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Legal positivism: emotivistic or naturalistic?

Ａs the greatest English legal philosopher,[1] Jeremy Bentham's universal expository jurisprudence (hereafter UEJ) has been undergoing various conflicting interpretations. Herbert Hart hailed him as the founding father and a prime exponent of legal positivism.[2] Starting from Bentham's utilitarian social and political theory, Gerald Postema indicated that "normative jurisprudence" was the right approach to adopt to understanding Bentham's "utilitarian positivism".[3] Recently, in his book *Utility and Democracy* and related articles,[4] Philip Schofield tried to create a radically different image of Bentham's UEJ. He argued rather provocatively that "Bentham was not a legal positivist in the senses in which Hart understood that notion." [5] Despite his claim that his reading, in contrast to a philosophical *reconstruction*, was an attempt to recover the historical Bentham, Schofield's narrative "on [Bentham's] own terms"[6] is, in fact, a philosophical *representation*, because, as he demonstrates convincingly,[7] the philosophical advancement of Bentham's thought

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[1] H.L.A. Hart and D. Sugarman, *Hart Interviewed*, "Journal of Law and Society", 32, 2005, p. 287.

[2] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Clarendon Press, Oxford 1983, pp. 147-148. See also *Essays on Bentham*, Clarendon Press, Oxford 1982, p. 17, p. 53.

[3] G. Postema, *Bentham and the Common Law Tradition*, Clarendon Press, Oxford 1986, p. 303, p. 331.

[4] P. Schofield, *Utility and Democracy*, Oxford University Press, Oxford 2006; "Jeremy Bentham, the Principle of Utility, and Legal Positivism", in M. Freeman (ed.), *Current Legal Problems*, 56, Oxford University Press, Oxford 2003, pp. 1-39; *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, "Jurisprudence", 1, 2010, pp. 147-167.

[5] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, as above, p. 150.

[6] P. Schofield, *Utility and Democracy*, as above, p. V.

[7] In chapter 1 of *Utility and Democracy*, Schofield, by means of detailed historical account, established that Bentham's inkling of his theory of entities preceded his formulation of the priciple of utility.

corresponds largely to its historical development. The whole thesis of *Utility and Democracy* is structured around Schofield's belief in the agreement between the philosophical and historical order of Bentham's theory. Encouraged by the acute awareness of this agreement, and inspired by Bentham's self-assessment that "J.B.'s new ideas derived from Logic,"[8] Schofield argues that a closer look at Bentham's ontology and its associated theory of language would provide a more plausible way of interpreting Bentham's project. Instead of legal positivism, he illuminatingly declares that, a framework based on Bentham's theory of entities would produce a better understanding of Bentham's UEJ, and of its potential contribution to contemporary debates in legal philosophy.[9] Unlike Hart, who started from legal positivism, and Postema, who started from utilitarianism, Schofield's starting point is Bentham's naturalistic ontology.

G.E. Moore famously convicted Bentham of a "naturalistic fallacy", on the ground that the latter defined a non-natural quality "good itself" as "pleasure maximizing", which is a natural property.[10] Following W.K. Frankena's distinction, Schofield pointed out that Moore's so-called naturalistic fallacy is in fact a definist fallacy. When Bentham is charged with a naturalistic fallacy, another thing meant by this mantra is the attempt to derive an "ought" from an "is", for which Schofield reserved the label of "the so-called naturalistic fallacy."[11] Of the principle of utility, compared with A.J. Ayer's emotivist reconstruction in terms of prescription and preference satisfaction,[12] and P. Kelly's re-categorization as a meta-ethical principle,[13] Schofield, by means of detailed exposition of Bentham's ontology, argues that, first, the charge of a definist fallacy is indefensible, because Bentham did not treat "good" as synonymous with "pleasure", but rather only explicated "good" in terms of pleasure; Secondly, the accusation of a naturalistic fallacy misses the point, because a naturalistic basis, for Bentham, is the only foundation on which ethics can make real sense, rather than make honeyed but fraudulent sound.[14]

For Bentham, all objects that ever were or ever can be present to any faculty of the human frame can be comprehended under two denominations, i.e. real entities and fictitious entities.[15] Real entities, i.e., substances or physical objects, are "the only

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[8] P. Schofield, *Bentham*, Continuum, London 2009, p. 17.

