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Bentham: “Right the child of law”—The myth of natural rights

Why is Bentham so opposed to the *Declaration of the Rights of Man and of the Citizen*? It is at first surprising how much of a froth Bentham works up against the notion of natural rights, given that he no doubt shared many of the early aspirations of the Revolution.

1. *Encouragement of insurrection and anarchy*
2. *Encouragement of partiality*
3. *Insensitivity to the circumstances*
4. *Overgeneralization*
 - Are all men equal in rights? Even madmen?
 - Is all speech to be permitted? Even slander?
 - Is the performance of any religious duty to be allowed? Even a duty to resist non-monarchical government?

Bentham on the obligation to obey the law

- One of Bentham’s main objections to a declaration of natural rights is that it encourages subjects to disobey the law whenever they believe that it violates one of those rights.
- Does Bentham, then, advocate a doctrine of absolute obedience to the law?
- This would be puzzling. After all, there is no guarantee that the legislature might not enact a bad law, say, a law that lowers general utility. If we believe that it has, then should we obey the law?
- Of course, we might agree with Hume and Bentham that it promotes utility for people *in general* to be disposed to obey the law, even when they think it is bad.
- But what relevance does this have for my decision, as an *individual* subject, whether to comply with what I sincerely believe is a bad law?

A number of responses might be given on Bentham’s behalf:

1. Bentham’s main target is disobedience *that is based on the supposed violation of supposed natural rights*.
 - (A) Appealing to a list of natural rights doesn’t help us to determine whether the law is bad. To determine that, we must turn to considerations of general utility.
 - (B) Moreover, appealing to natural rights seems to prejudice the question of whether we should resist. Appealing to the fact that the law has negative effects on utility, by contrast, forces one to consider whether resistance, which may have negative effects on utility of its own, is worthwhile on balance.
2. Bentham intends to be advising *legislators*, not *citizens*. The way *legislators* frame the laws *can* affect whether the laws are obeyed *in general*. Framing the law in terms of natural rights encourages general disobedience. General disobedience lowers utility (even if, on occasion, a particular act of disobedience raises it). Therefore, legislators should not frame laws in terms of natural rights. *Again, Bentham’s focus on acts of legislation gives his work a rule-utilitarian tendency.*

Bentham's theory of rights

The subtitle to Bentham's essay reads: "Right the child of Law." In other words, the only rights are legal rights. There are no moral rights.

Crude benefit theory of legal claim-rights: A has a claim-right that B X iff B has a legal duty to do X (the law requires B to) and B *will* benefit A if B does X.

Problem: I can become a rightholder simply by placing a bet on whether you will fulfill some legal duty.

Sophisticated benefit theory of legal claim-rights: A has a claim-right that B X iff B has a legal duty to do X and A the legislature *intended* to benefit in a particular way from B's doing X.

Problem: How do we make sense of the idea that B violates A's right in particular by (say) assaulting A? After all, a law against assault is intended to benefit everyone, not just A.

Add: "and A, in particular, fails to receive this benefit if B does not X" In other words, one needs both the intention to benefit and the actual production of benefit to identify the right-holder. The sophisticated theory has to be a supplement to, not a replacement for, the crude theory.

Could Bentham have endorsed moral rights?

Why not say that A has a moral right that B do X iff it ought to be the case, on utilitarian grounds, that A has a legal right that B do X? (In fact, this is fairly close to Mill's conception of moral rights, which we see next time.)

- Moral rights are often treated as *premises* in arguments for legal rights. Can Bentham make sense of this?
- Rights, legal and moral, are often thought to be *counterweights* to considerations of the public interest. Can Bentham make sense of this?