Society as a Code: Bentham and the Fabric of Order

(Article begins on next page)

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SUMMARY

The essay argues that Jeremy Bentham played a major role in the transitional process between the eighteenth and the nineteenth centuries leading to the 'discovery' or 'invention of society' as an order, i.e., as an autonomous object of knowledge. By comparing Bentham's discourse with those developed by select protagonists of that transition, particularly Ferguson, Sieyès, and Mirabeau, it is shown how society emerges as the logical and historical space of a set of relationships that affects both the rationalisation and the practice of government. In contrast with Michel Foucault's interpretation of Bentham's role in the genealogy of neoliberalism, recently developed by Pierre Dardot and Christian Laval, this paper suggests that 'the new governmental reason' rose from within the discourse of law. Consequently, the problem of 'constitution' was not left behind by the epistemological change of the eighteenth century, as they argue. Rather, the scientific and political understanding of society as a code became the base for an innovative conception of both law and politics.

1. Introduction

Jeremy Bentham played a major role in the transitional process between the eighteenth and nineteenth centuries that led to the 'discovery' or 'invention of society' as an order, i.e., as an autonomous object of knowledge. According to Keith Michael Baker, 'the Enlightenment invented society as the symbolic representation of collective human existence and instituted it as the essential domain of human practices'. From this moment onwards, '"progress", "civilization", "toleration", and "utility"' became 'unthinkable without "society" as their implied referent: they all assume its logical priority and moral value as the essential frame of collective human existence'.[1] As Sunil Khilnani suggests,

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[1] Keith Michael Baker, 'Enlightenment and the Institution of Society: Notes for a Conceptual History', in *Civil Society: History and Possibilities*, edited by Sudipta Kaviraj and Sunil Khilnani (Cambridge, 2001), 84–104 (84). Baker also clarifies that society 'replaces religion as the ultimate ground of order, the ontological frame of human existence' (99). From this point of view, the epistemological and theoretical shift which took place between the eighteenth and the nineteenth centuries could be read as an 'accomplishment' of the philosophical move inaugurated by Thomas Hobbes in the seventeenth century; see Carlo Galli, 'All'insegna del Leviatano. Potenza e destino del progetto politico moderno', in Thomas Hobbes, *Il Leviatano* (Milan, 2011), v–l.

the 'idea of society' developed along 'the languages of Roman law, classical republicanism, Pufendorf and the natural law tradition, Locke, Montesquieu, the theorists of commercial society, as well as Hegel and the nineteenth century traditions of civil associations and guild socialism'.[2] The list of the 'essential components' of this development is certainly incomplete, but it does help in defining a complex theoretical frame where Bentham should find his proper place.[3]

This place has been acknowledged by Michel Foucault in his genealogy of neoliberalism. According to Foucault, in fact, Bentham's distinction between *agenda* and *non agenda*, between what government ought and ought not do in order to pursue its proper ends,[4] reveals a crucial epistemological change that affected the way in which the 'art of government' was 'rationalised' after the end of the eighteenth century. While the discourse of natural rights established 'external' limits on government, utilitarianism turned those limits into 'internal' ones.[5] In other words, limits were defined by a nature that was no longer conceived of as a state anterior to the political one, but rather as the 'nature of governmentality'. Foucault argues that, at this turning point, political economy took the place of law as a 'regime of truth' or 'intelligibility', and the 'reason of the least State' became an even more crucial problem than that of 'constitution', upon which the political thought of the sixteenth and seventeenth centuries was focused.[6] In other words, the problem was not one of 'legitimacy' but one of 'effectiveness': government had to be 'useful', and this would be possible only when government was based on and applied to the 'phenomenal republic of interests'.[7] As Foucault suggests, this change of paradigm was allowed by the analytical grid provided by the *homo œconomicus*, whose interests had to be free to be fulfilled in order to realise public happiness, while government had to 'produce freedom', thus providing the conditions of the free movement of individual interests.[8] 'Society' was then conceived of by Foucault as 'civil society', that is the proper habitat of the *homo œconomicus*: not so much a historical factor but rather an 'effect' of the 'new governmental reason', a concept constructed in order to point out the limitations of government itself.[9]

Even though Foucault's contribution to the understanding of Bentham's place in the genealogy of the present—recently deepened by the work of Pierre Dardot and Christian Laval—is certainly relevant, his analysis is unfit for an overall understanding of the complex epistemological change which took place at the end of the eighteenth century.[10] In comparing Bentham's discourse with those developed by select contemporary protagonists of that change, particularly Ferguson, Sieyès, and Mirabeau, we shall see that society is neither the 'effect' of a new rationalisation of the art of government, nor a place inhabited by a plurality of isolated and self-referential 'economic men'.[11] Rather, society is the logical and historical space of a set of relationships that affects both the rationalisation and the practice of government. The 'new governmental reason' does not coincide exclusively with political economy, but rather rose from within the discourse of law, and law was no longer conceived

[2]Sunil Khilnani, 'The Development of Civil Society', in *Civil Society*, edited by Kaviraj and Khilnani, 11–32 (17).

[3]See Paola Rudan, *L'inventore della costituzione: Jeremy Bentham e il governo della società* (Bologna, 2013).

[4]Jeremy Bentham, 'Method and Leading Features of an Institute of Political Economy (Including Finance) considered not only as a Science but as an Art' (1801–1804), in *Jeremy Bentham's Economic Writings*, edited by Werner Stark, 3 vols (London, 1954), I, 303–80 (333–60).

[5]Michel Foucault, *The Birth of Biopolitics*: Lectures at the Collège de France, 1978–79, edited by Michel Senellart (New York, NY, 2008), 4–5.

[6]Foucault, *Birth of Biopolitics*, 15ff, 33–34.

[7]Foucault, *Birth of Biopolitics*, 46.

[8]Foucault, *Birth of Biopolitics*, ch. 11.

[9]Foucault, *Birth of Biopolitics*, ch. 12. For an updated discussion on Bentham and Foucault, see *Beyond Foucault: New Perspectives on Bentham's Panopticon*, edited by Anne Brunon-Ernst (Farnham, 2012).

[10]Pierre Dardot and Christian Laval, *La nouvelle raison du monde: essai sur la société néolibérale*, second edition (Paris, 2013).

[11]In this comparison, particularly where French political thinkers are concerned, an analytical rather than a historiographical path will be followed, taking for granted the important contributions already provided about the relationship between Bentham and France; see Cyprian Blamires, *The French Revolution and the Invention of Benthamism* (New York, NY, 2008); *Bentham et la France: fortune et infortunes de l'utilitarisme*, edited by Emmanuelle De Champs and Jean-Pierre Cléro (Oxford, 2009). In my analysis, I will follow the path drawn by Cheryl B. Welch in her comparison of 'philosophical radicalism' and 'ideology' based upon their shared 'utilitarian' view of society; see Cheryl B. Welch, *Liberty and Utility: The French Idéologues and the Transformation of Liberalism* (New York, NY, 1984).

of as an extrinsic limitation, but as a formalisation or institutionalisation of the 'natural' movements of society. Consequently, the problem of 'constitution' was not left behind by the epistemological change of the eighteenth century. Rather, as Bentham's reflections show, the scientific and political understanding of 'society as a code' became the base for an innovative conception of both law and politics.

2. Society as the Natural Condition of Men

The conception of society as an order does not coincide with 'civil society', as the latter entails a derivative and oppositional relationship with the State. On the one hand, the State is the condition of 'civil society', and 'civil society' would not exist without a political authority invested with the power to keep outside disorder, the state of nature, the *bellum omnium contra omnes*. On the other hand, 'civil society' is the border of the State and establishes limits to political authority that can be and have been defined through the language of natural rights, constitutionalism, mixed government, rule of law, market or division of labour.[12] However, Bentham's discourse is quite far from these assumptions, strictly bounded by theories of natural law and original contract that he con-stantly criticised throughout his life and career. Instead, the conception of society emerging from Bentham's discourse recalls the attribute *civil* only insofar as 'society' raises along the process of civilisation, a progressive or evolutionary development of human capacities and manners which is not limited to a specific *civitas* or political community.[13]

This semantic link—and shift—between civilisation and society can be analysed through Adam Ferguson's work. While perhaps not proof of his direct influence over Bentham's reflections, Ferguson's argument is relevant in understanding the theoretical frame in which Bentham himself articulated his conception of society.[14] In fact, only one quotation from Ferguson's *Essay on the History of Civil Society* can be found in the whole work of Bentham. In his first published essay, the 1774 'Preface' to the English translation of Voltaire's *Le Toureau Blanc*, Bentham referred to the *Essay* in order to describe 'those times of *high antiquity*, when what we *now* call the *marvellous* was the common course of things' and when '*miracles* themselves were *natural* to *nature*; as "*art*", says Professor Ferguson, is "*natural to man*"'.[15] Such a statement is particularly relevant in understanding the

[12]Khilnani, 'Development of Civil Society', in *Civil Society*, edited by Kaviraj and Khilnani, 17–18.

