

Infallibility in Bentham's Political and Legal Thought

Melissa Schwartzberg

Department of Political Science

The George Washington University

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Among the consistent themes in Bentham's writings is a horror of stifling progress. This argument, a key attribute of Bentham's political and religious radicalism, is widely recognized. Surprisingly, however, one primary formulation of this claim has been widely overlooked. In his legal, political and religious thought, Bentham regularly appealed to fallibilism – that is, the limitations of human reason and the importance of assuming the possibility of error – and heaped vitriol on those who would assert, tacitly or expressly, their own infallibility.

Of course, the language of fallibilism is familiar to utilitarian scholarship through the writings of J.S. Mill, particularly in *On Liberty*. Scholars, notably Skorupski and Ten,¹ have subjected Mill's use of fallibility to serious analytical scrutiny, yet Bentham's deployment of the term has had scant treatment. Some of this neglect may be attributable to H.L.A. Hart's summary dismissal of Bentham's use of the term. In his introduction to his *Essays on Bentham*, Hart suggested that Mill himself recognized Bentham's influence in this realm, but Hart believed that the treatment of the topic by Bentham was utterly unsatisfactory. Indeed, he claimed that in the discussion of fallibility Bentham's "limitations as a philosopher begin to appear."² In arguing that Bentham failed to demonstrate why the claim to infallibility by authorities is incorrect, Hart maintained that Bentham's account of fallibilism was a manifestation of his misguided subjectivism, tied up in a defective logical relationship between expressions of statements of fact and of opinions. Yet Hart did also note that in writing about logic, Bentham sometimes kept a close eye on "political argument and on the strategy for educating men into a proper

¹ C.L. Ten, *Mill on Liberty* (Oxford 1980); J. Skorupski, *John Stuart Mill* (London 1989).

² Hart 1982, p. 13.

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awareness of its snares and pitfalls," particularly in opposition to infallibility-claiming tyrants, and it is on this set of claims that I wish to focus.

My purpose here is to reconstruct Bentham's writings on fallibility and infallibility, particularly as linked to his legal theory; although here I will remain largely agnostic on the logical merits of Bentham's argument, I will attempt to clarify it so that such assessments may be made in the future. The analysis of fallibilism in Bentham, I believe, sheds light on several key debates over the character of Bentham's work. First, the analysis provides additional evidence for the claim that Bentham's religious work ought to be read as an element of his political thought; that his epistemology rested on his ontology; and the centrality of Bentham's theory of logic and language for his writings more generally. Second, a dimension of the "authoritarian" vs. "democratic" Bentham debate – which opposed writers such as Himmelfarb, Manning and Long³ to more recent works by Postema, Rosen, Kelly, and Schofield⁴ – is illuminated. Here it becomes clear that Bentham, through his linkage of immutable law with the assumption of infallibility (as in the Third Tract on Spanish and Portuguese Affairs, in which he identified the "immutability-enacting, *alias* the infallibility-assuming clause"⁵), rejected legislative efforts at permanently dictating individuals' interests and utility calculations. Bentham repeatedly argued that he himself would not presume to legislate for eternity, despite his 50 years of experience on these matters. A key element of Bentham's political radicalism – the linkage of absolutism with infallibility – is also usefully clarified. Third, and more specifically, through looking at immutability and infallibility, Bentham's views on legal

³ Himmelfarb 1968, Manning 1968, Long 1977.

⁴ Postema 1986, Rosen 1992, Kelly 1990, Schofield 1999.

⁵ *Third Tract on Spanish and Portuguese Affairs [TTSPA]*, in J. Bowring, ed., *The Works of Jeremy Bentham* (11 vols., Edinburgh, 1843) VIII, p. 483.

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change – a contentious matter – become both clearer and more sophisticated than previously asserted. The paper takes up these matters in turn.