[9] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, as above, p. 167.

[10] G.E. Moore, *Principia Ethica*, Cambridge University Press, Cambridge 1993, pp. 91-93.

[11] P. Schofield, "Jeremy Bentham, the Principle of Utility, and Legal Positivism", as above, pp. 3-4.

[12] A.J. Ayer, "The Principle of Utility", in G.W. Keeton and G. Schwarzenberger (eds.), *Jeremy Bentham and the Law*, Stevens & Sons, London 1948, pp. 245-48.

[13] P.J. Kelly, *Utilitarianism and Distributive Justice*, Clarendon Press, Oxford 1990, pp. 44-49.

[14] P. Schofield, *Utility and Democracy*, pp. 1-50; "Jeremy Bentham, the Principle of Utility, and Legal Positivism", as above, pp. 5 -28.

[15] J. Bentham, *De l'ontologie*, edited by P. Schofield, J.P. Clero and C. Laval, Seuil, Paris 1997, p. 80.

objects that really exist."[16] "Language, in order to make sense, ha[s] to refer, either directly or indirectly, to real entities."[17] Fictitious entities, although unreal, are absolutely necessary for language and thought to be carried on, and "must for the purposes of discourse be spoken of as existing."[18] The words that "abound so much in ethics and jurisprudence," including principle, duty, power, etc., are fictitious entities, which, in order to make sense, have to be explained by demonstrating their relationship to the words representing real entities. Human psychology and morality share the same foundation or real source, i.e., the real entities of perceptions of pleasure and pain, which are the "only objects possessed of intrinsic and independent value."[19] Schofield asserts that "Bentham did not accept any ultimate ontological distinction between statements of fact and statements of value." Any statement of value, including the moral vocabulary, such as the words ought, right and wrong, in order to be meaningful, has to be capable of being expounded as a particular sort of factual statement. "Properties, including moral properties, do not exist independently of the physical world. There is no such thing as a non-physical moral property."[20] In Schofield's view, Bentham's ethics is one kind of naturalism. However, there is nothing fallacious in it; on the contrary, only by being naturalistic can it make sense, become truth-apt, and avoid being nonsensical.

Armed with this new insight into Bentham's ontology, Schofield sets out to challenge Hart's influential interpretation of Bentham. Hart claimed to find in Bentham's writings the insistence on a morally neutral vocabulary in the discussion of law and politics, and the insistence on the distinction between law as it is and as it ought to be, and declared that these ideas had opened the positivistic tradition of jurisprudence, and established Bentham as the founder and the most important early representative of legal positivism.[21] Borrowing Stephen Perry's conceptual distinction,[22] Schofield argues that "neither methodological legal positivism nor substantive legal positivism […] can be attributed to Bentham."[23] The critical examinations unfolded in Schofield's writings are grand and sophisticated, and improve significantly our understanding of Bentham's legal theory, and of the

[16] UC lxix, 241, cited from P. Schofield, "Jeremy Bentham, the Principle of Utility, and Legal Positivism", as above, p. 13.

[17] P. Schofield, "Jeremy Bentham, the Principle of Utility, and Legal Positivism", as above, p. 12.

[18] J. Bentham, *De l'ontologie*, as above, p. 86-87.

[19] J. Bentham, cited from P. Schofield, "Jeremy Bentham, the Principle of Utility, and Legal Positivism", as above, p. 20.

[20] Ibid., p. 12.

[21] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, *as above,* pp. 147-148. See also *Essays on Bentham*, p. 17, p. 53.

[22] S.R. Perry, "Hart's Methodological Positivism", in J. Coleman (ed.), *Hart's Postscript*, Oxford University Press, Oxford 2001, pp. 311-313.