[13]Baker, 'Enlightenment and the Institution of Society', in *Civil Society*, edited by Kaviraj and Khilnani, 86. Bentham seldom used the phrase 'civil society'; a single occurrence can be found in Jeremy Bentham, *Legislator of the World: Writings on Codification, Law and Education*, edited by Philip Schofield and Johnathan Harris (Oxford, 1998, first published in 1810–20), 223. More often, he refers to 'civilised society', thus stressing the historical place of a specific 'state of society' within a general progress of customs, manners, and of the organisation of labour. This progressive movement includes political institutions and law, but it is not entirely determined by them; see Jeremy Bentham, *Securities Against Misrule and Other Constitutional Writings for Tripoli and Greece*, edited by Philip Schofield (Oxford, 1990, first published in 1822/3), 35; Jeremy Bentham, *Deontology: Together with a Table of the Springs of Action and Article on Utilitarianism*, edited by Amnon Goldworth (Oxford, 1983), 73; Jeremy Bentham, 'Official Aptitude Maximized, Expense Minimized, in Jeremy Bentham, *Official Aptitude Maximized, Expense Minimized*, edited by Philip Schofield (Oxford, 1993), 3–93: 326, 346–47. This linguistic shift is symptomatic of Bentham's understanding of society as an object characterised by its own inner logic, so much so that—as will be shown—the same world 'society' can be turned into an adjective of the word 'order'. On the 'politics of adjectives' which accompanied the fragmented semantic of society, see Maurizio Ricciardi, 'Società. Potere, dominio, ordine', in *Genealogie del presente. Lessico politico per tempi interessanti*, edited by Federico Zappino, Lorenzo Coccoli, and Marco Tabacchini (Milan, 2014), 219–30.

[14]Among Bentham scholars, only Eldon J. Eisenach and Jean-Pierre Cléro have pointed out a link between Bentham's and Ferguson's work. In particular, Eisenach stresses the role that Ferguson played together with Hobbes, Locke, and Hume in opposing the 'authoritative use of the past' through the articulation of a natural or hypothetical history. This innovation was then incorporated by Bentham in his scheme of legislation and political-religious reform; see Eldon J. Eisenach, 'The Dimension of History in Bentham's Theory of Law', *Eighteenth-Century Studies*, 16 (1983), 290–316. More recently, Cléro stressed the proximity between Bentham and Ferguson in regard to their conception of 'pleasure' as something that, differently from pain, is affected by the development of civilisation; see Jean-Pierre Cléro, 'On the Ambiguous Status of Pleasure in Bentham's Theory of Fictions', https://www.stern.nyu.edu/sites/default/files/assets/documents/con_037041.pdf [accessed 05 January 2015].

[15]Jeremy Bentham, 'Preface', in Voltaire, *The White Bull, an Oriental History from an Ancient Syrian Manuscript* (London, 1774), xlviii. In addition to this quotation, in 1827 Bentham told John Bowring the odd story of Ferguson's trip to America during the colonial war. While travelling with George Jonson, the governor of West Florida, Ferguson 'was urgent with the commissaries […] to put to death man, woman, and child as many as they could catch, as an inducement to the rest to take the benefit of the proffered

transformation of the concept of society, since it expresses a dismissal of the logical presumption of a 'state of nature' upon which contractual theories were based. According to Ferguson, in fact,

> if we are asked […] where the state of nature is to be found? we may answer, It is here; and it matters not whether we are understood to speak in the island of Great Britain, at the Cape of Good Hope, or the Straits of Magellan. While this active being is in the train of employing his talents, and of operating on the subjects around him, all situations are equally natural. […] If nature is only opposed to art, in what situation of the human race are the footsteps of art unknown? In the condition of the savage, as well as in that of the citizen, are many proofs of human invention; and in either is not any permanent station, but a mere stage through which this travelling being is destined to pass.[16]

Here, human nature becomes the original historical factor of a genealogy of society. Ferguson's premises lead to two main interconnected consequences. First, society is an 'artefact' or 'institution'. Second, this institution is not the product of a voluntary agreement among men, but of a historical progressive or evolutionary process that involves men but is not entirely determined by them. Society, therefore, is natural to men insofar as it is the unavoidable and incremental result of human activity. From this theoretical perspective, subordination is itself natural insofar as it is an effect of the contingent movements of society, whose order is built upon the valorisation of differences. As Ferguson explains,

> [i]n every society there is a casual subordination, independent of its formal establishment, and frequently adverse to its constitution. […] This casual subordination, possibly arising from the distribution of property, or from some other circumstance that bestows unequal degrees of influence, gives the state its tone, and fixes its character.[17]

The political order, therefore, is not the result of a human agreement which leaves disorder 'outside' or 'before', and society is not the result of the establishment of the State. Rather, political order is entirely based upon an already existing societal order.[18]

Bentham shared the refusal of an abstract and ahistorical conception of nature that characterised Ferguson's discourse. In 'A Comment on the Commentaries', for instance, he simply refused to enter the debate around the 'sociability' of men and the question concerning the goodness or wickedness of human nature, by stating that it is 'incontestable' that 'man was formed for society […] since he is in it'.[19] This statement does not derive from an Aristotelian conception of man. Rather, it highlights a conception of society as a 'fact' which is not entirely produced through the establishment of govern-ment, nor is it conceivable as a 'state of nature', that is, as a pre-political condition of perfect equality among men. As Bentham clarified in 'A Fragment of Government', together with 'political society' is a 'natural society' characterised by the absence of a 'habit of obedience' of the governed towards the governors, and by the presence of a 'habit of conversation' among individuals. In defining 'natural society' as a 'negative idea',[20] rather than as a chronological origin or a logical prequel, Bentham did not deny its existence; instead, he assumed an empirical approach according to which reality—that is the concrete existence of political society—can be the only legitimate starting point of any inquiry on government. As a logical or 'speculative' hypothesis,[21] the state of nature is unserviceable for his science of politics. At the same time, in regarding society as 'natural', Bentham also pointed out

grace!'; see Jeremy Bentham to John Bowring, 30 January 1827, in Jeremy Bentham, *The Correspondence of Jeremy Bentham*, edited by Timothy L. S. Sprigge and others, 12 vols (Oxford, 1968–2006), VII, 288–309 (306–07).

[16]Adam Ferguson, *An Essay on the History of Civil Society*, edited by Fania Oz-Salzberger, third edition (Cambridge, 2001), 14.

[17]Ferguson, *History of Civil Society*, 129.

[18]See Ricciardi, 'Società. Potere, dominio, ordine', in *Genealogie del presente*, edited by Zappino, Coccoli, and Tabacchini, 223–25.

[19]Jeremy Bentham, 'A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws of England', in *A Comment on the Commentaries and A Fragment on Government*, edited by James H. Burns and Herbert L. A. Hart, first edition (London, 1977), 1–389 (34).

[20]Jeremy Bentham, 'A Fragment on Government', in *Comment and Fragment*, 391–551 (428–29). On negative ideas and Bentham's theory of fictions, see *J. Bentham's Theory of Fictions*, edited by Charls K. Ogden (Paterson, NJ, 1959); Paola Rudan, 'Governare la felicità. Riflessioni sulla rinuncia al contratto originario nel pensiero politico di Jeremy Bentham', in *Storia dei concetti*, *Storia del pensiero politico. Saggi di ricerca*, edited by Sandro Chignola and Giuseppe Duso (Naples, 2006), 63–117.

[21]Bentham, 'Comment on the Commentaries', in *Comment and Fragment*, 34.

the existence of a set of conventional relationships among individuals, the first being *communicative* relationships.[22] Far from being an 'effect' of the 'new governmental reason', these relationships are as 'real' as government, and subsist together with government and apart from its direct intervention.

