Jeremy Bentham's 'Nonsense upon Stilts'

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Jeremy Bentham's 'Nonsense upon Stilts', hitherto known as 'Anarchical Fallacies', has recently appeared in definitive form in The Collected Works of Jeremy Bentham. The essay contains what is arguably the most influential critique of natural rights, and by extension human rights, ever written. Bentham's fundamental argument was that natural rights lacked any ontological basis, except to the extent that they reflected the personal desires of those propagating them. Moreover, by purporting to have a basis in nature, the language of natural rights gave a veneer of respectability to what, in the case of the French Revolutionaries at least, were at bottom violent and selfish passions. Yet that having been said, Bentham had no objection to the notion of a right which expressed a moral claim founded on the principle of utility. However, the phrase 'securities against misrule' better captured what was at stake, and avoided all the ambiguities otherwise associated with the word 'right'.

I

It is generally accepted that Jeremy Bentham's critique of the French Declaration of the Rights of Man and the Citizen, hitherto known under the title of 'Anarchical Fallacies', constitutes one of the most influential attacks on the concept of natural rights ever written. The appearance of the essay in definitive form in the new edition of The Collected Works of Jeremy Bentham, under Bentham's preferred title of 'Nonsense upon Stilts', presents an appropriate occasion for a reconsideration of the essay. In particular, the assumption that Bentham was simply and straightforwardly opposed to declarations


of rights needs some modification, as we shall see. While Bentham certainly disputed the existence of any metaphysical basis for rights (whether natural rights or, in contemporary parlance, human rights), he recognized that the language of rights might be used to state moral claims, although he also argued that the phrase ‘securities against misrule’ would be much more appropriate than the substantive term ‘rights’ in this context.

Bentham composed ‘Nonsense upon Stilts’ in the late summer or autumn of 1795. However, in order to appreciate the full force of Bentham’s arguments, it is helpful in the first place to consider the significance which he attached to the distinction between law as it is and law as it ought to be, which he advanced as early as 1776 in his first major published work, A Fragment on Government. In Bentham’s view this distinction highlighted the difference between established law and morality (law and morality as it is) and law and morality as it should be according to the principle of utility (law and morality as it ought to be). The distinction between law as it is and law as it ought to be both provided the basis for his utilitarian strategy of reform, and the basis for his attack on natural law with its related doctrine of natural rights. In A Fragment on Government Bentham identified two possible approaches which the legal commentator might adopt, that of the expositor and that of the censor:

To the province of the Expositor it belongs to explain to us what, as he supposes, the Law is: to that of the Censor, to observe to us what he thinks it ought to be. The former, therefore, is principally occupied in stating, or in enquiring after facts: the latter, in discussing reasons.

The task of the expositor was to show what had already been done by legislators and judges, while that of the censor was to show what they ought to do in future. Different countries had established very different laws, but what ought to have been established was in great measure the same.3 Bentham’s central criticism of William Blackstone’s approach in Commentaries on the Laws of England4 was not simply that he had not distinguished between the functions of censor and expositor, but had confounded them. Blackstone’s ‘professed object’ had been to describe the laws of England, in other words to perform the role of the expositor, but he had gone beyond this and, taking on the role of the censor, had attempted to justify the laws which he had found established. There was a sense that it was inappropriate to condemn ‘an old-fashioned law’, perhaps on account of

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‘a kind of personification ... as if the Law were a living creature’, or on account of ‘the mechanical veneration for antiquity’ or some ‘other delusion of the fancy’. For his part, Bentham did not know ‘for what good reason it is that the merit of justifying a law when right should have been thought greater, than that of censuring it when wrong. Under a government of Laws, what is the motto of a good citizen? To obey punctually; to censure freely.’ Bentham’s concern was not only that Blackstone had strayed beyond the province of the expositor into that of the censor, but also that he had in effect subverted the role of censor by adopting an all too complacent attitude. It was necessary not merely to approve those laws considered to be right, but also to condemn those laws considered wrong.

Thus much is certain; that a system that is never to be censured, will never be improved: that if nothing is ever to be found fault with, nothing will ever be mended: and that a resolution to justify every thing at any rate, and to disapprove of nothing, is a resolution which, pursued in future, must stand as an effectual bar to all the additional happiness we can ever hope for; pursued hitherto would have robbed us of that share of happiness which we enjoy already.\(^5\)

In the context of a discussion of heresy, Blackstone had remarked that, following certain legislative amendments, ‘Every thing is now as it should be’.\(^6\) Bentham believed that this phrase – which he usually rendered as ‘every thing is as it should be’, and implying, as he saw it, that all established law was justified – summarized Blackstone’s whole approach.\(^7\)

Bentham did not deny that law should be linked to morality – quite the contrary. The practical point of separating the roles of expositor and censor was to bring about the coincidence of law as it is and law as it ought to be. Jurisprudence, like any other science, might be organized according to either a ‘natural arrangement’ or a ‘technical arrangement’. A natural arrangement was one which ‘men in general are, by the common constitution of man’s nature, disposed to attend to’. In the case of actions in general, and hence in the case of actions regulated by the law, the feature with which men were most concerned was their utility, their tendency either to promote or to diminish happiness, either to produce pleasure or to produce pain. A law was justified in so far as it produced happiness, understood in terms of pleasure, and prevented misery or mischief, understood in terms of pain. The principle of utility, therefore, should ‘preside over and govern, as it were, such arrangement as shall be made of the several institutions or

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\(^7\) Bentham, *Fragment on Government* (CW), pp. 400, 407 and n.
combinations of institutions that compose the matter of this science', and given the universality of the principle, 'the same arrangement that would serve for the jurisprudence of any one country, would serve with little variation for that of any other'. Those actions which diminished utility, which produced mischief, would be constituted into offences: "The synopsis of such an arrangement would at once be a compendium of expository and of censorial Jurisprudence.... Such a synopsis, in short, would be at once a map, and that an universal one, of Jurisprudence as it is, and a slight but comprehensive sketch of what it ought to be.' The leading terms in a natural arrangement would therefore 'belong rather to Ethics than to Jurisprudence, even than to universal Jurisprudence'. Blackstone's mistake had been to attempt to justify the technical arrangement of English law, which, in contrast to the 'satisfactory and clear' qualities associated with a natural arrangement, was 'confused and unsatisfactory'. A technical reason was one associated with an art, science, or profession – in this case the art or profession of law – and would only make sense to a person trained in the profession in question. Under a natural arrangement, '[t]he 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'. Under English law, 'offences ... against prerogative, with misprisions, contempts, felonies, praemunires' did not indicate any connection between the acts in question and the principle of utility. In short, Bentham's concern was that Blackstone had attempted to justify the law of England without reference to the principle of utility, the only basis for any sort of justification.

