protest', contained in his legal theory, 'against the confusion of what is and what ought to be, has a moral as well as an intellectual value.'<sup>106</sup>
- 36 Second, Hart emphatically stresses that his 'morally neutral' method is not the same thing as a 'morally neutral' method in the scientific or empirical sense, which he thinks useless for the understanding of law as a form of normative social structure,<sup>107</sup> and which he asserts is not what Bentham means by science.<sup>108</sup> Quite the contrary, he seeks to give 'an explanatory and clarifying account of law' which focuses on law's rule-governed aspect.<sup>109</sup> When reviewing influential theses concerning the nature of law, Hart comments that they
- [A]ctually did in their time and place increase our understanding of it....they are more like great exaggerations of some truths about law unduly neglected....They throw a light which make us see much in law that lay hidden; but the light is so bright that it blinds us to the remainder and so leaves us still without a clear view of the whole.<sup>110</sup>
- 37 This remark applies to Hart's theory as well. Strictly speaking, 'a clear view of the whole' is unachievable, and also unnecessary. Like Bentham, Hart chooses what he wants to describe for his own purposes and his choice cannot avoid being related to morality. This Hart concedes readily and frankly. He chooses to describe the normative aspect of law, which he supposes is important. For Hart, this normative aspect raises three major questions: 'How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules, and to what extent is law an affair of rules.'<sup>111</sup> Hart invents

conceptual tools to 'pick out [the] action-guiding and evaluation-guiding function' of social rules.<sup>112</sup> This means Hart's description 'must itself be guided, in focusing on those features rather than others, by some criteria of importance.'<sup>113</sup> The analysis, therefore, 'will be guided by judgments, often controversial, of what is important and will therefore reflect such meta-theoretic values and not be neutral between all values.'<sup>114</sup> The chief meta-theoretic value is 'the explanatory power of what his analysis picked out.' The values lying behind 'judgments of what is important' surely cannot be merely meta-theoretic and epistemic. They are substantive practical values reflecting our moral and intellectual concerns.<sup>115</sup> However, Hart's purpose, choice and description are very different from Bentham's. These differences arise from their different ontologies and language philosophies, which are not my concerns in this paper.

- 38 Third, Hart accepts moral claims as essential, and moral beliefs and justificatory practices as important although contingent, constituents of the existence of rules.<sup>116</sup> His legal theory, as an explanation of the internal conceptual framework of participants in legal order, has to make sense of moral factors or moral considerations involved in participants' legal practice. When describing the conversion of the regime of primary rules into a developed legal system, Hart says that, as a form of social control, the regime of primary rules which fared successfully in a small community 'must prove defective' in other conditions. It is defective in that, judged against its primary function of 'guiding the conduct of its subjects',<sup>117</sup> it is uncertain, static, and inefficient as 'a means of social control'<sup>118</sup> in a world other than that where it came into being. This analysis involves evaluation.
- 39 In a word, Hart's being 'morally neutral' cannot be equated with 'being morally inert, indifferent, or irrelevant' as commonly understood. Compared with Bentham's crystal-clear declaration of the utility of his description, Hart's prevarication on the relationship between his theory and value indicates that he is hedging about his moral concerns or stance.
- 40 Despite the fact that his own legal theory has moral concerns, treats of moral factors and makes evaluation, and despite his awareness that Bentham does not think his UEJ could be separated from his utilitarian social philosophy, Hart still insists repeatedly that his own theory is 'morally neutral description', and that Bentham was attempting something similar. If Hart were not deliberately lying and contradicting himself, he must have meant something very different by 'morally neutral description'. In fact, Hart does offer two related ways of understanding 'morally neutral description'.
- 41 The first understanding is to regard 'morally neutral' as a requirement about 'vocabulary.' Hart encourages this reading. As we have seen above, one requirement of Bentham's natural language is that it should aspire to be neutral as possible as it can. Bentham emphasizes this as 'the only novelty' of his methodology of naming.<sup>119</sup> Hart picks out this idea as a 'very distinctive part of Bentham's general theory of law', and stresses that it is 'really part of something much wider' and manifests 'a very fundamental and original feature in Bentham's whole austere approach to the philosophy of law and politics.'<sup>120</sup> Understood in this sense, 'morally neutral' is indeed one property of Bentham UEJ. However, this interpretation raises another more basic question: why does Bentham never use the phrase 'morally neutral'?
- 42 Bentham, very cautious about words and language, never uses the phrase 'morally neutral'. A possible explanation is that, as has been shown above, Bentham is fully aware that his UEJ is utilitarian. His requirement for a neutral vocabulary aims to

ensure that a name expresses the idea in question only and nothing more, and avoids bringing in any unwarranted prejudices, thereby avoiding any question-begging fallacy. Prejudice is emotion that is unwarranted when it is not justified by utilitarian calculus. Because it is not justified, it is imposturous and question-begging. For Bentham, the effort to denominate without involving unwarranted emotion is, strictly speaking, not morally neutral, because moral judgment for him is a 'verifiable proposition about utility', and a matter of calculation of pleasures and pains according to seven circumstances (intensity, duration, certainty, propinquity, fecundity, purity and extent).