The logic of fallibility

Schofield has argued, compellingly, that Bentham's theory of logic and language is central to his moral and political thought, and Schofield and Postema both derive Bentham's epistemology from his ontology.⁶ The account of fallibilism should be situated similarly, if quite briefly, in the former before we may turn to the discussion of its status in Bentham's legal thought. Bentham famously distinguished between "real" and "fictitious" entities. Real entities, objects existing in the material world, are distinguished from abstract, fictitious entities, which require language for their very existence. The mind receives sense perceptions from objects in the physical world, and uses language to process these perceptions, and separating out real from fictitious entities was crucial. Through creation of abstract ideas with the aid of fictions, the development of the human mind occurs. Bentham, Postema has argued, "sought a method by the use of which the human mind could learn from, and build on, observation and experience. The task of such a logic, in his view, is to define strategies for the best use of the rational faculties, where 'best use' is defined in terms, ultimately, of successfully advancing

⁶ Philip Schofield, in "Political and Religious Radicalism in the Thought of Jeremy Bentham," *History of Political Thought* XX.2 (Summer 1999), has compellingly argued that Bentham's religious thought cannot be isolated from his political and legal commitments. I follow Schofield in arguing that, in contrast to James Crimmins, in *Secular Utilitarianism: Social Science and the Critique of Religion in the Thought of Jeremy Bentham* (Oxford, 1990), Bentham's religious views were not "integral" to his thought; rather, his theory of logic and language are explanatory of both his religious and political views, and that his religious thought comprise an "aspect" of his political theory.

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human purposes and satisfying human needs and interests."⁷ Yet the "heavy blanket of ignorance, prejudice, and superstition smothers universal human potential for rational judgment in practical and theoretical affairs."⁸ In particular, the intellectual faculty of judgment may be corrupted by "sinister interest" or "interest-begotten prejudice."⁹ Since "all that the mind of man is capable of containing is an act of the judicial faculty, an opinion, a judgment," the human mind is therefore fallible.¹⁰

The problem of superstition and the premise of infallibility as a hindrance to rational progress are of primary importance in Bentham's writings about religion. Bentham defined natural religion as religion "when there exist no written and acknowledged declaration, from which an acquaintance with the will and attributes of this almighty Being may be gathered."¹¹ The problem consisted in determining those behaviors of which God would approve or disapprove, and, since Bentham argued that the God of supporters of natural religion was capricious and tyrannical, there was no reason to believe that God's will was to promote human happiness. Through belief in natural religion, as Schofield has noted, the capacity of the community to judge what was virtuous and vicious was corrupted: this caused men to reject practices without harmful consequences, which, turn, "contributes to distort or disarm public opinion in its capacity of a restraint upon injurious acts."¹² The priests were considered to possess infallible judgment as to God's will, and, when linked to the power of the state, could cause the

⁷ Gerald Postema, *Bentham and the Common Law Tradition* (Oxford, 1986), p. 60.

⁸ *Ibid.*

⁹ *Table of the Springs of Action*, Bentham, *Works*, ed. Bowring, I, pp. 217-218.

¹⁰ *Essay on Language*, in Bentham, *Works*, ed. Bowring, VIII pp.321.

¹¹ Bentham, *The Influence of Natural Religion on the Temporal Happiness of Mankind* [INR] (Amherst,

NY, 2003), pp. 30-31. Although there is still debate over the status of the work due to the fact that it was published under the pseudonym Philip Beauchamp, scholarly consensus seems to be that it was written by Bentham under the influence of George Grote.

¹² *INR*, p. 113.

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total submission of the population. All that was necessary was for a powerful individual to have an antipathy for a particular action and it would be included in the immutable moral code – indeed, the less measurably harmful the action, the more likely the appeal to religion and morality as a means of denouncing it.¹³

“One consequence and manifestation of this principle is so important as to deserve particular notice. An aversion towards improvement is its decided effect – and where such a feeling previously existed, it is both aggravated in force, and hardened against all question and scrutiny.”¹⁴ Since all phenomena are traceable to a deity and formulated in natural law: “All fresh facts, all acquisition and application of knowledge, introduce a change in these sequences, and therefore break in upon the laws of nature.”¹⁵ The Enlightenment, Bentham suggested, had served to counter the conservative tendency on the part of natural religion, but too often the laws of nature are invoked against reform, which would “prohibit all improvement whatsoever.”¹⁶ Our only consolation may be that the “diffusion of knowledge” has been sufficient to stave off the silencing of latter-day Galileos.¹⁷

In general, Bentham argued, a person requires evidence to assent and dissents in case of refutation. A religion founded on faith, however, distorts the judgment of an individual, and “foist[s] in, by means of his hopes and partiality, a belief which unbiased reason would not have tolerated.”¹⁸ Hope and fear provide a motivation for a belief supported by only fragmentary evidence, leading a person to reject contradictory claims

¹³ *INR*, p. 177.