[23] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, as above, p. 159.

traditon of legal positivism. The many significant but long neglected differences between Bentham and Hart revealed and stressed by Schofield help us realize that their intellectual relation is much more complex and subtle than conventionally imagined. However one issue on which I feel unsure that I fully understand his analysis, but incline to disagree with him, is whether these differences are sufficient to warrant his conclusion that "Bentham was not a legal positivist in the senses in which Hart understood that notion." Schofield's arguments are manifold, which can not be discussed here comprehensively. The argument that I would like to take issue with is Schofield's proposition that the 20th century distinction between fact and value is "an essential element and crucial underlying assumption of contemporary Hartian legal positivism", and that Bentham, as a naturalist rejecting such distinction, is not a legal positivist.[24]

It is doubtless that Hart was entirely familiar with and did accept the 20th century fact/value distinction. We even can reasonably conjecture that Hart's project of legal positivism was initially inspired and boosted by the 20th century ethical theory based on this distinction. Hart himself, however, did not think the 20th century version of fact/value distinction is "an essential element and crucial underlying assumption" of his legal positivism. As to the nature of moral judgment, Hart's own theory is some kind of emotivism or non-cognitivism, which Hart was very clear that Bentham would not countenance. Hart's rejoinder to Schofield's criticism would be that he has confused the insistence upon the distinction between law as it is and as it ought to be, on the one hand, and the non-cognitivistic moral theory on the other hand. This confusion is just what "most troubles those who react strongly against legal positivism."[25] These anti-positivistic theorists stick to the opinion that the emphasis on the distinction between law as it is and law as it ought to be depends upon or entails moral emotivism or non-cognitivism, which Hart dismissed as irrelevant to the distinction between law as it is and law as it ought to be:

> Let us now suppose that we accept this rejection of non-cognitive theories of morality and this denial of the drastic distinction in type between statements of what is and what ought to be, and that moral judgments are as rationally defensible as any other kind of judgments. What would follow from this as to the nature of the connection between law as it is and law as it ought to be? Surely, from this alone, nothing. Laws, however morally iniquitous, would still (so far as this point is concerned) be laws. The only difference which the acceptance of this view of the nature of moral judgments would make would be that the moral iniquity of such laws would be something that could be demonstrated.[26]

[24] Ibid.
[25] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, as above, p. 82.
[26] Ibid., pp. 83-84.

In Hart's view, the rejection of moral emotivism or non-cognitivism "leaves untouched the fact that there are laws which may have any degree of iniquity or stupidity and still be laws."[27] In fact, Schofield recognizes this. He mentions in a footnote[28] that "Hart warns against confusing the is/ought distinction of legal positivism with the is/ought distinction associated with the so-called naturalistic fallacy. […] And points out that whether one rejects or accepts any sharp distinctions between is/ought, fact/value, means/ends, and cognitive/non-cognitive, this does not undermine the legal positivist distinction between law as it is and law as it ought to be." Schofield's criticism would have been more compelling if he had established that the denial of the is/ought distinction associated with the so-called naturalistic fallacy would necessarily undermine the distinction between law as it is and law as it ought to be.

Nevertheless, this seems an impossible mission, because the bigger problem is that Bentham's naturalism seems perfectly compatible with the is/ought distinction, which can be completely independent of moral emotivism. Schofield successfully dismissed Ayer's emotivistic interpretation of Bentham, and illuminatingly pointed out that Bentham

> was a "naturalist" in the sense that value was determined by the existence of certain events or states of affairs in the physical world, namely the experience of pleasure and pain by sentient beings. Hence, just as what the law is constituted a matter of fact, so what the law ought to be constituted a matter of fact.[29]

However, it is exactly in Schofield's own account that we can find that statements of fact and those of value are two different kinds of statements, despite the fact that both of them share, in real entities, the same ontological foundation. Both of them are naturalistic statements in that they, in order to make true sense, have to be expounded in terms of real entities, and translated into factual statements about real entities, especially pleasure and pain. "Psychology and morality shared a common foundation in the perceptions of pleasure and pain.[30] However, as Schofield said, perhaps in passing, statements of value are "a particular sort of factual statement".[31] They are particular in that: first, they take into consideration the circumstance of "extent". One of Schofield's brilliant contributions is that he highlighted the centrality of "extent" to Bentham's exposition of the principle of utility as a moral principle:

> A moral judgment was produced by taking into account all the pleasures and pains expected to be produced "in all breasts that seem likely to be in any way affected" by the