Blackstone's confusion of the roles of expositor and censor was an inevitable consequence of his adoption of the doctrine of natural law. In Commentaries on the Laws of England, Blackstone had strikingly asserted the priority of the law of nature over all other law:

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are are valid derive all their force, and all their authority, mediatly or immediately, from this original.

The law of nature was known through 'the due exertion of right reason' and through divine revelation. The role of reason was to discover what promoted happiness, since the creator, a being of not only infinite power and wisdom, but also goodness, had reconciled 'the laws of

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a Ibid., pp. 415–18.
eternal justice with the happiness of each individual'. But as man's reason was corrupt, divine providence, in order to remedy this defect, 'hath been pleased, at sundry times and in divers manners, to discover and enforce it's laws by an immediate and direct revelation', precepts which would again be found to promote man's happiness. All human laws rested on 'these two foundations, the law of nature and the law of revelation', deriving their 'force' from them, and were not to contradict them. For instance, the unlawfulness of murder arose from its prohibition by the divine and natural law, and 'if any human law should allow or injoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine'.

Bentham condemned Blackstone's natural law doctrine for its linking of legal validity to a particular substantive content. As John Austin was later to express it, also in the context of a discussion which was aimed, amongst other targets, at refuting Blackstone's conception of natural law:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.

Moreover, not only did Bentham condemn the linking of legal validity to a particular substantive content, he also condemned the view that the natural law provided any basis at all on which to ground the substantive content of human law. Blackstone's view that a human law which conflicted with the divine and natural law should be disobeyed, argued Bentham, was a 'dangerous maxim'. If the law of nature was 'nothing but a phrase', and if there was no really-existing standard with which the law of the state could be compared, and

if, in a word, there be scarce any law whatever but what those who have not liked it have found, on some account or another, to be repugnant to some text of scripture; I see no remedy but that the natural tendency of such doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like.

The non-existence of the law of nature – or more precisely its 'non-cognoscibility', though this was a consequence of its non-existence – meant that any appeal to the law of nature as invalidating a positive law, if it was not nonsense, was a reflection of 'the bare unfounded disapprobation' on the part of the objector to the positive law in question. No sort of government could survive in these circumstances.

Blackstone had stated that 'a law always supposes some superior who is to make it';\(^{11}\) Bentham drew out the corollary, that if there was no maker, then there was no law. Paradoxically, Blackstone’s position rested on a doctrine whose ultimate tendency might just as likely be anarchical as conservative. Only the principle of utility, ‘accurately apprehended and steadily applied’, could provide, in theory at least, and therefore in practice as well, the means of resolving the question of when it was proper to resist government.\(^{12}\)

II

The most prominent manifestations of theories of natural law and natural rights occurred in the various declarations of rights issued in the newly formed United States of America, and of course in the French Declaration of the Rights of Man and the Citizen. Bentham criticized these documents along the lines he had marked out in his criticisms of Blackstone. In general, Bentham pursued two related, but distinguishable, lines of argument. One was to criticize the attempt to restrain the supreme legislative power in a state by means of such documents. The other was the attempt to formulate such restraints in terms of natural rights. In July 1789 the Constituent Assembly decided that the new French constitution should be preceded by a declaration of the rights of man,\(^{13}\) and in the course of the next few weeks a number of drafts were produced. In a letter to Brissot, written in mid-August 1789, Bentham was quick to express his objections to the very notion of a declaration of rights:

I am sorry you have undertaken to publish a Declaration of Rights. It is a metaphysical work – the \textit{ne plus ultra} of metaphysics. It may have been a necessary evil, – but it is nevertheless an evil. Political science is not far enough advanced for such a declaration. Let the articles be what they may, I will engage they must come under three heads – 1. Unintelligible; 2. False; 3. A mixture of both. You will have no end that will not be contradicted or superseded by the laws of details which are to follow them. What, then, will be the practical evil? Why this: you can never make a law against which it may not be averred, that by it you have abrogated the Declaration of Rights; and the averment will be unanswerable. Thus, you will be compelled either to withdraw a desirable act of legislation – or to give a false colouring (dangerous undertaking!) to the Declaration of Rights. The commentary will contradict the text. The best thing that can happen to the Declaration of Rights will be, that it should become a dead letter; and that is the best wish I can breathe for it.

\(^{11}\) Blackstone, \textit{Commentaries on the Laws of England}, i. 43.
\(^{12}\) Bentham, \textit{Fragment on Government (CW)}, pp. 482 f.
\(^{13}\) \textit{Archives parlementaires de 1787 à 1860, première série (1787 à 1799)}, Paris, 1879–1913, viii. 216 (9 July 1789).
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Bentham did concede that it would be ‘some remedy if any declaration were made provisional, or temporary’. Nonetheless, Bentham’s reading of some of the draft declarations did nothing to shake his opposition: ‘My first impressions have been strongly confirmed by looking over all the “projects” which have hitherto had birth.’

Around the same time that he wrote this letter, Bentham composed ‘Observations on the Draughts of Declarations-of-Rights presented to the Committee of the Constitution of the National Assembly of France’, with the intention of commenting in detail on several of the draft declarations in turn, but, as it turned out, apart from some introductory material, he only composed a brief and incomplete commentary on the declaration proposed by Emmanuel Joseph Sieyès. Bentham was perhaps overtaken by events. The text of the Declaration of Rights was settled by the Constituent Assembly on 26 August 1789, and Bentham may thereby have been persuaded to abandon the essay. Several years later, around the time he was composing ‘Nonsense upon Stilts’, he explained why he had not criticized the Declaration of Rights when it had first appeared:

My opinion of the declaration of rights considered in itself was the same at the moment of its first issuing as now. But there seemed some thing generous and liberal in the intention of it. Willing to hope the best, I flattered myself it would slide quietly into neglect, and be even turned into a dead letter: that either no attempt at all would be made to give it execution, to carry it into practice, or that the first attempt of the kind that came to be made would present such a view of the mischievous tendency of it, as should unite all opinions of the sense of the necessity of laying it aside under the character of a collection of moral precepts, designed but to guide men only and not to bind them.

The implication is that had the Declaration of Rights been conceived and interpreted as a series of moral claims he would have had no objection to it, or at least to its form. Nevertheless, several important themes more extensively developed in his criticism of the Declaration of Rights in ‘Nonsense upon Stilts’ were foreshadowed in ‘Observations on Draughts of Declarations-of-Rights’.