Even though the 'habit of obedience' is the characteristic mark of political society and structures the relationship between the governors and the governed, power also exists within the natural society. According to Bentham, a condition of perfect equality—or, in other words, a condition where the 'habit of obedience' is perfectly absent—is nothing more than an 'extravagant supposition'. Since 'every person must, for some time, at least, after his birth, necessarily be in a state of subjection with respect to his parents', it is possible to say that those who are in this subordinate condition are 'into a state of perfect political society with respect to [their] parents'.[23] Bentham's arguments do not lead to the Filmerian conclusion that government is a development of what he called 'family society', because 'a society, to come within the notion of what is originally meant by a *political* one, must be such as, in its nature, is not incapable of continuing forever in virtue of the principles which gave it birth'.[24] This is not true in the case of the family society, insofar as children—once they are grown and overcome their natural weakness—are no longer subject to the authority of their parents. However, Bentham's remarks clarify his conception of natural society as a space characterised by both horizontal—that is, communicative exchange—and hierarchical relationships among individuals.

These theoretical assumptions are crucial in order to understand Bentham's critique of the American Declaration of Independence, in which he strongly criticised the idea of the natural equality of men and questioned their equal right to liberty by showing the anarchical implications of this claim. However, while Bentham's hierarchical conception of society is quite clear at this early stage of production, nothing more can be said about the reasons for this conception, at least nothing beyond his simple empirical observation or description of society *as it is*. These reasons can be understood only in moving along the path of Bentham's critique of natural rights theories, particularly the one developed during the French Revolution. Even though, in his *Nonsense upon Stilts*, Bentham used arguments that were quite similar to those he developed in 1776, his preoccupation was not the same. During the American Revolution, his main problem was to show how liberty, conceived of as a natural right, is radically inconsistent with government as a condition characterised by subordination and by the limitation of liberty through law. The aim of his utilitarian explanation of the revolution as a 'fact' rather than a 'right', therefore, was that of understanding the conditions necessary to grant the continuity of 'political society' in future times. This was the preoccupation which underlay Bentham's translation of liberty into the concept of 'security'.[25] During the French Revolution, his main problem was rather that of 'equality' conceived of as a threat not only to 'political society', but to society as such.

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[22]Here Bentham follows the path of David Hume, who conceived of the state of nature as a 'philosophical fiction' and regarded the original condition of man as a 'social' one insofar as it was characterised by the existence of conventions, such as language, caused by needs and by 'a sense of interest supposed to be common to all'; see David Hume, *Treatise on Human Nature*, edited by Lewis A. Selby-Bigge (Oxford, 1960), book III, part II, sect. II, 498. See also Frederik Rosen, *Classical Utilitarianism from Hume to Mill* (London, 2003), 52; Luca Cobbe, *Il governo dell'opinione. Politica e costituzione in David Hume* (Macerata, 2014).

[23]Bentham, 'Fragment on Government', in *Comment and Fragment*, 431–32.

[24]Bentham, 'Fragment on Government', in *Comment and Fragment*, 432–33. Bentham criticised Filmer's work, since 'parental power' does not exist with reference to 'any member of any other family'; see Bentham to Étienne Dumont, 14 May 1812, in Bentham, *Correspondence*, VII, 24–29 (25). For a non-political understanding of Bentham's conception of the 'family society', see Leonard J. Hume, *Bentham and Bureaucracy* (Cambridge, 1981), 64–66.

[25]Bentham to John Lind, 27/28 March 1776, in Bentham, *Correspondence*, I, 310–11; Paola Rudan, 'Securing the Future: Jeremy Bentham, *A Fragment on Government* and the American Revolution', *History of Political Thought*, 3 (2013), 479–506. On Bentham's conception of liberty as security, see Douglas Long, *Bentham on Liberty*: *Jeremy Bentham's Idea of Liberty in Relation to His Utilitarianism* (Toronto, 1977). In order to deepen our understanding of Bentham's influence in France during the second half of the eighteenth century and, particularly, during the revolutionary debate over the formulation of a declaration of rights, it may be useful to reconstruct the diffusion of the French translation of *An Answer to the Declaration of the American Congress* (London, 1776), commonly attributed to John Lind but substantially drafted by Bentham; see J. F. Fréville, *Réponse à la déclaration du Congrès Amèricain* (London, 1777). This translation is mentioned in Emmanuelle De Champs, 'An Introduction to Utilitarianism: Early French Translations of Bentham's *Introduction to the Principles of Morals and Legislation*', in *Cultural Transfers*: *France and Britain in the Long Eighteenth Century*, edited by Ann Thomson, Simon Burrows, and Edmond Dziembowski (Oxford, 2011), 269–83 (274–75).

3. The Social Order

This shift in Bentham's attention can be seen in 'Of the Levelling System', an appendix annexed to Bowring's English edition of the *Traités de legislation civile et penale*.[26] This short text is not clearly dated, but its title suggests that it was written after 1792. It was at this time that the Society for Preserving Liberty and Property against Republicans and Levellers was established in London by John Reeves, with the objective of organising the conservative propaganda against the diffusion of the revolutionary discourses on the English side of the Channel. Bentham was aware of the activity of this society. In fact, the society promoted the publication of the discourse of Judge Ashhurst, a publication that Bentham himself criticised in a well-known pamphlet written in 1792 but not published until 1823.[27] The reference to 'levellers' is not only rooted in seventeenth-century English history, but recalls the terms of the 1790–92 dispute between Edmund Burke and Thomas Paine on the French Revolution, when both spoke of a 'levelling system' in order to define, respectively, the theories of the rights of man and the monarchical form of government.[28] This historical contextualisation is particularly relevant because the Society for Preserving Liberty and Property was a crucial actor in the process of 'popularising' a discourse on society that moved from a natural, or rather ontological, view towards a functional explanation of the hierarchies among men. Once the French Revolution had questioned the immutability of the *ancien régime* hierarchies, these had to be justified upon new foundations. Together with the debate on the poor laws, the English conservative propaganda helps define the transitional frame in which Bentham developed his conception of society.[29]

'Of the Levelling System' was clearly an attack on the 1789 French Declaration of Rights, as it questioned the assumption—exposed in the first article—in which 'all human creatures are born and remain […] equal in rights'.[30] As Bentham later clarified in his *Nonsense upon Stilts*, the 'French oracle' perpetrated the 'nominal universality and real non-entity of rights set up provisionally by nature […] under the laws and in spite of laws'; thus, natural rights 'shot down as so many rough materials out of which the fabric of society might be reared'.[31] This *fabric*—a term which can be generally understood as 'tissue' or 'structure', being applied in architecture, medicine and mechanics —is made of differences among individuals, such as the ones between husband and wife, parent and child, master and servant.[32] According to Bentham, to deny these differences

[26]Jeremy Bentham, 'Of the Levelling System', in *The Works of Jeremy Bentham*, edited by John Bowring, 11 vols (New York, NY, 1962), I, 358–64.

[27]William H. Ashhurst, *Mr. Justice Ashhurst's Charge to the Grand Jury for the County of Middlesex, printed by Order of the Society for Preserving Liberty and Property against Republicans and Levellers* (London, 1793). See Jeremy Bentham, *Truth versus Ashhurst; Or Law as It Is Contrasted with What It Is Said To Be* (London, 1823), 15, where Bentham explicitly refers to the society and its founder John Reeves. In this period, Bentham also had a correspondence with Thomas Law, a member of the society who was invited to meet him in January 1793; see Bentham, *Correspondence*, IV, 413–14. Bentham refers to the society in a letter to his brother; see Bentham to Samuel Bentham, 15 September 1800, in Bentham, *Correspondence*, VI, 358–360. Concerning the 'Society for Preserving Liberty and Property', see also Mark Philp, 'Vulgar Conservatism: 1792–3', *The English Historical Review*, 435 (1995), 42–69; Harry T. Dickinson, 'Popular Loyalism in Britain in the 1790s', in *The Transformation of Political Culture: England and Germany in the Late Eighteenth Century*, edited by Eckhart Hellmuth (Oxford, 1990), 503–33.

[28]Edmund Burke, *Reflections on the Revolution in France, and on the Proceedings in Certain Societies in London, Relative to that Event. In a Letter Intended to have been Sent to a Gentleman in Paris. By the Right Honourable Edmund Burke* (London, 1790), 273–75; Thomas Paine, *Rights of Man*, edited by Eric Foner (London, 1985), 172. On the polemics between Paine and the Society for Preserving Liberty and Property, see Matteo Battistini, *Una rivoluzione per lo Stato. Thomas Paine e la Rivoluzione Americana nel mondo Atlantico* (Soveria Mannelli, 2012), 189.

[29]See Rudan, *L'inventore della costituzione*, ch. 2.

[30]Bentham, 'Of the Levelling System', in Bentham, *Works*, I, 361.

[31]Jeremy Bentham, 'Nonsense upon Stilts', in Jeremy Bentham, *Rights, Representation and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*, edited by Philip Schofield, Catherine Pease-Watkin, and Cyprian Blamires (Oxford, 2002), 317–401 (333).