¹⁴ *INR*, p. 118.

¹⁵ *Ibid.*

¹⁶ *INR*, p. 119.

¹⁷ *INR*, p. 120.

¹⁸ *INR*, p. 137.

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out of hand, and the less evidence there is, the more important faithful belief becomes. Indeed, the person begins to take pride in the triumph of belief over reason: “He accordingly speaks in the most degrading terms of the fallibility and weakness of human reason, and of her incapacity to grasp any very lofty or comprehensive subject. It thus becomes a positive merit to decide contrary to reason, rather than with her.”¹⁹

A key dimension of Bentham’s critique of organized religion is on the pernicious consequences of the infallibility of its articles of faith. In “Swear not at all,” Bentham attacked the use of compulsory oaths, particularly the Coronation Oath, in part on the grounds that the commitments they demand stifle the ability to make utilitarian choices in an ongoing fashion, and more generally because the articles of faith demanded by organized religion – and even more egregiously, established religion -- are infallible and immutable foundations which are not subject to question or improvability.

These oaths, Bentham argued, “corrupt[ed] the National Morals and Understanding,” in part from their very foundation in the “infallible” church – “that is, that a set of professors, who at the expense of the people, are paid by the sovereign” to interpret the Bible and make their particular gloss utterly immutable.²⁰ In this way, Bentham maintained, opinions were turned into articles of faith, which, emerging from authoritative sources, become law, and are converted into “what certain laws of the Medes and Persians were once pretended to be – *everlasting* and *immutable* laws or ordinances.”²¹ Both articles of faith and laws have the essential character of infallibility,

¹⁹ *INR*, p. 139.

²⁰ *Swear not at all* [*SNAA*], Bentham, *Works*, ed. Bowring, V, p. 209.

²¹ *SNAA*, Works, V, p. 209; italics in the text

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Bentham claimed, and, as a consequence “the minds of men are by these their rulers to be kept in a state of perpetual *dependence*: of dependence as abject and entire as possible.”²² The third clause of the coronation oath, administered by the Archbishop or Bishop, asks the King whether he will “maintain the laws of God,” and a proposed amendment would read, “And will you, to the utmost of our power, resist all innovations in religion and government, church and state?”²³ In an extended meditation on the term “innovation,” Bentham argued that the word’s pejorative connotation had given novelty such a bad name that even reform for the sake of clear amelioration is condemned. Through the language of “popish innovations” – quite common in the seventeenth century – the Church of England had succeeded in demonizing all forms of modifications, either religious or governmental, except those that they themselves found to their benefit.

As we have seen, Bentham’s religious radicalism is characterized, in part, by a rejection of infallibility, and this is compatible with the principle of utility more generally. Reason is our sole guide to the production of pleasure and the avoidance of pain, and insofar as we prioritize faith over knowledge we are doomed to unhappiness. We become “easy prey to deceit and error.”²⁴ Just as the principle of fallibilism enables reason to triumph over faith-based absolutism in the religious context, in the political realm the recognition of the limitation of human knowledge serves as a foundation for the creation of a stable political and legal structure. The contribution of fallibilism to the resolutely anti-absolutist character of Bentham’s political thought is the topic of the next section.

²² *SNAA*, Works, V, p. 210; italics in the text

²³ *SNAA*, Works, V, p. 208.

²⁴ *INR*, p. 139.

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The politics of infallibility and immutability

Blessed fruit of a wisdom which proclaims itself infallible! blessed state of the government of a great empire! anarchy planted by the hand of tyranny: anarchy without remedy, tyranny beyond example!²⁵

Fallibilism plays a key role in the development of Bentham’s political radicalism: it served as a cornerstone of his critique of both an omnipotent legislature and absolute monarchy. The most sustained treatment of the topic is in his writings on the French Revolution, both in the critique of natural rights and in the assessment of the constitution: in both cases, as we shall see, Bentham chose to attack the supposed omniscience of the drafters in their ability to legislate for the future. A key element of Bentham’s rejection on constitutional limitations is that it could serve as a “veto upon remedy and improvement,” rendering legislatures “would-be tyrants over futurity.”²⁶ In attempting to bind the future, the revolutionaries and the members of the Assembly had expressed the greatest hubris imaginable: they had conferred infallibility upon themselves. This infallibility, in turn, led to their ability to create immutable laws, in the form of natural rights and in a substantively unamendable constitution, and, in so doing, they sought to override the shifting demands of utility.