16 University College London Library, Bentham Papers, Box cxlvii, fo. 223 (15 November 1795).
17 In the version of ‘Anarchical Fallacies’ which appears in the Bowring edition of Bentham’s Works, this material is mistakenly placed at the beginning of the work as a commentary on the Preamble to the Declaration of Rights (see Bowring, Works,
Bentham identified four purposes for which a declaration of rights might be issued: to limit the authority of the Crown; to limit the authority of the National Assembly as the supreme legislative power; to guide the National Assembly as it drafted detailed legislation in the future; and to afford 'a satisfaction to the people'. He then showed that in each case except the last, which was of too 'local' a character to merit consideration, a declaration of rights was without any use whatsoever. Since it was the object of the constitution itself to set limits to the authority of the Crown, a declaration would be superfluous in this respect. The limitation of the National Assembly as the supreme legislature would be unnecessary, since the people would be just as prepared to express their disapproval of a measure whether or not it conflicted with the declaration. Moreover, every declaration of rights faced a dilemma. If a declaration listed the exceptions and modifications that might be made to its provisions by subsequent laws, it would fail to set limits to the power of the legislature, which was its avowed purpose. If it did not list the exceptions, it would prove impossible to comply with its terms, since the detailed law would inevitably conflict with them.

Suppose a declaration to this effect: No man's liberty shall be abridged in any point. – This, it is evident, would be an useless extravagance which must be contradicted by every law that came to be made. Suppose it to say, No man's liberty shall be abridged but in such points as it shall be abridged in by the law. This, we see, is saying nothing: it leaves the law just as free and unfettered as it found it.

As a restraint upon a sovereign legislature, a declaration was either incoherent or worthless.

Finally, the notion that a declaration might operate as a guide to the legislature in the drafting of future detailed legislation was founded on a confusion between 'what is first in the order of demonstration and what is first in the order of invention'. In demonstration, the logical order was to begin with the general proposition, and proceed to the particular propositions included within it. But this was 'not the order of conception, of investigation, of invention', where 'particular propositions always precede general ones. The assent to the latter is preceded by and grounded on the assent to the former.' The plan of the National Assembly was to declare the principles, the fundamental laws, and from this deduce the laws of detail. However, the proper method was to establish the laws of detail, and then proceed to the more general, fundamental laws, which would be 'exact and fit for
service’ in so far as they were consistent with the particular laws from which they had been derived.

What follows? That the proper order is first to digest the laws of detail: and when they are settled and found to be fit for use, then, and not till then, from them may be selected in terminis or deduced by abstraction such propositions as may be capable of being, without self-contradiction, given as fundamental laws.

The desire to enact fundamental laws was ‘the old appetite of ruling posterity, the old recipe for enabling the dead to chain down the living’. It was absurd to bind succeeding legislators with a general law whose consequences could not be foreseen, especially when the absurdity of the attempt to do so in relation to a particular law whose consequences were foreseeable was ‘pretty well recognized’.

Bentham’s objections did not only extend to the futility or mischievousness of attempting to bind the legislator for the time being; he also objected to the delusive properties possessed by the language in which such documents were typically expressed. Were a person to say that no law ought to be made which would diminish general happiness, this expressed the ‘simple matter of fact ... that a sentiment of dissatisfaction is excited in my breast by the idea of any such law’. Were he to say that no law shall be made, this signified ‘that the sentiment of dissatisfaction in me is so strong as to have given birth to a determined will, to a determined wish, that no such law should ever pass, and that determination so strong as to have produced a resolution on my part to oppose myself as far as depends on me to the passing it, should it ever be attempted’. However, were he to say that no law could be made, this signified

the same wish as before, only wrapped up in an absurd and insidious disguise. My wish is here so strong, that as a means of seeing it crowned with success, I use my influence with the persons concerned to persuade them to consider a law which at the same time I suppose to be made in the same point of view as if it were not made: and consequently to pay no more obedience to it than if it were the random command of a single unauthoritied individual. To compass this design I make the absurd choice of a term expressive in its original and proper import of a physical impossibility in order to represent as impossible the very event of which I am apprehensive: occupied with the contrary persuasion I raise my voice to the people, tell them the thing is impossible, and they are to have the goodness to believe me, and act in consequence.

And finally were he to say that the law was ‘a violation of the natural and indefeasible rights of man’, this was as much as to say that he

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18 For further comments of Bentham on ‘the fallacy of irrevocable laws’ and the related ‘the wisdom of our ancestors fallacy’ see ‘The Book of Fallacies’, Bowring, Works, ii. 396–408.
would endeavour to kill the persons concerned in the enactment of it. Declarations of rights indicated ‘the violence of the passions’, for they provided a means of ‘subduing opposition at any rate and giving to the will of every man who embraces the proposition imported by the article in question a weight beyond what is its due, its just and intrinsic due’. Hence, said Bentham, ‘These several contrivances for giving to an encrease in vehemence the effect of an encrease of reason, may be stiled bawling upon paper’.20

The use of the words ‘can’ and ‘can not’ was particularly obfuscatory, since these words might denote either physical, moral, or legal impossibility. In a legal context, to say that a subordinate magistrate could not perform a certain action made sense, in that it implied that he lacked legal power to do so. However, when applied to the supreme legislature ‘clouds of ambiguity and confusion roll in in a torrent almost impossible to be withstood’. Instead of the matter being referred to utility, ‘the only just standard for trying all sorts of moral questions’, there would be irrational assertion, which would either produce irrational acquiescence or be answered by irrational denial:

I say the law can not do so and so. You say, it can. When we have said thus much on each side, it is to no purpose to say more. There we are completely at a stand: argument, such as it is, can go no farther on either side: [either] neither yields, or passion triumphs alone, the stronger sweeping away the weaker.

However, if the language, rather than ‘can not’, was ‘ought not’, this ‘leads naturally to the inquiry after a reason: and this reason, if there be any at bottom that deserves [the name], is always a proposition of fact relative to the question of utility’. While there was no certainty that agreement would be reached, ‘the track which of all others bids fairest for leading to agreement is pointed out’.21

III

Bentham’s most sustained attack on declarations of natural rights was, of course, ‘Nonsense upon Stilts’, written in the late summer or autumn of 1795. He was stimulated to compose this essay by the appearance of the Declaration of the Rights and Duties of Man, prefixed to the new French Constitution of 1795, which was approved by the National Convention on 22 August 1795. The work contains a critique of all seventeen articles of the Declaration of 1789 (or more precisely the virtually identical text reissued with the French Constitution of 1791), a partial critique of the Declaration of 1795, and the

20 Ibid., pp. 186 f.
21 Ibid., pp. 188 f.
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beginnings of a critique of the draft Declaration drawn up by Sieyès in July 1789. In ‘Nonsense upon Stilts’ he stressed more forcefully than he had previously the anarchical tendencies which characterized the doctrine of natural rights, and even went so far as to claim that the doctrine had been responsible for the mischiefs which had afflicted France since the beginning of the Revolution. Bentham did not intend merely to denounce the two French Declarations of Rights, but such documents generally: ‘The opinion I set out with declaring, the proposition I set out with, is, not that the Declaration of rights should not have existed[?] in this shape, but that nothing under any such name or with any such design should have been attempted.’22 Again, Bentham announced, ‘What I mean to attack is – not the subject or citizen of this or that country ... but all ante-legal and anti-legal rights of man, all declarations of such rights. What I mean to attack is not the execution of such a design in this or that instance, but the design itself.’ The French had not failed in the execution of their design because they had used ambiguous language, but rather the design could not be executed at all without an abuse of language.