[32]In *Johnson's Dictionary*, sixth edition (London, 1785), the term 'fabric' refers to a building. The use in architecture is meaningful if we consider that, with his *Panopticon*, Bentham aimed to organise a space which would have realised his principles of efficiency and economy, and would have also expressed his overall conception of power. Efficiency recalls two additional meanings of the term 'fabric': that of mechanism and that of a 'body' made up of different parts, where the body could be either animal or produced by man. These meanings are all crucial to explain Bentham's understanding of 'society': a complex political space characterised by its own dynamics, organised through interacting differences upon which it is possible to intervene once their logic is known. For a definition of the category of 'political space', see Carlo Galli, *Political Spaces and Global War* (Minneapolis, MN, 2010).

would have erased all progress and civilisation by destroying the very conditions upon which both the production of wealth and the reproduction of the species were based.[33] This same criticism was addressed against Sieyès, who believed that 'every man is sole proprietor of his own person, and this property is unalienable'.[34] In addition to this criticism, however, Bentham admitted that this statement aimed to question only the institution of slavery, and that Sieyès 'n'avoit pensé ni aux femmes, ni aux enfants, ni aux mineurs, ni aux fous, ni aux malfaiteurs, ni aux ouvriers, ni aux soldats. Il n'avoit pas la moindre intention d'abolir l'*ordre social*'.[35] It is therefore clear that, for Bentham, inequality is the foundation upon which society as an order is based.

This view was already expressed by Bentham in his work on the civil code, written mainly during the 1780s. Here he clarified that 'a single error' in fostering equality 'may overturn the whole social order' insofar as world equality, 'employed alone, is usually understood as referring to the distribution of property'.[36] An unequal distribution of property is therefore necessary to social order; it is 'unavoidable' and even 'natural'.[37] However, here the term 'natural' does not refer to either a pre-political origin of the right of property or the inner logics of governmentality; rather, it is based upon the 'discovery' and understanding of a set of dynamics that are natural for society as such. According to Bentham, the term 'property' does not define an actual possession, but rather an 'idea', a 'creature of the mind', consisting of 'an established expectation—in the persuasion of power to derive certain advantages from the object according to the nature of the case'. Though he assumed that this expectation 'can only be the work of the law', Bentham also believed that even in their 'primitive state', men had 'a natural expectation of enjoying certain things—an expectation derived from sources anterior to law' which explains the 'commencement' of the laws protect-ing property.[38] In order to avoid the precariousness of an unprotected possession, the savage men supposedly made 'the slightest agreement […] reciprocally to respect each other's booty: this is the introduction of a principle to which you can only give the name of law'. This conjectural history does not aim to define property as a pre-political right acting as a limit to political power; rather, it allows Bentham to point out the existence of a normativity derived from expectations that the legis-lator ought to 'respect', so that 'when he does not interfere with them, he does all that is essential to the happiness of society'.[39] Once property, that is the future relationship of individuals with the objects of their possession, is granted, society works autonomously. In fact, a man's

> natural hope to keep what he possess[es] is founded upon the ordinary course of things; for if we look at the whole mass of men, they not only keep what they have acquired, but still further increase its amount. The proof is in the difference between the primitive poverty of every country and its actual wealth.[40]

Individual interests and expectations are not isolated, but rise from within a set of relationships among 'the whole mass of men', and these relationships establish an 'ordinary course of things' which turns 'wants and enjoyments', that is 'physical sanctions', into 'universal agents in society'.[41] In other words, these sanctions are turned into productive forces that suffice both to 'command labour'—thus granting subsistence—and to motivate entrepreneurship, which is necessary in the pursuit of opulence. Once the normativity derived from expectation is pointed out, security of property does not establish a difference between the disordered condition of the state of nature and political society, but different stages within a process of civilisation. This process reaches a higher degree in England, where 'commerce is free', where exchange value has been freed from use value, and where the division of labour has developed so much that a 'gewgaw, useless in itself, obtains a

[33]Bentham, 'Of the Levelling System', in Bentham, *Works*, I, 358–59.
[34]Bentham, 'Nonsense upon Stilts', in *Rights, Representation and Reform*, 390.
[35]Bentham, 'Nonsense upon Stilts', in *Rights, Representation and Reform*, 392 (emphasis added).
[36]Jeremy Bentham, 'Principles of the Civil Code', in Bentham, *Works* , II, 297–364 (302, n. ‡).
[37]Bentham, *Truth versus Ashhurst*, 6, 13; Jeremy Bentham, *A Protest Against Law Taxes* (London, 1793), 15–17, 39.
[38]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 308.
[39]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 308–09.
[40]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 306.
[41]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 303.

value in exchange for necessaries', while labour becomes a source of subsistence insofar as it is exchanged.[42] Knowing that many differences in 'the conditions of property' exist among civilised nations,[43] Bentham celebrated the ordering power of 'commercial society' in which, to use Adam Smith's words, 'every man lives by exchanging, or becomes in some measure a merchant'.[44] This ordering power consists of a diachronic satisfaction of the individual interests—different and even opposite—involved in the exchange. As Bentham explained in his most Smithian work, the *Defence of Usury*, the borrower obliges himself to return the loan with interest at a future time to satisfy a present need; the creditor renounces the possibility of enjoying his wealth at a present time to obtain a future profit. Both calculate their utility, but their utility depends on their different conditions in terms of wealth. This original asymmetry is overcome insofar as both parties find an *equivalent* satisfaction, though at different point in time. Thus, the individuals involved in the exchange are 'only apparently rival parties',[45] and once they are freed from any interference, their 'mutual conveniences […] as manifested by their consent' realise social effects.[46]

The ordering power described by Bentham in his understanding of commercial exchange operates within *all* social relationships. He classified these relationships as so many species of that particular 'kind of property' called 'services', i.e., every performance useful to man, which define the space of the 'social intercourse'. In their origin, 'all services must have been free' and 'only by degrees' were they converted into positive laws.[47] Among services, marriage is exemplary in explaining the order-ing dynamics of exchange: while the interest of a man is that of satisfying 'a transient passion', a woman would derive only inconvenience from sexual union, since pregnancy exposes her life to trouble and to the burden of child care. The husband, therefore, ought to grant his care and protection both to his wife and to his children, so to 'oblige' the woman to freely accept the subordinate position that the reproduction of the species and the transmission of property throughout generations requires of her.[48] The obliging force of the marriage contract—that, like every contract, cannot but be free and express the consent of the parties—depends on its capacity of realising the general maxim according to which 'every alienation implies advantage'.[49] Thus property—the meaning of which has come to refer to any social relationship between persons through the medium of things,[50] these things being both objects of possession and services—exercises a disciplinary power over individuals. Discipline, therefore, is not derived from the continuous exercise of supervision, but is a dynamics immanent to social relationships and secured by law.[51] As Bentham explained,

> to enjoy quickly—to enjoy without punishment—this is the universal desire of man; this is the desire which is terrible, since it arms all those who possess nothing, against those who possess any thing. But the law, which restrains this desire, is the most splendid triumph of humanity over itself.[52]

With this understanding of Bentham's conception of society, his critique of natural rights acquires a different significance. The rights of man are the weapons of those 'who possess nothing against those who possess anything' because the universal human desire is such that, if laws did not secure property, every man would discover a way—be it force or fraud—to avoid not only starving, but also the

[42]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 303–04.

[43]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 311.

[44]Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, edited by William B. Todd (Indianapolis, IN, 1976), book I, ch. IV, 37. For a contextualisation of Bentham's thought within the historical frame provided by the 'commercial society' see Werner Stark, 'Jeremy Bentham as an Economist', *The Economic Journal*, 224 (1946), 583–608.

[45]Jeremy Bentham, *Defence of Usury* (London, 1787), 108.

[46]Bentham, *Defence of Usury*, 12.

[47]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 338.

[48]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 352.

[49]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 330.

[50]According to Louis Dumont, 'the primacy of the relations [of men] to things over the relations between men' is 'the decisive shift that distinguishes the modern civilization'; see Louis Dumont, *From Mandeville to Marx*: *The Genesis and Triumph of Economic Ideology* (Chicago, IL, 1977), 8.

[51]Foucault, *Birth of Biopolitics*, 67.

[52]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 309.

pain of labour.[53] If property were equally distributed, needs would not force man into labour; if sexual equality were a reality, a conflict between the will of the husband and that of the wife would disturb the order of the 'family society', whose reproduction is granted by the authority of one, and only one, domestic 'sovereign will'.[54] Hierarchies, power relationships, and subordination are not only 'facts' to be described in order to criticise the illogical assumptions of the right of man theories. Society is, in fact, also conceived of as a normative space where even the individuality of the individual is socially determined,[55] so that it is impossible to conceive of individuals as isolated agents whose attitudes can be explained by an abstract behavioural pattern, like the *homo œconomicus* is. In other words, every man lives and acts within a social relationship that produces individual interests, and these interests are not the presupposition but the product of that social relationship. It is the social relationship which turns men into isolated individuals by producing their interests.

