

BOOK REVIEW

BENTHAM'S THEORY OF LAW AND PUBLIC OPINION

EDITED BY XIAOBO ZHAI AND MICHAEL QUINN

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Bentham is often quoted in textbooks and articles on sentencing (and in a legion of other contexts) and it is common to encounter references to the belief that ‘every action by a sentient creature [is] motivated by a desire either to experience some pleasure or to avoid some pain’,¹ or a variation of this principle.² Unfortunately it is often difficult to acquire Bentham’s writings and, if one is successful in this enterprise, to find the time to study his many essays. Hence, we encounter the need to study his influential thoughts through the medium of a collection of essays drawn together by current scholars. The collection — *Bentham’s Theory of Law and Public Opinion*, edited by Xiaobo Zhai and Michael Quinn — is an outstanding example of this genre and is highly recommended.

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¹ Quoted in Philip Schofield, ‘A Defence of Jeremy Bentham’s Critique of Natural Rights’ in Xiaobo Zhai and Michael Quinn (eds), *Bentham’s Theory of Law and Public Opinion* (Cambridge University Press, 2014) 208.

² Also discussed in Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010), 79, 97–8, 148–9, 166, 192.

Indeed, this collection of quite focused contributions on this wide subject is characterised by the quality of the writing, and of the editing,³ and offers a first-rate source of contemporary commentary on a number of controversial subjects. Not least of these is the view of Bentham on the role of public opinion in the selection of criminal laws and the potential sanctions for their breach.⁴

The gallery of authors who have contributed to this collection is impressive, especially Professor Gerald J Postema who has written two of the essays, 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law' and 'The Soul of Justice: Bentham on Publicity, Law, and the Rule of Law'. Interestingly, Professor Philip Schofield has also penned two of the nine essays, a relatively rare occurrence in a publication of this kind, but one that is welcome in this case in light of the value of those discussions. The book contains a thorough index and the internal divisions are sufficient to orient the reader ably. The reader's interest is sustained by the avoidance of too lengthy a review of any particular theme without intervening reminders of the path taken and the subject to be examined next.

Leaving the general in order to draw attention to elements of particular excellence, I note that the introduction is well structured and serves to engage the reader from the outset, identifying the various themes that are the subject matter of the 254 pages to follow. As Frederick Rosen states in the Introduction,

The focus of the book on Bentham, law, and public opinion is central to understanding Bentham's thought ... The essays will be of interest not only to students of Law and its history but also to students of numerous aspects of Bentham's thought and its historical context.⁵

We are alerted to the upcoming discussion of the contributions of H L A Hart to the philosophy of law,⁶ Bentham's views on same-sex repression, the rule of law, what might be described today as the concerns surrounding penal

³ Indeed, the number of cross-references to other chapters is unusually high and this has contributed to the reader's understanding of the various points being discussed.

⁴ See, eg Julian Roberts, 'Clarifying the Significance of Public Opinion for Sentencing Policy and Practice' in Jesper Ryberg and Julian Roberts (eds), *Popular Punishment on the Normative Significance of Public Opinion* (Oxford University Press, 2014) 228; Mirko Bagaric, 'Proportionality in Sentencing: The Need to Factor in Community Experience, Not Public Opinion' in Jesper Ryberg and Julian Roberts (eds), *Popular Punishment on the Normative Significance of Public Opinion* (Oxford University Press, 2014) 76.

⁵ Zhai and Quinn, above n 1, 2.

⁶ This is discussed elsewhere in Nicola Lacey, *A Life of H.L.A. Hart The Nightmare and the Noble Dream* (Oxford University Press, 2004); Gilles Renaud, 'A Life of H.L.A. Hart: The Nightmare and the Noble Dream [Book Review]' (2006) 2(2) *International Journal of Punishment and Sentencing* 95.

populism⁷ and to the limited role that judges should play in law reform, amongst other interesting things.