Let a man distinguish the senses [of the word right], let him allot, and allot invariably, a separate word for each, he will find the impossibility of making up any such Declaration of rights at all without running into such nonsense as must stop the hand even of the maddest of the mad.

Ex uno disce omnes. From this Declaration of Rights learn what all other Declarations of Rights – of Rights asserted as against government in general – must ever be – the Rights of anarchy – the Order of chaos.23

Bentham should not, however, be quite taken at face value here. Although a large proportion of the essay was on one level concerned with detailed criticisms of drafting, such difficulties might be avoided in more carefully drafted documents stripped of their metaphysical claims and enacted as positive law,24 as Bentham himself, as we will see below, was later prepared to recognize.

Bentham identified four problems with the Declaration of Rights of 1791. The first was its tendency to produce anarchy. Bentham noted that ‘the penners and adopters of this declaration’ faced a paradox. They had to justify the insurrection which had produced the Revolution, yet in doing so they could not avoid encouraging future insurrection. The people were presented with their rights, and told that if

22 Ibid., p. 358.
23 UC cxxvi. 182 (1795).
a single article of them were violated they had not only a right but a
sacred duty to resist. Consequently, 'They sow the seeds of anarchy
broadcast: in justifying the demolition of existing authorities, they
undermine all future ones, their own consequently in the number.'

The second problem was the incorporation of fallacious argument.
While a declaration of rights did not necessarily involve fallacious
argument, the more abstract or extensive the propositions which it
contained, the more likely they were to involve the fallacy of begging
the question, which consisted in 'the abuse of making the abstract
proposition resorted to for proof, a cover for introducing, in the com-
pany of other propositions that are nothing to the purpose, the very
proposition which is admitted to stand in need of proof'. In this
particular instance, the proper question would have been whether a
particular provision would constitute a suitable law for France.
However, 'as often as the utility of a provision appeared ... of a doubt-
ful nature, the way taken to clear the doubt was to affirm it to be a
provision fit to be made law for all men: for all Frenchmen, and for all
Englishmen, for example, into the bargain'. The third problem was
the encouragement it gave to violent feelings. Instead of restraining
'the selfish and the hostile passions', the object of the Declaration had
been to add 'as much force as possible to these passions already but too
strong'.

The fourth problem, which, given its ontological nature, was argu-
ably at the root of Bentham's critique, was the inappropriate use of
language. The language of the Declaration would have suited 'an
oriental tale or an allegory for a magazine', but not 'a body of laws,
especially of laws given as constitutional and fundamental ones',
where 'an improper word may be a national calamity: and civil war
may be the consequence of it'. Ambiguous words were used unnecess-
arily; the same word was given several different meanings; improper
words were substituted for proper ones; and no attempt was made to
limit the application of 'words and propositions of the most unbounded
signification'. The result was 'a perpetual vein of nonsense flowing
from a perpetual abuse of words'. In summary, Bentham's argument
was that the language in which the propositions contained in the
Declaration were expressed was ambiguous or self-contradictory. If
one attempted to give these propositions a clear and consistent mean-
ning, one discovered in most cases that their import was either trivial
or false. If the propositions in question were not understood as

26 Ibid., p. 320.
27 Ibid., p. 321.
28 Ibid., pp. 321 f.
straightforward statements of fact, but reinterpreted as moral claims, they turned out to be nonsense, since they were not grounded on the principle of utility, but on non-existent natural rights. As Bentham remarked:

The criticism is verbal: true – but what else can it be? Words – words without a meaning – or with a meaning too flatly false to be maintained by any body, are the stuff it’s made of. Look to the letter, you find nonsense: – look beyond the letter, you find nothing.29

The purpose of the authors of the Declaration, however, was anarchy and mischief, and in that respect the Declaration succeeded admirably. Bentham objected that propositions of fact were made which were obviously false. In Article 1, for instance, it was stated that, ‘In respect of their rights men are born and remain free and equal.’ Yet all men were ‘born in subjection, and the most absolute subjection: the subjection of a helpless child to the parents on whom he depends every moment for his existence’, a subjection which continued ‘for a great number of years’. The implication was that the rights in question existed prior to the establishment of government, but this question was irrelevant in those places where government now existed. Under no existing government was there any such equality as that declared to exist, even setting aside the dependence of children on parents.30 Instances in which individuals were not treated equally ‘appear sufficient to suggest a reasonable doubt whether ... the smack smooth equality which rolls so glibly out of the lips of the rhetorician be altogether compatible with that conformity to every bend and turn in the line of utility which ought to be the object of the legislator’.31 Men without hereditary dignities were not equal in rights to those who did possess them, apprentices were not equal in rights to their masters, wards to their guardians, and wives to their husbands. Bentham recognized, however, that the assertions in question might not have been intended as statements of fact, but as an attempt to proscribe the inequalities in question – to subvert the relationship between master and apprentice and to destroy the institution of marriage.32

This ambiguity, stated Bentham, referring specifically to the draft Declaration drawn up by Sieyès, ‘runs through the whole’, though undoubtedly he would have regarded his comment as being applicable to the promulgated Declaration as well. It was unclear whether Sieyès’s Declaration was intended to be merely prospective or both retrospective and prospective, ‘whether it means solely to declare what

29 Ibid., p. 322.
30 Ibid., pp. 322 f.
31 Ibid., p. 346.
32 Ibid., pp. 325 f.
shall be the state of the law after the moment of the enactment of this declaration, or likewise what has been its state previous to that moment'. If the Declaration was intended, as Bentham believed it was, to be a retrospective declaration, it followed:

1. that it is notoriously untrue; 2. that the untruth of it is supposed by the very act of enacting the declaration, since if what is there established were established already, there would be no use for establishing it anew; 3. that the declaration of the past existence of the provisions in question would be of no use, though the matter of fact were true.33

This confusion of historical fact and normative claim was also apparent, for instance, in Article 12 of the Declaration of 1789, which stated that the public force was instituted for the advantage of all, and not for the private advantage of those to whom it was entrusted. This might have been true in some instances, remarked Bentham, but not in others. It was unlikely that the author of the Declaration believed that William the Conqueror, for instance, had in view the greatest good of the whole community when sharing out England amongst his followers. It was more likely that the author had no clear conception of the difference between

a declaration of what he supposes was or is the state of things with regard to this or that subject, and a declaration of what he conceives ought to have been or ought to be that state of things: and this being the case, it may be supposed that in saying such was the end in view upon the several occasions in question, what he meant was that such it ought to have been.34