In speaking of the 'social intercourse', where the term 'intercourse' refers both to communicative and commercial exchange, Bentham reconceptualised the 'habit of conversing' upon which the 'natural society' of *A Fragment on Government* was based, thus describing a social order produced through exchange.[56] This order could exist if differences, hierarchies, and power relationships were granted by the law and harmonised through the 'naturally social' dynamics of equivalence. This order, however, would have been radically questioned by the rising number of the indigent excluded by the exchange.

4. The Political Problem of Society

In 1788, Bentham observed that 'le Tiers-État […] est la Nation par essence'.[57] This statement suggests that his relationship with Sieyès should not be reduced to his well-known criticism of the Declaration of Rights proposed by the French Abbé, or to the resentment raised by the presumed role of 'Bonaparte's Chief-Law Manufacturer' in the rejection of Bentham's reform of the judicial establishment in France.[58] Rather, it is possible to compare their discourses from the observation that Sieyès himself was a turning point in the 'discovery of society' which took place between the eighteenth and the nineteenth centuries. In a text published in 1775, for instance, he wrote:

> Il faut donc à la société, indépendamment de la puissance de la nature productrice des biens, une *force vive* coproductrice de richesses, et il faut que les éléments de cette force, unis par la société, produisent plus qu'ils ne feraient s'ils restaient isolés. La somme de des travaux de tous les citoyens forme la force vive. S'il est un citoyen que retire sa portion d'activité il renonce à ses droits, nul homme ne doit jouir du travail d'autrui sans échange. Le travail général est donc le fondement de la société, et l'ordre social n'est que le meilleur ordre possible des travaux.[59]

[53] Jeremy Bentham, 'Essays on the Subject of the Poor Laws', in Bentham, *Writings on the Poor Laws*, edited by Michael Quinn, 2 vols (Oxford, 2001–2010), I, 1–140 (10).

[54] Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 324–36. On Bentham and marriage, see Mary Sokol, *Bentham, Love and Marriage: A Utilitarian Code of Law in Historical Contexts* (London, 2011).

[55] See Baker, 'Enlightenment and the Institution of Society', in *Civil Society*, edited by Kaviraj and Khilnani, 98. See also Michael Quinn, 'A Failure to Reconcile the Irreconcilable? Security, Subsistence and Equality in Bentham's Writings on the Civil Code and on the Poor Laws', *History of Political Thought*, 2 (2008) 321–42, in which the social determination rather than abstractedness of Bentham's conception of the individual is underlined. A different view is developed by Paul Kelly, who starts from an abstract conception of the individual entitled with rights, stressing the compatibility between Bentham's utilitarianism and an individualistic conception of rights; see Paul J. Kelly, *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law* (Oxford, 1990).

[56] As Christian Laval explains, 'la representation de la societé comme espace d'échanges et d'interactions entre individus est une condition de possibilité historique de la raison sociologique'; see Christian Laval, *L'ambition sociologique*, second edition (Paris, 2012), 31.

[57] Jeremy Bentham, 'France', in Bentham, *Rights, Representation and Reform*, 1–61 (41).

[58] According to Bentham, 'Bonaparte's Chief Law-Manufacturer'—as he defined Sieyès—'was responsible for having thrown out' his work on Judicial Establishment which, in the 'promising days of the French Revolution, had some chance of becoming *law*'; see Bentham to Robert Peel, 13 April 1826, in Bentham, *Correspondence*, XII, 210–11 (210). See also Bentham to William Wilberforce, 1 September 1796, in Bentham, *Correspondence*, V, 254. Bentham's judgement was based on a letter sent by the duc de la Rochefoucauld to the marquise of Lansdown, in Bentham, *Correspondence*, IV (1775), 137.

[59] Joseph Emmanuel Sieyès, 'Lettres aux économistes sur leur système de politique et de morale', in Sieyès, *Écrits politiques*, edited by Roberto Zapperi (Glasgow, 1985), 25–43 (32).

According to Sieyès, labour is not simply an individual activity applied to nature; instead, it becomes productive of wealth insofar as society provides the conditions for cooperation. Participation in this cooperative activity explains the acknowledgement of individual rights while, at the same time, legitimising the exclusion of aristocracy—a parasitic class—from the division of labour and, consequently, from the political space.[60] In Sieyès' discourse, society replaces nature as the foundation of order because cooperation and the incremental growth of social forces can be realised only within society. Though, as Étienne Dumont observed, Sieyès knew Bentham's work from the extracts published by the *Bibliothèque britannique* in 1797 and was clever enough to understand that their systems differed substantially,[61] Bentham shared the assumptions of 'Bonaparte's Chief Law Manufacturer' when he stated:

> By the adjunct *social*, the subject *order* is perhaps rendered somewhat the less fit for the use of tyrants, but not so much. Among the purposes to which the word *social* is employed, is indeed that of bringing to view a state of things favourable to the happiness of society: but a purpose to which it is also employed, is that of bringing to view a state of things no otherwise considered than as having place in society.[62]

Thus, Bentham seems to attribute both a descriptive and a prescriptive meaning to the term 'social'. In fact, this term refers not only to what is useful to society but also to something that can occur only within society. Just like Sieyès, Bentham conceived of social order as a productive space where a plurality of individuals are interconnected by the dynamics of exchange and cooperation caused by the division of labour starting from the different amounts of possession held by them.[63] After all, Sieyès cannot be ascribed to the tradition of natural rights theory unless the shift from nature to society underlying his discourse is acknowledged.[64] Bentham's discourse, however, diverges from that of Sieyès since he was able to see not only the ordering effects of social cooperation and exchange, but also the disordering dynamics emerging from within society. Bentham's critique of Sieyès, therefore, expresses his theoretical urgency of 'cleaning' both language and science of every dangerous abstraction, an urgency strengthened by his focus on the political problem of society which engaged him since 1795, when he began his work on the poor laws. In fact, the rising number of indigents—defined by Bentham as those who are not able to grant themselves subsistence through labour—radically questioned the possibility of realising social happiness, or the greatest happiness for the greatest number, through cooperation and exchange. As we shall see, when the poor are obliged by wants and motivated by expectations to enter the ordering dynamics of exchange—they are not a threat, but a necessity of society, and society is ordinarily able to provide them a satisfaction con-sistent with their social position and function. Indigence, however, points out the possibility of a decrease in happiness which is not simply an individual fate but also a political problem, insofar as it may direct the expectations and the interests of the great mass of the working poor *against* the order of society.

To understand this development of Bentham's thought, it is of note that he refused a moral explanation of indigence like the one provided by Joseph Townsend, a major voice within the debate on the poor laws.[65] Indigence is not the external evidence of a moral defect, like Calvinist ethics pretend, but the result of objective conditions, whether 'internal', such as old age, infancy, or illness, or 'external', such as bad reputation, economic stagnation, or the introduction of machinery that reduces the

[60]Maurizio Ricciardi, *La società come ordine. Storia e teoria politica dei concetti sociali* (Macerata, 2010), 43–50.
[61]Dumont to Bentham, 27 November 1801, in Bentham, *Correspondence*, VI, 457–60 (458). The extracts from Bentham's works published in the *Bibliothèque britannique* are listed in Bentham, *Correspondence*, V, 200 n. For a reconstruction of the role played by the *Biblioteque britannique* in the 'philosophical transfer' of Bentham's thought to France, due particularly to Dumont's editing of the published extracts and to the way he changed their focus from 'morals' to 'legislation' or 'jurisprudence', see De Champs, 'Introduction to Utilitarianism', in *Cultural Transfers*, edited by Thomson, Burrows, and Dziembowski.
[62]Jeremy Bentham, 'The Book of Fallacies', in Bentham, *Works*, II, 375–487 (441).
[63]See Welch, *Liberty and Utility*, 15, 141, where the author stresses how the process of cooperation 'assures that each person gains by every act of exchange and that the total increases not arithmetically but synergistically'.
[64]See Welch, *Liberty and Utility*, 16.
[65]Joseph Townsend, *A Dissertation on the Poor Laws by a Well-Wisher to Mankind* (London, 1786).

demand for a workforce.[66] If poverty must not be eliminated, since it is necessary for social production,[67] indigence seems unavoidable, not only because social production can be affected by negative circumstances but also because expulsion from labour is caused by progress itself. Indigence, therefore, both results from the natural dynamics of commercial society and is the problem that commercial society is not able to solve or to govern autonomously, insofar as the indigent do not participate in the ordering dynamics of exchange. The indigent—whose paradoxical position recalls Hegel's 'plebs'[68]—are a political problem not because of their high numbers, but because they may catalyse the expectations of the entire poor population, whose future is open both to the hope of improving their condition and to the fear of starvation.