[27] Ibid.
[28] P. Schofield, *Jeremy Bentham, the Principle of Utility, and Legal Positivism*, as above, p. 28.
[29] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, as above, p. 158.
[30] P. Schofield, *Utility and Democracy*, as above, p. 29.
[31] P. Schofield, *Jeremy Bentham, the Principle of Utility, and Legal Positivism*, as above, p. 12.

act in question. Once the final "circumstance" by which the quantity or value of a pain or pleasure was to be measured-namely that of extent-had been taken into account, a statement of psychological fact was transformed into a statement of moral value. [32]

Bentham later preferred the phrase "the greatest happiness principle" to "the principle of utility", partly because the latter cannot sufficiently indicate the circumstance of extent involved in moral judgement, and can be easily confused with a psychological statement. Secondly, the principle of utility, as a moral principle, is one kind of statement of fact, however, it is the statement of "future fact – the probability of future certain contingencies",[33] namely "a prediction about the pleasure and pain that would be experienced by sentient creatures should an alternative arrangement of the legal system be introduced."[34] When discussing the function of expositor and censor, Bentham asserted that the former explains the facts of "what the legislator and his underworkman the Judge have done already," while the latter occupies himself with "what the legislator ought to do in future," [35] which comes from a better felicific calculation than that on which "what the legislator and his underworkman the judge have done already" was based.

It is seen that, at the ontological level, statements of value are ultimately statements of facts. However, they are statements of the pleasures or pains which, "in all breasts that seem likely to be in any way affected" by any proposed act, "seem liable and likely, in the opposite cases of the act's being done and of its being left undone, to take place."[36] The dimensions of "future" and "extent" bestow double identities upon such statements of facts, and distinguish them from the statements of past or existing facts. In a word, Bentham's naturalism does not exclude the value/fact distinction, which is as basic a theme as naturalism in Bentham's thought. As Ross Harrison demonstrated with a wealth of textual evidence, this distinction is "of cardinal importance" in the tradition from Francis Bacon to David Hume with which Bentham identified, and constitutes "the key to the central point of Bentham's attack on natural rights."[37] The whole field of ethics must be "a labyrinth without a clue" if it refuses this distinction, which "allows criticism and change of the laws" and itself "should on every occasion, be clearly perceived, is [...] the interest of the great bulk of mankind."[38] Gerald Postema argued that "while Bentham insists on a sharp

[32] *Utility and Democracy*, as above, p. 36. See Inaugural, p. 25.

[33] P. Schofield, *Jeremy Bentham, the Principle of Utility, and Legal Positivism*, as above, p. 27.

[34] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, as above, p. 158.

[35] J. Bentham, *A Fragment on Government*, edited by R. Harrison, Cambridge University Press, Cambridge 1988, p. 8.

[36] J. Bentham, *Deontology*, edited by A. Goldworth, Clarendon Press, Oxford 1983, p. 168.

[37] R. Harrison, *Bentham*, Routledge, London 1983, p. 100.

[38] J. Bentham, *Chrestomathia*, cited from R. Harrison, ibid., p. 204.

distinction between is and ought, validity and merit, and the functions of expositor and censor at the level of particular laws, his distinction is much less sharp at other levels, especially at the level of general reflection on the nature and proper form of laws."[39] This view can be formulated the other way around without changing its substantive idea: namely, while the distinction between value and fact is not very sharp at the level of general reflection on the nature and proper form of morals and law, the distinction between is and ought, validity and merit, and the functions of expositor and censor is really much more sharp at the level of particular laws.

However, all this does not mean that Hart's interpretation of Bentham is without flaws. Although his argument that Bentham's ontology manifests itself in his denial of is/ought distinction is open to further discussion, Schofield was completely right when he said that "it is […] the different ontological theories of Bentham and Hart that is at issue." [40] In his *Postscript* to *The Concept of Law*, Hart claimed that his theory is

> [a] theory of what law is which is both general and descriptive. […] My account is descriptive in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.[41]

Hart attributed this morally neutral description to Bentham when he wrote that

> [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 legal positivism of which Bentham may be regarded as the founder.[42]