In the same vein, Article 16 stated that every society in which rights were not secured nor the separation of powers established had no constitution. Bentham commented that Thomas Paine had asserted that Britain had no constitution,35 but, 'if government depends upon obedience, the stability of government [upon] the permanence of the disposition to obedience, and the permanence of that disposition [upon] the duration of the habit of obedience', it seemed more plausible to argue that it was France which had no constitution.36

If such statements were intended to be statements of historical fact, they were obviously false. However, much of the language of the

33 UC cxlvi. 233 (1789).
35 See Thomas Paine, Rights of Man: being an answer to Mr. Burke's attack on the French Revolution, London, 1791, p. 54: 'I readily perceive the reason why Mr. Burke declined going into the comparison between the English and French constitutions, because he could not but perceive, when he sat down to talk, that no such thing as a constitution existed on his side [of] the question.' Paine's allusion was to Burke's Reflections on the Revolution in France, first published on 1 November 1790: see The Writings and Speeches of Edmund Burke, vol. 8, The French Revolution 1790–1794, ed. L. G. Mitchell, Oxford, 1989, pp. 53–293.
Declaration was ambiguous, particularly in the use of the word ‘can’, which might be taken to mean either ‘what is established’ or ‘what ought to be established’. The second part of the first Article, for instance, announced that ‘Social distinctions can not be founded but upon common utility’. Apart from flatly contradicting the first part of the article which stated that such distinctions, implying as they did inequality, could have no existence, it was unclear whether this meant that no social distinctions but those which it approves of as having the foundation in question are established any where, or simply that none such ought to be established any where, or that if the establishment or maintenance of such distinctions by the laws is attempted any where, such laws ought to be treated as void, and the attempt to execute them to be resisted? For such is the poison that lurks under such words as can and can not when set up as a check upon the laws. They present all these three so perfectly distinct and widely different meanings. In the first, the proposition they are inserted into refers to practice, and makes appeal to observation: - to the observation of other men in regard to a matter of fact: in the second, it is an appeal to the approving faculty of others in regard to the same matter of fact: in the third, it is no appeal to any thing or to any body, but a violent attempt upon liberty of speech and action on the part of others by the terrors of anarchical despotism rising up in opposition to the laws.

The first meaning was innocent, even though palpably untrue, while the second was equally innocent, allowing one the liberty to agree or disagree, but the third was ‘the ruffian-like or threatening import’. Can and can not when thus applied, can and can not when used instead of ought and ought not, can and can not when applied to the binding force and effect of laws – not of the acts of individuals, nor yet of the acts of subordinate authority, but of the acts of the supreme government itself, are the disguised cant of the Assassin: after them, there is nothing but do him betwixt the preparation for murder and the attempt.

There were many laws which Bentham wished to see altered or abolished, and he could conceive cases where he might approve of resistance.

But to talk of what the law – the supreme legislature of the country, acknowledged as such – can not do! - to talk of a void law, as you would of a void order or a void judgment! – the very act of bringing such words into conjunction is either the vilest of nonsense, or the worst of treasons: - treason – not against one branch of the sovereignty, but against the whole: – treason not against this or that government, but against all governments.37

This use of the ambiguous ‘can’ and ‘can not’ reflected the claim that natural rights were supposed to exist independently of government, and prior to the establishment of government, as opposed to legal

37 Ibid., pp. 326–8. Elsewhere Bentham referred to ‘the ambiguous and envenomed can’: see ibid., p. 337.
rights, which were the product of government. The priority of natural
dights was asserted in Article 2, where it was stated that the end in
view of every political association was the preservation of the natural
and imprescriptible rights of man, namely liberty, property, security,
and resistance to oppression; that these natural rights could not be
abrogated by government; and that governments originated from
formal meetings or conventions. The purpose of establishing govern-
ment, according to this theory, was to protect already-existing natural
rights, and any government which failed to do so, and indeed any
government which did not originate in a social contract, lacked legit-
imacy. Resistance to and subversion of such a government was lawful
and commendable. In truth, however, noted Bentham, there were
‘no such things as natural rights – no such things as rights anterior to
the establishment of government – no such things as natural rights
opposed to, in contradistinction to, legal’. The notion of men living
without government was perfectly plausible, but in such a state there
were no rights, and consequently no property and no security. It was
fallacious to assume that because a certain thing was desirable, that
the thing in question existed.

In proportion to the want of happiness resulting from the want of rights,
a reason for wishing that there were such things as rights. But reasons for
wishing there were such things as rights, are not rights: a reason for wishing
that a certain right were established, is not that right: wants are not means:
hunger is not bread.

Moreover, if natural rights did not exist, they could not be abrogated.
To say that they were imprescriptible was to mount one nonsensical
statement upon another: ‘Natural rights is simple nonsense: natural
and imprescriptible rights, rhetorical nonsense, nonsense upon stilts.’
The purpose of declaring the existence of imprescriptible rights, and
employing such vague terms as property and liberty, was ‘to excite
and keep up a spirit of resistance to all laws, a spirit of insurrection
against all governments. Against the governments of all other nations,
instantly: against the government of their own nation, against the
government they themselves were pretending to establish, soon: that
is as soon as their own reign should be at an end.’ It was also to claim
infallibility and enchain all future governments and peoples: ‘Our will
shall consequently reign without controul and for ever: reign now we
are living, reign when we are no more. All nations, all future ages,
shall be, for they are predestined to be, our slaves.’ To claim that no
government could abrogate natural rights was ‘Terrorist language’,
whereas ‘the language of reason and plain sense’ judged whether a

\[\text{Ibid., pp. 328–31.}\]
right should or should not be established or abrogated on the basis of whether or not it was for the advantage of society to do so. Moreover, the right itself had to be specifically described, along with the circumstances under which it was proposed to establish or maintain it.\textsuperscript{39}

In declaring liberty to be an imprescriptible right, the authors of the Declaration had misunderstood the conceptual relationship between liberty and right, since ‘all rights are made at the expence of liberty’. In Bentham’s view, liberty consisted simply in the absence of constraint and restraint.\textsuperscript{40} The existence of a right implied a correspondent obligation; in other words, a liberty enjoyed by one person could only be created by imposing coercion on another or others. Indeed, coercive laws (that is all laws except those laws which repealed already-existing laws) were necessarily abrogative of liberty, and, therefore, according to Article 2 of the Declaration, were null and void, and should be resisted.\textsuperscript{41} There was further confusion in Article 4 where liberty was said to consist in doing what was not hurtful to another. This was a perversion of language, since the liberty of doing mischief was still liberty. Moreover the statement that the bounds of liberty could only be determined by law was contradictory and confusing: ‘this liberty, this right which is one of four rights that existed before laws and will exist in spite of all that laws can do, owes all the boundaries it has, all the extent it has, to the laws’.\textsuperscript{42}