Bentham's understanding of the dynamics of 'sympathy' is crucial here and stresses his distance from the contemporary celebrators of commercial society. Particularly, he disagreed with those—like Townsend—who believed that beneficence could motivate the gratitude of the poor towards the rich.[69] This conclusion was based upon Adam Smith's conception of benevolence as a result of sympathy, i.e., a dynamics of moral exchange. According to Smith, sympathy promotes an 'imaginary change of situations' by which every individual is able to judge his own action as if he were being observed by an 'impartial spectator' who represents the 'mirror' of society.[70] Insofar as society is made up of different ranks entitled to different powers, privileges, and immunities, the property of an action should be measured according to the particular position of each individual within society.[71] Sympathy, therefore, produces an internalisation of one's own social position and role, motivated by a desire to be the object of 'the more complete sympathy' of others.[72] This internalisation is strengthened, at least for the lower ranks, by the sentiments of admiration and deference which superior ranks inspire. According to these premises, 'of all the duties of beneficence, those which gratitude recommends to us approach nearest to what is called a perfect and complete obligation' and 'the poor man must neither defraud nor steal from the rich, though the acquisition might be much more beneficial to the one than the loss could be hurtful to the other'.[73]

In Bentham's language, the 'impartial spectator' could be regarded as the source of 'moral sanction', and he therefore acknowledged that a desire for a good reputation motivates individuals to act consistently with their role and position within society. However, he also believed that the effect of this desire depends upon the position of those whose approval is sought after.[74] Insofar as the judgements of the individuals are influenced by their social position, the property of an action could always turn into a dangerous 'partiality'[75]:

[66]See Jeremy Bentham, 'Table of Cases Calling for Relief', in *Writings on the Poor Laws*, II, 470–71; Jeremy Bentham, 'Pauper Systems Compared, or A Comparative View of the Several Systems Establishable as well as Established in Relation to the Poor', in *Writings on the Poor Laws*, I, 141–216 (164).

[67]Bentham, 'Essays on the Subject of the Poor Laws', in *Writings on the Poor Laws*, I, 3–5.

[68]It is not by chance that Hegel developed his conception of 'plebs' after he analysed the same literary sources known to Bentham; see Robert Fatton, 'Hegel and the Riddle of Poverty: The Limits of Bourgeois Political Economy', *History of Political Economy*, 4 (1986), 579–600; Mark Neocleous, 'Policing the System of Needs: Hegel, Political Economy and the Police of Market', *History of European Ideas*, 24 (1998), 43–58. See also Emanuele Cafagna, *La libertà nel mondo. Etica e scienza dello Stato nei 'Lineamenti di filosofia del diritto' di Hegel* (Bologna, 1998), 190–202, where Colquhoun's influence on Hegel is pointed out.

[69]Townsend, *Dissertation on the Poor Laws*, 19, 85–99. See also David Davies, *The Case of Labourer in Husbandry* (London, 1795), 14–15, 88–92, 101; John MacFarlan, *Inquiries concerning the Poor* (Edinburgh, 1782), 352; John Vancouver, *An Enquiry into the Causes and Production of Poverty* (London, 1796), 106, 148.

[70]Adam Smith, *The Theory of Moral Sentiments*, edited by Knud Haakonssen (Cambridge, 2004), 24, 129.

[71]Smith, *Theory of Moral Sentiments*, 27.

[72]Smith, *Theory of Moral Sentiments*, 27. On Smith's conception of sympathy, see Peter L. Danner, 'Sympathy and Exchangeable Value: Keys to Adam Smith's Social Philosophy', *Review of Social Economy*, 3 (1976), 317–31; Edward W. Coker, 'Adam Smith's Concept of the Social System', *Journal of Business Ethics*, 2 (1990), 139–42; Adelino Zanini, *Adam Smith. Economia, morale, diritto* (Milan, 1997), 208–09.

[73]Smith, *Theory of Moral Sentiments*, 92, 159.

[74]On love of reputation, the influence of rank upon sensibility, and the influence of the interests of those toward which benevolence is exercised over the effects of benevolence, see Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, edited by James H. Burns and Herbert L. A. Hart (London, 1982), 105, 65, 116–17.

[75]The term 'partiality' appears in Bentham, *Introduction to the Principles of Morals and Legislation*, 69, 109.

It is an observation that has been frequently made […] that the classes the least elevated above actual indigence are proportionally more liberal in their contributions, and that in a reasonable degree, than the most elevated. It is natural that they should be so. Natural temper being the same, a man's sympathy is more strongly exerted by the spectacle of suffering, the more exposed he feels himself to be to the danger of experiencing similar suffering, and the nearer the similitude which the suffering he witnesses appears to bear to the suffering of which he has had experience.[76]

Like Smith and Hume before him, Bentham stressed the role played by proximity within the dynamics of sympathy.[77] As he himself clarified, the summit of the social pyramid is not able to be seen by those at the base, and what is out of sight cannot become an object of desire.[78] This distance is an assurance against the danger of those desires not being satisfied, because it allows only a 'slight acquaintance' between the rich and the poor, while 'the only persons under whose observation [the latter] are sure to fall, are their fellow-poor'.[79] According to Bentham, because the poor have experienced a condition similar to that of the indigent, the poor sympathise with them, and this sympathetic bond is a threat not only to the continuity of political society, which is '*towards* the legislature' that is supposed to grant the indigent their entitlement to subsistence, but also to the 'safety of the other class' and the 'security of the affluent'.[80]

Thus, indigence defines the borders of the ordering power of commercial society: commercial society works autonomously until all individuals, *as individuals*, are integrated within the system of exchange and equivalence, even when the object of exchange is their labour. However, since their labour is not included within the 'social intercourse', the indigent endanger society because they break the isolation of the individuals produced by the social intercourse by showing to the poor a future exposed to misery. In making this possibility visible, the indigent cause an aggregative dynamics which goes beyond an understanding of class as a scientific instrument of classi-fication and beyond rank as a moral normative system. Sympathy, therefore, is not to be understood as a 'social' sentiment which moderates the disjunctive effects of self-interest, thus granting social bonds.[81] Rather, when it establishes an exclusive and partial communication between the poor and the indigent, sympathy radically questions the commercial and contractual order of the society of individuals. Bentham's 'theory of indigence' is a political improvement on the Smithian theory of the wealth of nations, for he clearly understood that the ordering dynamics of society are bounded with disordering tendencies that are not simply conjunctival or anarchical, but rather pertain to society as such and develop along the lines of its functional hierarchies and differences. This political problem highlights the necessity of institutional instruments fit to govern the contradictory movements of society according to their scientific understanding.[82]

[76]Bentham, 'Essays on the Subject of the Poor Laws', in *Writings on the Poor Laws*, I, 25.
[77]Bentham, *Introduction to the Principles of Morals and Legislation*, 49–50.
[78]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 309.
[79]Bentham, 'Essays on the Subject of the Poor Laws', in *Writings on the Poor Laws*, I, 12.
[80]Bentham, 'Essays on the Subject of the Poor Laws', in *Writings on the Poor Laws*, I, 21, 151, 19.
[81]In his analysis of Ferguson's conception of civil society, Foucault suggests that sympathy is among those instincts and sentiments

which differentiate 'the bonds that bring economic subjects together and those that bring together individuals belonging to civil society: there is a distinct set of non-egoist interests, a distinct interplay of non-egoist, disinterested interests which is much wider than egoism itself'; see Foucault, *Birth of Biopolitics*, 301. The paradoxical effect of such a distinction is a 'duplication' of the societal order corresponding to a fracture in the nature of the individual.

[82]The scheme of Industry Houses promoted by Bentham is based both on his understanding of the ordering dynamics of exchange and cooperation, reproduced within his social establishments, and of his explanation of the social dynamics of sympathy between the indigent and the poor. Once they are inside the Industry Houses, the indigent are out of the poor's sight, and the indigent's capacity of catalysing the poor's fear and disappointment is neutralised. Thus, Industry Houses would affect both the indigent, since their habit of industry is nurtured and their expectations are moulded according to their social duties, and the outside poor, since they will no longer expect starvation in case of indigence, but the subsistence granted by labour and the socialisation managed by the Industry Houses. The latter, therefore, would exercise over the mass of the working poor what Bentham called a 'plastic power'; see Jeremy Bentham, 'Outline of a Work Entitled Pauper Management Improved', in *Writings on the Poor Laws*, II, 550.

