Bentham Mocks the Declarations: ‘Every Law ... Is Void'

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ABSTRACT.
Jeremy Bentham famously savaged American declarations of rights, beginning with the Declaration of Independence. What irked him? If individuals had rights that government was bound to honor, then philosophy was obligated to address the conflict between the two. Settle it? Too ambitious. Ignore it? Too lazy. The consequences of Bentham’s unwillingness to survey American constitutions and legislation (using his own tools) are surveyed.

KEY WORDS: reponsibilities, disabilities, Bentham’s Sieve.

A. INTRODUCTION. Jeremy Bentham devoted himself, among other projects in the 1780s, to his Introduction to the Principles of Morals and Legislation. “Here ends the original work,” as he folds in additional text, “in the state into which it was brought in 5 November, 1780. What follows is now added in January, 1789.”

From the final chapter XVII: “And what is it that the law can be employed in doing, besides prohibiting and commanding?” After all, when you consider what a sovereign does – enlightened despot, parliament or Congress – what are the tools of government?

Bentham previously observed: “The constitutional branch is chiefly employed in conferring, on particular classes of persons, powers, to be exercised for the good of the whole society, or of considerable parts of it, and prescribing duties to the persons invested with those powers.”

B. A FOUR-WAY SIEVE. We can modestly recast Bentham’s classes of legislation as follows: The sovereign commands or permits; add two negations each, for a total of four things sovereigns can do.

The search for semantic expressions of sovereign power is fulfilled by the ‘hits’ following the schema:
1. Sovereign commands act;
2. Sovereign uncommands act; that is, sovereign prohibits act;
3. Sovereign permits act;
4. Sovereign unpermits act, which is the same as 2.

It should be added that many writers have supplied Bentham with sieves. Mine is no better or worse than others. Why didn’t Bentham trouble to straighten up after himself?

C. BENTHAM’S BLACK EYES. He earned both. First, Bentham was a thinker who did not traffic in discussions of other writers. Passing references to Justinian or Jefferson are one-off and no writer is allowed to enter the theatre of Bentham’s mind and enter the contest.

This is rather a shame because the vast majority of ideas which supply Benthamite currency were, in fact, given serious attention in the two and a half millenia in which western civilisation managed to trundle on without Bentham’s expositions.

Bentham’s project was to create a pedigree-less political philosophy; he is then the exponent of Dada in political science and art, a mere century plus before painters and writers supposed that they were first to create without precedent.

Bentham’s other black eye concerns us more closely. The Benthamite machine enjoyed no research faculty; it never road-tested its classes, for example, on the dozens of new governments, constitutions, settlements and arrangements created in his lifetime (1748-1832). Satisfied with churning out neologisms – ‘imperation,’ ‘punitory,’ ‘expository’ and so forth – it never occurred to Bentham that if these terms could stand the test of
text which he did not write his own thinking would benefit from the effort. At a minimum.

Bentham reminds one of the very brainy student who cannot be bothered to read the assigned class-work. He has, at hand, always the ready excuse, but others take his measure: the student is afraid to deal with ideas that conflict with his own.

D. OH, THOSE NATURAL RIGHTS. “That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.” XVII.93

Bentham’s annoyance with these ideas, ideas thoroughly modern at the time (and untouched by better in human experience) turns to frenzy most truculent. “Not to dwell on the oversight of confining to posterity the benefit of the rights thus declared, what follows? That — as against those whom the protection, thus meant to be afforded, includes — every law, or other order, divesting a man of the enjoyment of life or liberty, is void. Therefore this is the case, amongst others, with every coercive law. Therefore, as against the persons thus protected, every order, for example, to pay money on the score of taxation, or of debt from individual to individual, or otherwise, is void: for the effect of it, if complied with, is to ‘deprive and divest him,’ pro tanto, of the enjoyment of liberty, viz. the liberty of paying or not paying as he thinks proper: not to mention the species opposed to imprisonment, in the event of such a mode of coercion's being resorted to: likewise of property, which is itself a ‘means of acquiring, possessing and protecting property, and of pursuing and obtaining happiness and safety’.”

E. TIDYING UP AFTER JEREMY. What can be made of the conflict between individual rights and government authority? First, reconcile, as a matter of classification, individual rights and official rights. ‘Congress shall make no law …’ the First Amendment begins. This is a prohibition on official action. So too is every species of judicial review of official action, such as would attend on a court reviewing an “order, for example, to pay money on the score of taxation, or of debt from individual to individual, or otherwise … .”

This brings up the accuracy of Bentham’s observation: “And what is it that the law can be employed in doing, besides prohibiting and commanding?”

Whether government officials traffic in commands or traverse other official action – the Bill of Rights is nothing less (and little more) than a laundry list of prohibited official actions – command and prohibit does indeed cover all cases that can be named. So much for government as it attends to and acts upon officials in their dealings with individuals. Restraints, that is conditional or contingent statements, are addressed in Supplemental Restraints Anyone? 2 OCL 283.

Examine government’s fulfillment of its responsibilities for the collective good; as Bentham put it, “to be exercised for the good of the whole society, or of considerable parts of it … .”

Here commands and permissions to officials are the stock-in-trade of constitutional text.

So we have, on the one hand, a very Benthamite vision of government and its responsibilities, with a tidied up vocabulary of commands and permissions to government officials. On the other hand, we have the much-depised ‘rights’ (and Bentham did make a point against listing for posterity ‘natural rights,’ which OCL will attend to) and these, instead of rights, are disabilities of officials, leaving room for individual action or inaction, as the individual – yes, Jeremy – as the individual sees fit.

F. DANGER: SEMANTICIsts AT WORK. A human being clothed in sovereign power can only act through language; even the most vile of sovereigns – and there’s serious competition recently – must employ speech acts. Language is the point-of-entry par excellence for social scientists. It’s a rodeo and it’s not their first.

G. BACK TO COMMAND AND PERMISSION. This requires a second look. Assume this: all the sovereign can do is invoke the perfect world by commanding that subjects act in conformity with (the sovereign’s view) of same; or permit subjects to act in conformity with (the subject’s view) of same.

That’s what’s at stake.
In command, it really matters in the first instance what the King thinks. In permission, the subjects’ hope, wish, fear comes to the fore.

This recalls the periphrastic: *everything that’s not permitted is forbidden*, playing against *everything that’s not forbidden is permitted*.

As Lewis Carroll noticed – ‘What the Tortoise Said to Achilles,’ 4 Mind 278 (1895) – conflict between the two is not resolved by sovereign lardings and lashings of additional instructions. The periphrastic is, always will be and always should be.

Words-in-inventory are not the answer and this explains why *more* words-in-inventory are not the answer. Ask the Tortoise if you don’t believe me and, by the end of *Mind*, ask Achilles, who came to believe.

H. Subject Matter Areas. One point which should now be clear: if the sovereign wants to get anything done, she has to be able to make clear where command ends and permission begins or where permission ends and command begins, same thing, same problem.

Linguistically, that is to say, tactically, this is the value of the real world. By attaching real world events to perfect world Shouldstatements, the sovereign and the subject act with (at least) minimal confidence: *here* lies a subject matter area committed to sovereign initiative, while over *there* the subject acts (or not) at her insistence.

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