There were conceptual problems with the other ‘imprescriptible’ rights. As for the right to property, unless some particular subject of property to which a man had a right were specified, the implication was that every man had a right to everything, which would be tantamount to destroying all property.\textsuperscript{43} The right to security seemed to refer to security for person, though one might speak of security for liberty and security for property. Such a right was also too sweeping, since it would nullify any law which appointed capital or corporal punishment, or which exposed a man to risk in military service against foreign enemies.\textsuperscript{44} The right of resistance to oppression was superfluous in that any oppression to which a man might be subjected would be an infringement of his rights to either liberty, property, or

\textsuperscript{39} Ibid., p. 330.
\textsuperscript{41} Bentham, \textit{Rights, Representation, and Reform (CW)}, p. 334.
\textsuperscript{42} Ibid., pp. 338–40.
\textsuperscript{43} Ibid., pp. 334 f. Bentham attributed the doctrine that ‘Nature has given to each man a right to every thing’ to ‘some of the interpreters of the pretended law of nature’ (see ibid., p. 332). The view was famously expressed by Thomas Hobbes in \textit{Leviathan}, pt. 1, ch. 14, [64], but similar views were formulated by Hugo Grotius, Benedict de Spinoza, and Samuel Pufendorf.
\textsuperscript{44} Bentham, \textit{Rights, Representation, and Reform (CW)}, pp. 335 f.
security. However, whereas the previous three rights were intended to restrain the legislator, the purpose of this was to encourage the individual to resist: 'as often as any thing happens to a man to inflame his passions, this article, for fear his passions should not be sufficiently inflamed of themselves, sets itself to work to fan the flame, and urges him to resistance'.\(^{45}\) The incitement to resistance was taken even further in Article 3, where it was stated that the act of every government, not only in France but throughout the world, to which anyone had been appointed other than by popular election, and moreover by the whole nation, was void. 'Consequently all the acts of every government in Europe, for example, are void, excepted perhaps, or rather not excepted, two or three of the Swiss Cantons: the persons exercising the powers of government in those countries, usurpers: resistance to them and insurrection against them, lawful and commendable.'\(^{46}\) Furthermore, the assertion made in Article 5 that 'the law has no right' to forbid any actions other than those hurtful to society, and in particular the phrase 'the law has no right', preached 'constant insurrection', a call to every man forcefully to resist 'every law which he happens not to approve of'.\(^{47}\)

On several occasions Bentham remarked that the Articles of the Declaration were either 'mischievous or nugatory'. His point was that on the one hand, if the rights were limited by positive law, the Declaration was nugatory in that positive law, and not natural right, was the source of the rights in question. On the other hand, if the rights were not limited by positive law, then their tendency was mischievous in that they constituted an incitement to insurrection. For instance, in Article 7 it was stated that no one could be accused, arrested, or detained but in the cases determined by law, and in the forms prescribed by law. Taken at face value this Article gave the citizen no security against arbitrary power, for if the existing law authorized arbitrary arrest, the Article did nothing to prevent it. However, if the Article was interpreted in the context of Article 6, where it was stated that the law was the expression of the general will, it meant that no arrest or detention was legal until authorized by a law issuing from that source.\(^{48}\) Bentham remarked that it was easier to fall into the linguistic confusion which lay at the root of the problem in the English than in the French language. In English the sense of ‘right’ might be changed from an adjective to a noun-substantive without changing

\(^{45}\) Ibid., pp. 336 f.  
\(^{46}\) Ibid., pp. 337 f.  
\(^{47}\) Ibid., p. 341.  
\(^{48}\) Ibid., pp. 349–51. Bentham identified the same dilemma in Article 11: see ibid., pp. 361 f.
the letters which composed the word. As an adjective the word ‘right’ was ‘as innocent as a dove: it breathes nothing but morality and peace’, being ‘synonymous with desirable, proper, becoming, consonant to general utility, and the like’. But as a substantive, for instance as employed in the proposition I have a right to equality, ‘it plants the banner of insurrection and lawless violence’. The lack of an adjective ‘right’ composed of the same letters as the substantive had not, however, hindered the French:

Is, has been, ought to be, shall be, can, all are put for one another, all are pressed into the service, all made to answer the same purpose. By this inebriating compound we have seen all the elements of the understanding confounded, every fibre of the heart inflamed, the lips prepared for every folly, and the hand for every crime.

Real rights were the product of real laws; imaginary rights the product of imaginary laws:

Right, the substantive right, is the child of law: and when once brought into the world, what more natural than for poets, for rhetoricians, for all dealers in moral and intellectual poisons, to give the child a spurious parentage, to lay it at Nature’s door, and set it up in opposition against the real author of its birth. ... And thus it is that from legal rights, the offspring of law and friends of peace, come anti-legal rights, the mortal enemies of law, the subverters of government and the assassins of security.49

Bentham’s critique of the Declaration of Rights was intended to demystify the language of natural rights, and to halt the subversive schemes of those who employed such language. He posed himself the question: ‘If, as you say, it is nonsense, why spend so much time and paper upon nonsense?’ He answered first, ‘If it is nonsense, it is nonsense with great pretensions, with the pretensions of governing the world. A part of the world, too large a part in point of number, at least betrays a disposition to be governed by it. If the sceptre of nonsense can be effectually broken, the time and paper will not be altogether thrown away; and second, ‘If the criticism is just, the indication of the errors will have its use. Hints will have been given tending to the improvement of the art and practice of legislature.’50 The question was whether Bentham’s ‘antidote to the second French disease’51 would be effective. The problem was that opinions were dependent upon sounds, and therefore the ‘connections between words and ideas’ had to be dissolved, connections which were ‘coeval with the cradle’. Education, although slow, was ‘the surest as well as earliest resource. The recognition of the nothingness of the laws of nature, and

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49 Ibid., pp. 398–400.
50 UC cviii. 108 (1795).
51 The first ‘French disease’ was, of course, syphilis.
of the rights of man that have been grounded on them, is a branch of knowledge of as much importance to an Englishman, though a negative one, as the most perfect acquaintance that can be formed with the existing laws of England.\^52