5. The Science of the Social Code

In speaking about services and the social intercourse, Bentham clarified that 'there are a great number of services upon which [the legislator] has no hold: he cannot direct them, because it is not possible to define them, and even because constraint would change their nature and convert them into evils'. While Bentham acknowledged that this impotence is an 'imperfection of the law', he also admitted that such an imperfection

> is corrected by a species of supplemental law; that is to say, by *the moral or social code*—a code which is not written—which consists altogether in opinion, in manners, customs—and which begins where the legislative code ends.[83]

This use of the term 'code' to define an unwritten set of norms is surprising, particularly when considering that the *code* was, for Bentham, one of the most important objectives of his struggle for the transformation of the common law into a statute law codified according to scientific criteria of arrangement, promulgation, and publicity. After all, even before Napoleon's codification, the term *code* was usually understood as a collection of legal norms, such as the codes of Roman Law. Bentham's 'discovery of society, however, seems to explain this apparent anomaly: under this light, in fact, the 'moral or social code' can be regarded as the expression of his understanding of a normativity emerging from society and of its specific relationship with positive laws.

Once more, a comparison with Adam Ferguson could help explain Bentham's approach. Ferguson provided an original definition of what he calls the 'civil code' as the concrete 'arrangement of different interests' upon which the form of government and the equity and enactment of the laws of the State depend.[84] Since no 'civil code' actually existed in Ferguson's time, it is possible that he was both referring to the concrete constitution of society at a certain stage of civilisation and pointing out the existence of a relationship between the constitution of society and political institutions. Yet, this relationship is not a given, and Ferguson claims that the 'States are accordingly unequally qualified to conduct the business of legislation, and unequally fortunate in the completeness, and regular observance, of their civil code'.[85] For Ferguson, then, the 'arrangement of different interests' should be known and find expression within the State so that political institutions could be consistent with the constitution of their society. Bentham shared a similar approach when he stated that 'the legislator is not the master' but the 'interpreter and servant' of human dispositions, that 'the goodness of his laws depends upon their conformity to the general *expectation*', and that 'it is highly necessary […] for him rightly to understand the direction of this expectation, for the purpose of acting in con-cert with it'.[86]

The legislator does not produce an order *ex nihilo*, like Hobbes' Leviathan, but rather has to manage an already existing order which must be 'respected' insofar as it is able to reproduce itself autonomously within the legal frame of security. Society, therefore, exercises a normative force on the law: first, it 'imposes' the transformation of all laws into statutes and their publicity, since this is the only way of securing the future upon which the social dynamics of exchange and equivalence among different interests is based. Second, law ought to 'incorporate' this social dynamic, to ensure the continuation of these differences that are necessary for the reproduction of society. Concretely, this means that law taxes should be abolished, because 'they add an unnecessary injustice' to the 'unavoidable inequalities' among individuals in terms of wealth.[87] Furthermore, laws should act according to the principle of 'equability', meaning they have to realise equal *effects*, in terms of pain and pleasure, starting from those same 'unavoidable inequalities'. The detailed classification of the 'circumstances influencing sensibility' realised by Bentham, therefore, results from his conception of

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[83]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, 338–39, emphasis added.
[84]Ferguson, *History of Civil Society*, 158.
[85]Ferguson, *History of Civil Society*, 158.
[86]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 322.
[87]Bentham, *A Protest against Law Taxes*, 15.

equality as equivalence among different social positions, so that utility is conceived of as the 'representative legal standard' of justice, like money is 'in civilized society […] the almost universal representative standard' of property.[88] Lastly, the legislator has to drive the course of expectations, without disappointing them, towards the *ought to be* defined by the order of commercial society: he has to complete the process of enclosure, to realise a gradual abolition of slavery, and to repeal all laws conferring commercial monopolies so as to emancipate labour and the natural productive forces of want and enjoyment from the fetters of feudal society.[89] As Philip Schofield has already pointed out, Bentham's legal positivism is therefore 'substantial' because it distinguishes between what the law *is* and what it *ought to be*, but it is not 'methodological', insofar as he does not conceive of law in 'morally neutral' or—as is suggested here—'socially neutral' terms.[90] For the same reason, Bentham could be conceived of as a supporter both of *laissez-faire* and of the intervention of the legislator into economics, as both of these directions could be 'commanded' to his action by the normative order of society.[91]

Remarkably, some years before Bentham's formulation of his discourse on society and his 'theory of indigence', Mirabeau also explicitly referred to the existence of a 'social code'.[92] In his *Essai sur le dispotisme* (1775), in fact, he stated:

> Les devoirs de tous consistent dans l'accomplissement de la loi. La loi, c'est-à-dire l'*ordre*, est toute fondée sur les sensations et les besoins physiques de l'homme, à qui la nature accorda autant de facultés pour jouir, qu'elle lui permit de jouissances; c'est donc au sein de ces jouissances, c'est dans leur distribution, leur arrangement, leur reproduction, qu'il faut chercher le *code social*.[93]

Mirabeau was well aware that the word 'social' did not have a clear meaning. Thus, he explained that such a term should take the place of 'natural', since men are naturally dependent on one another for the satisfaction of their needs. This 'natural tendency' towards society is not based on the natural goodness of the individual, who, on the contrary, has a 'despotic attitude' towards other men. Rather, society is the only condition which allows men to improve their property and multiply their enjoyment. The consequence of such a conception is that the formation of society does not consist of an abolition of the primitive condition of man, but rather of its development.[94] Given his relationship with Bentham, Mirabeau's analysis is an important example of the changing attitude toward society which took place between the eighteenth and nineteenth centuries, and it helps to define the theoretical context in which Bentham's discourse took shape. Yet, one important difference between them

[88]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 339. From this point of view, Bentham's description of the 'circumstances influencing sensibility' (Bentham, *Introduction to the Principles of Morals and Legislation*, ch. VI) is not relevant for our understanding of whether it is possible to calculate happiness according to objective criteria, but rather because it translates the 'naturally social' dynamics of equivalence into the legal principle of 'equability' (Bentham, *Introduction to the Principles of Morals and Legislation*, 175). On the 'felicific calculus', see Wesley C. Mitchell, 'Bentham's Felicific Calculus', *Political Science Quarterly*, 2 (1918), 161–83; André Lapidus and Nathalie Sigot, 'Individual Utility in a Context of Asymmetric Sensitivity to Pleasure And Pain: An Interpretation of Bentham's Felicific Calculus', *The European Journal of the History of Economic Thought*, 7 (2000), 45–78; Jan-Christoph Marschelke, *Jeremy Bentham – Philosophie und Recht* (Berlin, 2008), 206ff.
[89]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 342–43.
[90]Philip Schofield, 'Jeremy Bentham, the Principle of Utility, and Legal Positivism', *Current Legal Problems*, 56 (2003), 1–39.
[91]On the debate concerning Bentham's position in economic politics, see Stark, 'Bentham as an Economist'; Terence W. Hutchison, 'Bentham as an Economist', *The Economic Journal*, 262 (1956), 288–306; Leonard J. Hume, 'Jeremy Bentham and the Nineteenth-Century Revolution in Government', *The Historical Journal*, 3 (1967), 361–75 (371–72); Paul J. Kelly, 'Utilitarianism and Distributive Justice: The Civil Law Foundation of Bentham's Economic Thought', *Utilitas*, 1 (1989) 62–81; Stephen Conway, 'Bentham and the Nineteenth Century Revolution in Government', in *Victorian Liberalism: Nineteenth Century Political Thought and Practice*, edited by Richard Bellamy (London, 1990), 71–90; Nathalie Sigot, *Bentham et l'économie. Une histoire d'utilité* (Paris, 2001).
[92]For a reconstruction of Bentham's relationship with Mirabeau during the years of the French Revolution, see Charles Blount, 'Bentham, Dumont and Mirabeau, an Historical Revision', *University of Birmingham Historical Journal*, 3 (1952), 153–67; James H. Burns, 'Bentham and the French Revolution', *Transactions of the Royal Historical Society*, 16 (1966), 95–114; Emmanuelle de Champs, 'La postérité des idées de Jeremy Bentham: la notion d'influence à l'épreuve', *Cromohs*, 11 (2006), 1–17. Bentham most likely knew many details about Mirabeau's life and political experience through the *Souvenirs sur Mirabeau* written by Dumont. Though the *Souvenirs* were not published until 1832, Bentham had the opportunity to read a draft of that 'very interesting and amusing' work in 1806; see Bentham, *Correspondence*, 10–16 May 1806, VII, 342.
[93]Victor Riqueti Mirabeau, *Essai sur le despotisme* (Paris, 1821), 57–58.
[94]Mirabeau, *Essai sur le despotisme*, 58.