Although the revolutionaries lambasted in “Nonsense Upon Stilts” scarcely understood the meaning of the term “natural right,” Bentham nearly hissed, this did not keep them from enshrining it with an aim toward universal insurrections, secure in their

²⁵ *Necessity of an Omnipotent Legislature [NOL]*, in Bentham, *Rights, Representation, and Reform*, ed. P. Schofield, C. Pease-Watkins and C. Blamires (Oxford, 2002), p. 272.

²⁶ *Constitutional Code*, in Bentham, *Works*, ed. Bowring, IX, p. 119.

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superior knowledge. “In us is the perfection of virtue and wisdom: in all mankind besides the extremity of wickedness and folly.”²⁷ In creating “imprescriptible rights,

these unrepealable laws,” the revolutionaries arrogated to themselves normative control over all future governments and citizens, forbidding them from determining the utility of this legislation. The “true source” of these immutable laws, Bentham suggested, was “Power turned blind by looking from its own height: self-conceit and tyranny exalted into insanity.”²⁸ The revolutionaries did not even acknowledge their own agency in creating these laws; instead, they pretended that they merely discovered these laws, which derived not from God – “they allow of none: but their Goddess, Nature.”²⁹ In so doing, they created what they deemed to be inalterably correct and valid legislation, and secured for themselves nearly divine status.

No less grave was the efforts by the National Assembly at creating a substantively immutable constitution, in which changes could be made by a Council of Revision only after three successive approved a clause's modification. Like ancient legislators, the Assembly had asserted its own perfection in attempting to bind France for successive generations. “The attempts made by Lycurgus, of Numa, the Medes and Persians, by the lovers of raree shews among the Athenians, and so many other pretenders to infallibility with or without inspiration, have been hitherto quoted only for the absurdity, as so many imitations of Salmoëus who, by making a noise, thought to rival Jupiter, the King of gods and men, and as so many attempts to transform finite power into infinite.”³⁰

²⁷ *Nonsense Upon Stilts* [NUS], in Schofield et al., ed. (Oxford, 2002), p. 331.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *NOL*, p. 265-266.

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Bentham invoked problems of comparative intergenerational rationality repeatedly in “Necessity of an Omnipotent Legislature.” If the Assembly were superior in wisdom to future generations, why would they have permitted future legislatures whatsoever -- but if they lack this preeminence, why would they attempt to legislate for eternity?³¹ Bentham inferred the Assembly's response. They had not attempted to preserve particular pieces of legislation, nor did they regard these details as perfect; indeed, they might well be improvable. However, “were we to expose any one article to innovation, the change, the spirit of innovation, might extend to the rest -- as there is no drawing of the line, it is for the sake of the whole that we must protect the parts.”³² Yet, Bentham countered, if you, the Assembly, acknowledged the possible defectiveness of individual articles, this in turn suggested, “You are not persuaded of your own infallibility; and yet you act as if you were; you engage in a measure which nothing but infallibility could justify.”³³

Infallibility is in these discussions linked analytically to immutability, but the argument is subtle. One claim seems to be the explicit rejection of any claim to infallibility, full stop. This may be traceable to the logic we have already seen: in sum, the assumption of infallibility hinders the development of human reason, and, in turn, the improvement of human happiness that will follow from such progress. A second claim seems to be that the status of infallibility gives already immutable laws an additional normative weight. It is difficult enough procedurally to amend the constitution, but if these laws are to be viewed as transcendentally valid and correct, the possibility of

³¹ *NOL*, p. 272.

³² *NOL*, p. 273.

³³ *Ibid.*

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change ought to be discounted entirely. This, in turn, prevents modifications of the law both in light of human progress and in response to shifting demands of utility.