IV

Despite his criticism of the French Declaration of Rights, Bentham was not totally opposed to the issuing of constitutional charters or declarations of rights. In the late summer of 1789, around the same time that he condemned the decision of the Constituent Assembly to draw up a declaration of rights in ‘Observations on Drafts of Declarations-of-Rights’, he composed ‘Short Views of Economy for the use of the French Nation but not unapplicable to the English’, in which he sketched out a number of principles of political economy, and dealt with their application. He explained that, ‘[i]f a Declaration of Rights should be thought proper to be extended to such part of the business of government as respects finance’, he might be seen to be suggesting an appropriate form for it to take.\^53 Bentham presumably thought that if the French were determined to have declarations of rights, then at least they should have them in a form which would not do any mischief, and might be of some benefit. He also noted that a declaration should first, ‘inform people of their rights’, but second, ‘reconcile them to their obligations’, adding the comment that, ‘If it affords a stimulant on one side, it ought to afford a calmant on the other.’ A declaration should also ‘[s]erve as a guide to the legislator in detail’.\^54 The crucial point was that such declarations should not be issued as law. If they were to have any value, he stated in ‘Nonsense upon Stilts’, it would be in the form of instructions or advice. Article 7 of the Declaration of Rights, for instance, purported to provide security against arbitrary orders. Had the purpose of the authors of the Declaration been not to set limitations on ‘their more experienced and consequently more enlightened successors’, and to ‘keep their fellow-citizens in a state of constant readiness to cut their throats’, but rather to provide for the security of individuals, they would have advised succeeding legislatures to define clearly the forms by which the powers of justice should be exercised: ‘for instance, that no man should be arrested but for some one in the list of cases enumerated by the law as capable of warranting an arrest, nor without the specification of that case in an instrument executed for the purpose of warranting such

\^52 Bentham, Rights, Representation, and Reform (CW), p. 400.
\^53 See ibid., pp. 193–203.
\^54 UC clxx. 48 (1789).
arrest: nor unless such instrument were signed by an Officer of such a description; and so on'. Instead, they had attempted 'to exhibit a code of such importance and extent and nicety in the compass of a parenthesis'.

A striking example of Bentham's willingness to countenance a declaration was the constitutional charter which he proposed for issue by the Pasha of Tripoli in 1822. Through his friendship with Hassuna D'Ghies, a young Tripolitan who had been sent to London on a diplomatic mission by the Pasha, Bentham became involved in an attempt to introduce political reform in Tripoli, which he hoped would spread, if necessary with military aid from the United States of America, to other North African states. He composed a document containing 'constitutional securities ... against abuse of power, now and for ever', which were to be granted by the Pasha to the people of Tripoli. The securities would be preceded by two addresses from the Pasha to the people. In the first address, the Pasha was to claim that he had had a vision of the Prophet Mohammed, who had instructed him to set up a representative assembly and a judicial establishment. In the second address, the Pasha was to acknowledge the greatest happiness of the greatest number as his 'only right and proper end in view and object of pursuit', and to proceed to grant 'rights and securities ... the securities against misrule: securities against abuse of power on the part of the Sovereign or those in authority under him' to his 'beloved people'. In these circumstances Bentham was prepared to take advantage of the ambiguity involved in the word 'rights'. He explained to D'Ghies that the recognition of the rights in question might be given two interpretations: the first was that the sovereign was merely recognizing rights which already existed of themselves, and did not require the act of the sovereign to confer them; and the second was that the rights were being granted by the sovereign, with the sovereign and his successors retaining the power of revoking them. On the one hand, if the rights were regarded as existing independently of the sovereign's will, the danger was that he would not agree voluntarily to sign the declaration in question. On the other hand, if the rights were regarded as depending on his will, the danger was that he would revoke them in part or in whole, and that the people would accept this without complaint and without any perception of injustice. Bentham seems to have thought that the Pasha might be

55 Bentham, Rights, Representation, and Reform (CW), pp. 351 f.
57 Ibid., pp. 76 f.n.
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persuaded to acknowledge the rights on the grounds that they con-
stituted his gift to the people, and that he would retain the power to
revoke them, but that the people might see them as existing indepen-
dently of the sovereign's will, and therefore once established would
resist any attempt to revoke them.

Again in 'Securities against Misrule' Bentham explained that in
the past legislative arrangements established with the intention of
providing security for the governed against governors, for instance
the Petition of Right and the Bill of Rights in England, the American
Declaration of Independence, and the French Declaration of Rights,
had trusted to force for their success. The 'radical defect' of these
instruments was that they had failed to present any conception of
their purpose, which had been 'the affording to the governed security
against misrule – i.e. bad government at the hands of their governors'.
While the words 'security' and 'misrule' were clear, once one resorted
to 'such a word as right, a cloud, and that of a black hue, envelops the
whole field'. A person intimated that some of his rights had been
violated, and that he was determined 'not to sit still and see them
violated any longer'. A right could only be understood by reference to
a law: 'from a merely imagined law nothing can come more substantial
than a correspondently imagined right'. Yet it was not in the case
where a legal right was violated that the demand for security was most
pressing, but where 'the laws being altogether at the command of the
rulers – the very work of their hands, no violation of law can be needed
for the accomplishment of the misrule'. Bentham recognized that a
declaration of rights might at least provide some protection against a
sovereign, and more effectively still against subordinate officials, who
oppressed the people through and by means of the law. Nevertheless
the same objective would be achieved, and without the ambiguity
and confusion involved in the word 'rights', by employing the phrase
'securities against misrule'. The great advantage of this phrase was its
application to cases where misrule took place without any violation of
law. It was applicable to every circumstance in which a society might
find itself, whether 'employed by a sovereign representative body on
the occasion of the establishment of the constitution of the State',
or whether introduced under an absolute monarchy, so long as the
securities in question did not appear, in the eyes of the monarch, to
be limiting his authority. In relation to Tripoli, Bentham believed that
his proposed securities against misrule might operate effectively even
though the form of government would remain an absolute monarchy.
An absolute monarch, while unlikely to agree voluntarily to limits
being imposed on his own power, might be prepared to limit that of

58 Ibid., pp. 23 f.n.
his agents, ‘in which case matters may be so managed, as that without knowing it he may thus be made to throw obstacles in the way of his own steps in so far as they proceed in a sinister direction’.  

By 1822 there did appear to be a greater latitude in Bentham’s approach to declarations of rights compared with his position in 1795, when, as we have seen above, he had said that what he intended to attack was ‘not the execution of such a design in this or that instance, but the design itself’. Perhaps it was his increasingly radical view of politics that had persuaded him that declarations of rights might, in certain circumstances, be of some value in the struggle against misrule, a value he had not been prepared to recognize in 1795 in the face of the anarchy which he attributed to the doctrine of natural rights, and in the midst of the very real threat of a French invasion. The problem which he encountered in the early 1820s was how to motivate a supine people to resist oppression committed by rulers according to the letter of the law. This was a problem which he needed to solve on his own terms, and not by appeal to what he regarded as the non-existend rights of man. On the other hand, one should not under-estimate Bentham’s sensitivity to the context with which he was dealing. He was perhaps prepared to advocate measures for Tripoli which he would not have thought appropriate to the circumstances of Britain and France.