is clear: even if Mirabeau acknowledged that utility has been the first bond within society and the basis of sovereign authority, he also believed that it 'n'a pas été *la seule mère de la justice et des lois*'.[95]

Bentham, however, assumed utility as the sole principle sufficient to explain the relationship among men and the work of government. His conception of society is, therefore, a *systemic* one, at least if we assume a definition like the one provided by Condillac—an author admired by Bentham—according to which:

> Un systême n'est autre chose que la disposition des différentes parties d'un art ou d'une science dans un ordre où elles se soutiennent toutes mutuellement, et où les dernières s'expliquent par les premières. Celles qui rendent raison des autres, s'appellent *principes*; et le systême est d'autant plus parfait, que les principes sont en plus petit nombre: il est même à souhaiter qu'on les réduite à un seul.[96]

This systemic approach turns Bentham's science of law into a science of the social code or, more precisely, a social science of utilitarian individuals.[97] In fact, it is true that the legislator cannot define all services and social relationships in detail, from which the social or moral code arises. However:

> The feelings of men are sufficiently regular to become the object of a science or an art; […]. Medicine is founded upon the axioms of physical pathology: morals are the medicine of the soul: legislation is the practical branch; it ought, therefore, to be founded upon the axioms of mental pathology.[98]

Here the term 'pathology' does not refer to a condition of illness or a deviation from normality, but to the logic of passions and to the practical knowledge of individual behaviours as determined by their different social positions. Of course, Bentham did not provide an accomplished and autonomous science of society like the one developed in the second half of the nineteenth century, after August Comte found a proper name for it. Yet, through the language of morals, of law, and of political economy, Bentham attempted to systematise the epistemological change which was necessary in order to understand, and to govern, the relationships among men. Perhaps this aim provides a further explanation of Bentham's persisting criticism of natural law theories. For him, disorder cannot be understood as a state of nature which defines the external border of society, since there is no 'outside' society. Disorder is a pathology of society insofar as it is a possibility inscribed within its logic. The poor, like savage men, are forced to labour by their needs, even though civilisation grants the former a security for the fruits of their labour that the latter could not enjoy.[99] When society refuses their labour, however, the poor fallen into indigence do not become savages or barbarians who threaten civilisation from outside. Instead, they trigger the political problem of society, which Bentham tried to solve both with his Industry Houses and with his Constitutional Code. Industry Houses, on the one hand, are nothing more than an institutional or mimetic reproduction of the social dynamics of exchange, as Michael Quinn has already suggested,[100] a space where the indigent are submitted to the 'moral or social code' which establishes the dependency of subsistence on labour and fosters productive cooperation. On the other hand, the Constitutional Code, as a democratic organisation of society, expresses its all-inclusive pretensions, while at the same time defining a structure of management that would allow for the maximisation of the ordinary movements of

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[95]Mirabeau, *Essai sur le despotisme*, 59.

[96]Etienne Bonnot de Condillac, *Traité des systèmes* (Paris, 1798), 1. Bentham knew Condillac's work on systems and defined it as a 'judicious and philosophical work'; see Jeremy Bentham, 'Manual of Political Economy', in Bentham, *Works*, III, 31–84 (51). Bentham critically discusses Condillac's *Logic* in Jeremy Bentham, *Chrestomathia*, edited by Martin J. Smith (Oxford, 1983), 165, 268.

[97]As Baker pointed out, Bentham indirectly introduced in England the term 'social science', which had been used by the *Idéologues* since the 1790s. In fact, he approved the title chosen by his Spanish translator, Toribio Núñez, who was familiar with the works of Destutt the Tracy, for a Spanish edition of some extracts of his works; see Jeremy Bentham, *Espiritu de Bentham: sistema de ciencia social* (Salamanca, 1820). See also Keith Michael Baker, 'The Early History of the Term "Social Science"', *Annals of Science*, 20 (1964), 211–26; Toribio Nuñez to Bentham, 20 December 1821, in Bentham, *Correspondence*, V, 463–78 (471).

[98]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 304–05.

[99]Bentham, 'Principles of the Civil Code', in Bentham, *Works*, I, 309.

[100]Michael Quinn, 'The Fallacy of Non-Interference: The Poor Panopticon and Equality of Opportunity', *Journal of Bentham Studies*, 1 (1997), 1–28.

society and the minimisation of its inner contradictions. In both cases, society provides the *ought to be* that the legislator should know and interpret.[101]

Thus, as Dardot and Laval have suggested, Bentham radically redefined the relationship between science and art. Science was not independent from the art of government, as Adam Smith's political economy was, because the State and the law played a fundamental role in establishing the conditions for the 'spontaneous' economic life and improvement of general well-being.[102] Consequently, art defines science, and science is driven by the political ends of government according to a logic ends/means.[103] However, this technological understanding of science highlights only one face of Bentham's overall doctrine. As he clarifies in articulating his peculiar understanding of political economy:

> Along with the matter employed in the enquiry what the law ought to be, [is] intermixed matter employed in the description of the course that human industry takes abstractly from the consideration of law. This matter, instead of being *censorial*[, i.e.,] critical with regard to the state of law, [is] *expository* or descriptive with regard to the actual course of nature.[104]

Thus, the priority of art over science coincides with the logical priority of 'nature', that is the concrete historical system of social relationships.[105] The very possibility of knowledge rests on the existence of 'natural principles of order' that establish a 'connexion' among the parts of a whole.[106] Social relationships, however, are not simply the historical determinations of a progressive or evolutionary movement that the government is called to maximise. The 'natural principles' which govern them, in fact, include the possibility of their subversion, thus pointing out a political problem that must be understood in order to be governed. This means that the rationality which governs the relationship between science and art is not merely instrumental. Rather, it articulates a science of the social relationships among individuals. It is not—as Dardot and Laval suggest, following Foucault's logic—that the object of science, namely society, must be redefined according to the practical problems of government, so that its rationality 'produces' society as an 'universal'.[107] On the contrary, as the development of Bentham's thought shows, it is the object-society, i.e., the discovery of the social determination of individual behaviours and of the 'social code' which rules over them, that imposed a radical change in the rationality of government.

Acknowledgements

[101]See Rudan, *L'inventore della costituzione*, ch. 3.
[102]Dardot and Laval, *La nouvelle raison du monde*, 110–15.
[103]Dardot and Laval, *La nouvelle raison du monde*, 27–28. Here the authors refer to Bentham, 'Manual of Political Economy', in *Bentham's Economic Writings*, I, 224: '[Adam Smith's] views seem scarcely to have carried him beyond the science, by me the science is considered only as a means to an end'.
[104]Bentham, 'Manual of Political Economy', in *Bentham's Economic Writings*, I, 224.
[105]About Bentham's distinction between 'art' and 'science' see Mary P. Mack, *Jeremy Bentham: An Odyssey of Ideas*, *1748–1792* (London, 1962), ch. 6; Stephen G. Engelmann, 'Mill, Bentham and the Art and Science of Government', *Revue d'études benthamiennes*, 4 (2008); Christian Laval, *Jeremy Bentham, les artifices du capitalism* (Paris, 2003), 106ff; Sheldon S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought*, second edition (Princeton, NJ, 2004), 268.
[106]In describing the method of teaching that should have been adopted in his 'chrestomathic school', Bentham explained that 'if the objects presented in this course of instruction to the youthful mind, had no connection with each other, no such beneficial result as that which is here announced could be expected. But amongst those objects, natural principles of order have place, and to apply those principles to the best advantage, will be the constant aim of the whole system from the beginning to the end. Every part having a natural connexion with every other, and every favorable occasion being embraced for bringing that connexion into view, every object will, by virtue of the principle of association, as often as it is presented, contribute more or less to fix every other in the memory, and thus to render the conception entertained of it so much the clearer'; see Bentham, *Chrestomathia*, 26.
[107]Dardot and Laval, *La nouvelle raison du monde*, 122: 'Bentham ne se contente donc pas d'entériner la 'vérité' de la doctrine de Smith, il déplace l'angle de vue, il change le terrain. […] si l'on veut tirer les leçons de la science de l'économie politique pour l'art politique, il faut redéfinir l'objet de la science en fonction des problèmes pratiques du gouvernement'. See also Foucault, *Birth of Biopolitics*, 3.