As noted, Professor Postema penned the second essay, 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law', and I commend the excellence of his insights into the conditions that must be met for the realisation of law's rule. His discussion on the subject of fidelity to the law is introduced by a brief discussion of the catastrophic results of a judge ignoring the law, not merely as a manifestation of what might be described as a 'rogue attitude'⁸ to the dictates of the law but as a representation of corruption motivated by gain.⁹ The learned author goes on to address the core idea underscoring the rule of law by means of a cogent and compelling argument, making the claim throughout that 'the aim of the rule of law is to provide protection and recourse against the arbitrary exercise of power through the instrumentality of distinctive features of law'.¹⁰ Professor Postema later introduces the first of many helpful thoughts on the subject of judging found throughout the nine chapters.¹¹ In this case, we are reminded of the fragility of law courts in many emerging states. The image he uses to illustrate the case is that, without the rule of law, judges are found inside mere buildings, not courthouses dedicated to justice. In effect, we are made to understand that law can only rule when all of the laws' servants agree to be bound together in a dense network of mutual accountability.

The next essay, also by Professor Postema — 'The Soul of Justice: Bentham on Publicity, Law, and the Rule of Law' — addresses the signal need for publicity in order to ensure that justice will prevail.¹² Stated in another way, publicity brings about security against misrule. Familiar themes such as 'the

⁷ This is discussed elsewhere in Arie Freiberg and Karen Gleb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008); Gilles Renaud, 'Penal Populism, Sentencing Councils and Sentencing Policy [Book Review]' (2008) 4(3) *Original Law Review* 68; John Pratt, *Penal Populism* (Routledge, 2007); Gilles Renaud, 'Penal Populism [Book Review]' (2007) 49(3) *Canadian Journal of Criminology and Criminal Justice* 424.

⁸ This is discussed elsewhere in Jason Whitehead, *Judging Judges Values and the Rule of Law* (Baylor University Press, 2014); Cheryl Wattleby, *A Step Toward Brown v. Board of Education: Ada Lois Sipuel and Her Fight to End Segregation* (University of Oklahoma Press, 2014).

⁹ Gerald J Postema, 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law' in Zhai and Quinn, above n 1, 7, 8–10.

¹⁰ *Ibid* 16–17.

¹¹ *Ibid* 19.

¹² Postema in Zhai and Quinn, above n 1, 40. The matter is discussed elsewhere in Ted McCoy, *Hard Time Reforming the Penitentiary in Nineteenth-Century Canada* (Athabaska University Press, 2012) which illustrates the need for publicity by pointing out how a Commission of Inquiry had laid bare the crisis in one penitentiary. The tragic facts resemble the first scene from the movie *The Shawshank Redemption* in which a prisoner is beaten to death, save that the victim in question was a challenged youth.

tribunal of public opinion' are discussed fully and fairly and the result is that cogent argumentation is part of the essential infrastructure of the rule of law. The discussion of 'public reasons and law' is especially recommended for the excellence of the insights into the need for both warnings about, and public rationales for, the imposition of sanctions, if those sanctions are to be considered just.¹³

Chapter 4 by Michael Quinn, entitled 'Popular Prejudices, Real Pains', includes remarkable instruction on the harm principle¹⁴ including discussion of questions touching upon same-sex relationships and the need for law enforcement officials to apply their authority with restraint lest certain distasteful activities be elevated to the status of crimes. I note in particular the following observations.

A rational public opinion (and thus a rational popular sanction) would accord with abstract utility ... A popular sanction is 'the most active and faithful servant of the principle of utility, the most powerful and least dangerous ally of the political sanction'.¹⁵

Other writers have advanced powerful arguments against assimilating moral or social offences to actions requiring the intervention of the state by means of the blunt instrument of the criminal law, and the passages quoted throughout this chapter constitute a powerful reminder of the need for restraint.¹⁶

The next essay, by Professor Philip Schofield, is entitled 'Jeremy Bentham on Taste, Sex, and Religion'.¹⁷ Its themes include 'utility versus asceticism' and 'Bentham versus Mill on higher and lower pleasures'. Readers interested in mounting challenges to a variety of proscriptions, notably with respect to same-

¹³ Postema, above n 12, 54, 55.

¹⁴ Elsewhere discussed in Andrew Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principle of Criminalisation* (Hart Publishing, 2011) and Gilles Renaud, 'Crimes, Harms and Wrongs: On the Principle of Criminalisation [Book Review]' (2012) 36(3) *Criminal Law Journal* 192.

¹⁵ Michael Quinn, 'Popular Prejudices, Real Pains' in Zhai and Quinn, above n 1, 63, 73.