V

In A Fragment on Government, Bentham had highlighted the distinction between the censor and the expositor, but in ‘Nonsense upon Stilts’ he was concerned to distinguish between the censor and the anarchist. On the one hand, ‘the good subject, the rational censor of the laws’, while ‘acknowledging the existence of the law he disapproves of, proposes the repeal of it’. On the other hand, ‘The anarchist, setting up his will and fancy for a law before which all mankind are called upon to bow down at the first word – the anarchist, trampling on truth and decency, denies the validity of the law in question, denies the existence of it in the character of a law, summoning all mankind to rise up in a mass and resist the execution of it.’ The anarchist claimed that while men might be ‘slaves in respect of the pretended human laws, which though called laws are no laws at all, as being contrary to the laws of nature’, yet remain at the same time ‘free in respect of the laws of nature’. In fact, in Bentham’s view, the anarchy of the French Revolution was closely related to the dogmatic conservatism he asso-

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60 Bentham, Rights, Representation, and Reform (CW), p. 324.
cated with Blackstone. As we have seen above, Bentham had accused Blackstone of confounding the role of the expositor with that of the censor: he had claimed to be describing the laws of England, but at the same time had attempted to justify those laws on no other ground than that they already existed. Blackstone’s approach, encapsulated in the phrase ‘every thing is as it should be’, confused descriptive with prescriptive statements. This was a confusion which also characterized the anarchist, who, in claiming to describe the law of nature, was setting forward prescriptions. In other words, both were offering prescriptive statements under the guise of descriptive ones. The difference between them was that while Blackstone tended to assume that existing law was consistent with the natural law, and therefore that it was valid law, the anarchist tended to assume that existing law was inconsistent with the natural law, and therefore that it was invalid law. Since both appealed to a non-existent metaphysical standard in justification of their respective claims, they were both talking nonsense. What explained their difference of approach, the one ultra-conservative and the other anarchical, was their sentiment – that is their sympathy and antipathy – which was ultimately grounded on their respective interests, whether they believed it would be of benefit to them to retain or to overthrow the existing laws and institutions of their society.

The pernicious tendency of the doctrine of natural law, and its off-shoot natural rights, was, in Bentham’s view, a consequence of its non-existence. Bentham attributed the popularity of the doctrine to the fact that it gave apparent justification to the sentiments of the speaker. A man who disapproved of a particular activity simply had to state that it was against a law of nature. If there was any sense in this claim, then the law of nature was a dictate of utility, but otherwise his appeal was to an ‘imaginary standard’ which was ‘neither more nor less all the while than his own opinion in disguise’. If the man claimed that a particular usage or law was detrimental to the happiness of the

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61 See Twining, ‘Contemporary Significance of Bentham’s Anarchical Fallacies’, 329: ‘if the validity of a law is judged by conformity to some purported statement of Natural Law or Natural Rights, then the distinction between law as it is and law as it ought to be is rejected. When this happens the door is opened to two lines of fallacious argument, one justifying anarchy, the other extreme conservatism. For the anarchist argues: “This is bad, therefore it is not a (valid) law, therefore I have no duty to obey it”. The reactionary argues: “This is a (valid) law, therefore it is good, therefore it is immune from criticism”.

Jeremy Bentham’s ‘Nonsense upon Stilts’

community, he would be called upon to explain why, which he might not be able to do.

He says not that it is contrary to a dictate of utility: for a dictate of utility, it would be seen, is no more than his opinion of what is useful. But he says it is against a Law of Nature: and a Law of Nature being a sacred thing, which multitudes have concurred in magnifying, it is but crying out profanation, and this gives him a pretence to be angry, to indulge his spleen, and to run out into invectives.63

The appeal to the principle of utility had to be justified by reference to matters of fact, but appeal to right was no more than an appeal to a sound:

Talk of utility, and of pains and pleasures, this is grounding your doctrine on matter of fact: and to enquire into and duly to collect the matter of fact, takes more trouble than they are willing, and perhaps more sagacity than they are able to bestow. – Talk of right: – say a man has a right to such a thing in such a case, we have no matter of fact to encumber ourselves with. – When you have said he has a right – insist upon it: it is a plain case, all proof is needless. The business is thus settled in a trice by the help of a convenient word or two, and without the pains of thinking.64

Bentham later argued that a similar appeal to passion, rather than to reason, resulted from the use of the words justice and injustice. The appeal to the ‘cold appellative of utility’, which was ‘generally recognized to be matter of calculation, matter of figures’, did not have the rhetorical power associated with an appeal to ‘the burning and impassioned sounds ... of justice and injustice’. Moreover, by appealing to justice and injustice there was no need for argument, unlike the appeal to the principle of utility, which required proof. The appeal to justice and injustice was more attractive, therefore, ‘in proportion to the force of [a man’s] passions and the weakness of his understanding’. The same sort of man who appealed to justice and injustice would also appeal to

its quasi-conjugate, – right understood in the sense of the phrase natural right, and for the same purposes and the same views. With him, every question, every one at least in which his interests or his passions are concerned, is to be placed on the ground of right – Give us our rights! never on the ground of utility, of expediency. The same sort of man, if it suits his purpose to teach morality as a science, and write a book on it, talks of the moral sense.66

In Bentham’s view, only the principle of utility provided any rational grounds for resolving ethical disputes, while talk of justice, injustice, natural rights, or moral sense was merely a veneer to give respect-

63 UC bix. 102 (c. 1776).
64 UC bix. 6–7 (c. 1776).
66 UC lix. 84–5 (19 May 1805).
ability to, or to endow with persuasive force, the likes and dislikes of the speaker.

The doctrine of natural law and natural rights was grounded on the delusive properties of language. The use of the noun-substantive 'rights' had given rise to the opinion that rights as such did actually exist. Now to talk of rights established by law did make sense, since they might be shown to have their source in the will of a sovereign legislature. But to talk of natural rights, with their source in natural law, was to talk nonsense. Such talk might be the product of ignorance, but in the instance of those who understood that such talk was nonsense, it was an attempt to persuade others of the existence of the law or rights in question in order to gain some benefit for themselves.

To say that a thing ought not to be done because there is a Law of Nature against it's being done, is an obscure and roundabout way of saying one of two things. 'It ought not to be done, because it would be mischievous or dangerous to the community': or else 2nd 'It ought not to be done, because I say it ought not.' The grand mischief of the expression is that most commonly when examined into, the only meaning which it is found to cover is the latter. Tis the common resource of those who either tremble to take for the standard of right and wrong the Principle of utility; or meaning in general to take that for their standard know not how to try by it the proposition they approve of.

The best that might be said regarding a statement about natural law or natural rights was that it amounted to an expression of opinion on the part of the speaker that such a law or such a right ought to exist — in other words, the statement was a moral claim ambiguously expressed.

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66 UC lxix. 106 (c. 1776).