The problem with Hart's attribution is that Bentham's UEJ is by no means "morally neutral". Bentham's UEJ should be carried out in terms of utilitarian language of pleasure and pain, should serve the project of utilitarian legal reform, and can help to repel incompetent and evil institutions. It should, however, limit itself to the "humbler function" of "simply stating an institution as he thinks it is," since condemning or defending, guarding from reproach or recommending to favour are

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[39] G. Postema, *Bentham and the Common Law Tradition*, as above, p. 308.
[40] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence*, as above, p. 162.
[41] H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford 1994, pp. 239-240.
[42] H.L.A. Hart, *Essays on Bentham*, Clarendon Press, Oxford 1982, p. 27.

the functions of censor.[43] Nevertheless, Bentham did indeed insist that we should use as "neutral" a vocabulary as we can. For him, a "neutral" vocabulary requires expositors to avoid emotive terms, including eulogistic and dyslogistic words, which exist for the purpose of "excitation" and are passion-kindling, hence question-begging and fallacious.[44] Bentham's "neutral" can be reasonably dubbed as "emotively neutral". For Bentham, utilitarian description can be, and should be, carried out in emotively neutral language, which for him is one of the ways avoiding question-begging fallacy. Bentham, who was very cautious about words and language, never used the phrase "morally neutral description" to portray his UEJ, because, UEJ, as we have seen, strictly speaking, is morally utilitarian. However, Bentham did declare explicitly that his vocabulary is neutral, i.e., emotively neutral. There is nothing self-contradictory in Bentham's methodology, because, for him, moral judgment, as Hart said, is a "verifiable proposition about utility",[45] and a matter of calculation of pleasure and pain according to seven circumstances (intensity, duration, certainty, propinquity, fecundity, purity, and extent), whereas emotion is a state of mind produced by transient pleasure and pain,[46] which often represents some prejudice or delusion. Longing for some independent rational foundation for ethical thought, Hart was highly skeptical of objective moral facts. He required 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.[47] P.M.S. Hacker thought Hart was "an ethical pluralist",[48] and Sylvie Delacroix regarded him as a moral agnostic.[49] Hart seems to subscribe to some kind of noncognitivism concerning the nature of moral judgment. For him, moral judgment is a matter of attitude, feeling and emotion, and, therefore, Bentham's emotively neutral description is equated by him with a morally neutral description. That's why, first, he wrongly asserted that his theory is morally neutral description, although he did start his theory from particular moral concerns and from the moral truth that he longed for but could not prove; secondly, he wrongly attributed a morally neutral description to Bentham when he found an emotively neutral description in Bentham's UEJ. So the mistake of Hart is not that he erroneously ascribed the positivistic is/ought distinction to Bentham, but that he wrongly attributed his emotivistic is/ought distinction to Bentham, whose is/ought

[43] J. Bentham, *A Fragment on Government*, as above, p. 9.
[44] J. Bentham, *The Works of Jeremy Bentham*, V, 2, edited by J. Bowring, Tait, Edinburgh 1837, p. 436.
[45] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, as above, p. 82.
[46] J. Bentham, *The Works of Jeremy Bentham*, as above, V, 10, p. 509.
[47] H.L.A. Hart, *The Concept of Law*, as above, pp. 253-254.
[48] P.M.S. Hacker, "Hart's Philosophy of Law", in P.M.S. Hacker and J. Raz (eds.), *Law, Morality, and Society*, Clarendon Press, Oxford 1977, p. 8, note 12.

distinction is naturalistic. Hart and Bentham share the *prima facie* same distinction between is and ought. If this distinction is the ID card of legal positivism, we have to say, Bentham's and Hart's legal positivisms are ontologically different. Hart's emotivistic legal positivism does not belong to the "utilitarian tradition in jurisprudence" founded and represented by Bentham. On the contrary, this tradition, at its beginning and in its classical form, is naturalistic legal positivism. The root cause of its positiveness is naturalism. As Schofield says, "Bentham was not a legal positivist in the senses in which Hart understood that notion." However, the senses here have nothing to do with Hart's is/ought distinction, but everything to do with Hart's emotivistism.

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[49] S. Delacroix, *Meth-Ethical Agnoticism in Legal Theory*, "Jurisprudence", 1, 2010, pp. 225-226.