¹⁶ William Twining (ed), *Bentham: Selected Writings of John Dinwiddy* (Stanford University Press, 2004) 100–4; Gilles Renaud, 'Bentham: Selected Writings of John Dinwiddy [Book Review]' (2005) 1(2) *International Journal of Punishment and Sentencing* 111; Andreas von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 44–5 for a review of the question of unruly but not necessarily harmful behaviour suggested to be the responsibility of youths; Andrew von Hirsch and Andrew Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Hart Publishing, 2006); Gilles Renaud 'Incivilities: Regulating Offensive Behaviour' [Book Review]' (2007) 52(3) *Criminal Law Quarterly* 501.

¹⁷ In Zhai and Quinn, above n 1, 90.

sex relationships, will find — leaving aside the more obvious challenges — significant suggestions for lines of argument, notably the potential submission that any legislation limiting same sex relationships will be void by reason of vagueness.¹⁸

The principal editor, Professor Xiaobo Zhai, wrote the seventh essay, 'Bentham's Natural Arrangement and the Collapse of the Expositor-Censor Distinction in the General Theory'. The reader is guided ably through the intellectual thicket constituted by the jurisprudence and general philosophy put forward by Bentham on the important subject of the 'natural arrangement', and I commend in particular part two which explores the sophisticated interrelations between natural arrangement, the principle of utility and investigation of truths.

Perhaps the most valuable contribution to the lawyer, to the criminologist and to anyone interested in the study of sentencing, is chapter 8, 'Utility, Morality, and Reform.' The author is Professor Emmanuelle de Champs, and she brings to this task a wealth of knowledge of traditional English jurisprudence and the Continental contributions to the subject. We read at page 186 and thereafter many passages setting out the wisdom of Bentham and Beccaria and other writers as to the need for public, speedy and proportionate sanctions, limited as far as may be possible by the need for parsimony. The discussion starting at page 192 highlights the importance of a codified guide for sentencing. Yet, in Canada, important and everyday elements of sentencing, notably the guilty plea principle and the weight to be assigned to a criminal record,¹⁹ are left to the common law, notwithstanding the efforts to codify sentencing in 1996. Much of the discussion could form the basis for a potential challenge to section 19 of the *Criminal Code* by means of which ignorance of the law is neutralised as a potential defence. In effect, the many passages touching upon the need for a clear and codified system of communicating the limits of personal liberty, though dating back 200 years and more, may continue to influence courts should a challenge be raised to this well-known provision.²⁰

¹⁸ See also Don Stuart, *Charter Justice in Canadian Criminal Law* (Carswell, 6th ed, 2014) 125.

¹⁹ See especially Julian Roberts and Andrew von Hirsch, *Previous Convictions at Sentencing Theoretical and Applied Perspectives* (Hart Publishing, 2010). See also Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) and Gilles Renaud, 'Mitigation and Aggravation at Sentencing [Book Review]' (2012) 36(5) *Criminal Law Journal* 317.

²⁰ See also Don Stuart, *Canadian Criminal Law: A Treatise* (Carswell, 7th ed, 2015) 311–98; Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013) 81–108; Gilles Renaud, 'Positive Obligations in Criminal Law [Book Review]' (2013) 37(2) *Provincial Judges Journal* 56.

The final essay, ‘A Defence of Jeremy Bentham’s Critique of Natural Rights’, by Professor Schofield,²¹ is of valuable assistance to those vitally interested in the subject of what might be described as contemporary anti-utilitarianism, in the sense that it is often argued that the good of the community as a whole is incompatible with human rights.²² Proportionate sanctions are discussed ably, and the question of the subjective degree of harm visited upon victims in light of their objective standard of living, discussed by others at various points in the text, is addressed with aplomb.²³

Bentham’s Theory of Law and Public Opinion is an impressive scholarly text, with a balance of views and a wealth of useful references to further readings. It cannot be denied that certain passages contain challenging discussions but that is at the heart of any enriching experience: one must endure some difficulty but the pains-taking is of no moment when measured against the ultimate pleasure.

²¹ Philip Schofield in Zhai and Quinn, above n 1, 208.

²² See especially Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish Publishing, 2001) ch 5.

²³ See above n 21, 225–7 in particular.