43 Hart mistakes Bentham's neutral vocabulary, i.e., naming without involving unwarranted emotion, for morally neutral description. The reason might lie with Hart's own meta-ethical theory. Although longing for some independent rational foundation for ethical thought, Hart is highly sceptical of objective moral facts. He requires legal theory to 'avoid commitment to controversial philosophical theories of the general status of moral judgments' and to leave open the general question of whether they have objective standing.<sup>121</sup> P. M. S. Hacker thinks Hart is 'an ethical pluralist.'<sup>122</sup> Hart seems to subscribe to some kind of non-cognitivism<sup>123</sup> concerning the nature of moral judgment. For him, moral judgment is a matter of attitude, feeling and emotion, and so Bentham's naming without involving unwarranted emotion is understandably but mistakenly equated by him with morally neutral description.

44 Even if we assume that Hart is correct when he equates Bentham's naming without involving unwarranted emotion with morally neutral description, he is still utterly wrong when he asserts

Among Bentham's many claims to be an innovator none is better founded nor, I think, more important than his insistence on a precise and *so far as possible* a morally neutral vocabulary for use in the discussion of law and politics. This insistence, though it may seem a merely linguistic matter, was the very centre, and I would say the sane and healthy centre, of legal positivism of which Bentham may be regarded as the founder.<sup>124</sup>

45 He is wrong, because, first, Bentham's insistence on neutral vocabulary, although highly important and essential, is mainly a matter of methodology, which is only one aspect of legal positivism. Second, because, as far as methodology is concerned, a neutral vocabulary is not sufficient to define UEJ, of which the real centre is a natural arrangement, as I argued above.

46 The second understanding of 'being morally neutral' which Hart offers is that his account 'has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures' which appear in his account.<sup>125</sup> This understanding needs to answer at least two questions. First, it is not clear how it can be distinguished from the 'neutral vocabulary' understanding, especially when it is considered that Hart regards the latter as the 'healthy centre' of Bentham's legal positivism which 'accounts for many important themes in his general theory.'<sup>126</sup> Second, even if it were disentangled from the neutral-vocabulary understanding, it still misses the point of Bentham's UEJ. Bentham's expositor should limit himself to the 'humbler function' of 'simply stating' interesting qualities of legal materials in terms of real entities. Condemning or defending, guarding from reproach or recommending to favour, are properly the functions of the censor.<sup>127</sup> The requirement aims to help the expositor to find and reveal all the possible interesting and complete truths about legal operations, which really exist, and are useful and valuable, although might be very

harsh and cruel. Truths exist and are useful by being true and interesting. They do not need to be justified or commended on any grounds other than being interesting truths.

## Conclusion

- 47 My conclusion is that Bentham's UEJ is not equivalent to Hart's 'morally neutral description'. Bentham's UEJ is utilitarian by describing in natural language the interesting properties of real legal materials. 'Neutral vocabulary' is very important for Bentham's UEJ, but it is by no means its healthy centre. This accolade belongs rather to natural arrangement. If Hart were the archetype of legal positivism, and if neutral vocabulary or morally neutral description, as Hart claims, were the healthy centre of legal positivism, I would say that Bentham is not a legal positivist. If Bentham, as conventionally interpreted, is the founder and prime exponent of the tradition of legal positivism, then this tradition would accept neither Hart nor Hartian legal positivists.
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## ABSTRACTS

In his statement of the nature of his own theory and his exposition of Bentham's Universal Expository Jurisprudence (hereafter UEJ), Hart clearly considers Bentham's UEJ as the same as his morally neutral description. My question in this paper is: is Hart's interpretation correct? My conclusion is: Bentham's UEJ is not any kind of Hartian 'morally neutral description'. Bentham's UEJ is utilitarian by telling in natural language all the interesting properties of real legal materials. 'Neutral vocabulary' is very important for Bentham's UEJ, but it is by no means 'the healthy centre' of Bentham's UEJ. This glorious title belongs to natural arrangement. If Hart were the archetype of legal positivism, and if neutral vocabulary or morally neutral description, as Hart believes, were the healthy centre of legal positivism, then Bentham is not a legal positivist. If Bentham, as conventionally interpreted, is the founder and prime exponent of the tradition of legal positivism, then this tradition cannot accept Hart and his contemporary followers.

Lorsqu'il présente sa propre théorie du droit en la confrontant à la Jurisprudence Explicative Universelle de Bentham (J.E.U.), Herbert Hart considère les deux théories comme moralement neutres. Est-ce à raison ? Cet article montre que la J.E.U. de Bentham n'est pas ce que Hart appelle une « description moralement neutre ». La J.E.U. est utilitariste en ce qu'elle utilise une langue naturelle pour décrire les propriétés des matériaux juridiques. Il faut en cela un vocabulaire neutre, mais cela ne constitue pas le centre de la théorie du droit benthamienne. Elle repose plutôt sur l'examen de ce que serait un « arrangement naturel ». Si l'on considère Hart

comme un positiviste, et si on prend comme fondation du positivisme juridique une théorie qui repose sur l'emploi de termes moralement neutres, alors cette définition exclut Bentham. Si au contraire on considère Bentham comme le fondateur et le meilleur défenseur du positivisme juridique, alors cette tradition doit exclure Hart et ses disciples contemporains.

## INDEX

**Keywords:** Bentham, expository jurisprudence, Hart, legal positivism, morally neutral description, natural arrangement, utility

**Mots-clés:** arrangement naturel, Bentham, description moralement neutre, Hart, jurisprudence explicative, positivisme juridique, utilité

## AUTHOR

XIAOBO ZHAI

Zhengzhou University/University College London