In so doing, the legislature places itself at risk of being destroyed by the smallest challenge. When a law is deemed inexpedient in a relatively flexible constitution, a petition for redress may be offered and the law may be changed with minor difficulty. In the case of the French constitution, however, such a petition must be formulated as a

"protestation of invalidity," and disobedience would follow.³⁴ Habits of obedience cannot develop when minor challenges result in the shaking of the very foundations of the constitution, and the predictability of consequences that comes with well-formulated norms will similarly disappear. Similarly, successive legislatures would find themselves "judges in their own cause" in determinations of the coherence of their laws with the constitution, or would simply distort the meanings of the constitutional provisions to suit their needs, resulting in uncertainty and unpredictability.³⁵ Bentham drew an analogy between the unchecked introduction of an incoherent law into a constitutional code and the "authoritative introduction of an absurd article of faith, of speculative theology": for this to be permissible, "the whole mass of the understanding, the reasoning faculty, must have been vitiated and rendered weaker and less fit for use in every instance in which it can be employ'd."³⁶

Through creating a largely immutable constitution, far from making laws familiar and predictable, the Assembly had doomed the French people -- particularly the poor, he noted -- to a life under legal uncertainty: only the lawyers would understand the law. Circumstances are difficult enough during a transitional period, but under a "helpless

³⁴ *NOL*, p. 267.

³⁵ *NOL*, p. 268.

³⁶ *NOL*, p. 269.

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legislature," bound by the will of a past Assembly, the French would be "struggling without remedy ... an only physician appointed, and he without power to prescribe."³⁷ Yet another ambiguity emerges. At least in the latter case, Bentham recognized that the Assembly did not necessarily consider themselves to be infallible: instead, Bentham suggested, their use of immutable law implied their own infallibility. In the critique of natural rights, the argument had an almost religious cast: the revolutionaries claimed to be discerning the rights from nature, and to have a monopoly on the interpretation of the unknowable divine will -- despite, as Bentham sneered, their failure to acknowledge a God.³⁸ But in the case of the Assembly, their claim to infallibility is only implicit in the procedural difficulty of enacting constitutional change. Why, then, does Bentham target the assumption of infallibility, rather than simply the substantive immutability of the constitution? Although it is not perfectly clear, other than Bentham's argument that immutable law is by definition "infallibility-assuming," I believe the reasoning in the French context is an element of the anti-absolutist character of Bentham's work, seen most clearly his rejections of the twin concepts of parliamentary and monarchical infallibility.

In "Supreme Operative," Bentham turned to the question of aptitude in rulers, and in particular the question of whether the king could err. He distinguished the principle of infallibility from that of impeccability on the dimensions of the relative status of subjects. On the account of impeccability, the subjects were created solely for the monarch's use, and whatever the monarch deemed correct -- whatever was in keeping with the monarch's

³⁷ *NOL*, p. 270.

³⁸ The debate over Bentham's atheism is well explored in Crimmins 1990 and Schofield 1999.

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happiness -- was for that sole reason "rendered moral and right."³⁹ The monarch could not do wrong by virtue of the fact that his happiness was the sole criterion for his decision's goodness and, presumably, would not act to harm himself; as the people's utility is identified with that of the monarch's, the possibility of widespread unhappiness serving as a counterbalance to the monarch's pleasure does not arise. Under the theory of infallibility, however, the monarch exists to serve his subjects, and, as a consequence, a conflict between the two is conceivable. Although the subjects' happiness is preferred in the case of conflict, the monarch nevertheless is the judge of the proper action. The monarch is infallible with respect to his judgment of what is in the public utility. In the case of absolute monarchy, the theories ought to be viewed as substantively

interchangeable: nothing is riding on the distinction of whether the subjects' interest is identifiable with the monarch's, he suggests, although impeccability is the proper terminology. In essence, even if the decision brings about misery among the population, by virtue of the fact that the monarch has willed it, it is therefore properly the object of universal approbation. Yet this is repugnant, on Bentham's reading: the monarch is always the object of machinations by his advisors, and is closer to "imbecillity" than to "impeccability."⁴⁰ In the case of a "limited, or say a mixt" monarchy, the impeccability of the monarch coexists with the infallible parliament, and this is a theory proper for a "mad house," "a den of thieves," or a "debating club," none of which concerns itself with the public utility.⁴¹

³⁹ *Supreme Operative* [SO], in Bentham, *First Principles Preparatory to Constitutional Code*, ed. Schofield (Oxford, 1989), ch. 4, p. 273.

⁴⁰ SO, ch. 4, p. 275.

⁴¹ SO, ch. 4, pp. 275-6.

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Through the assertion of infallibility, a monarch or parliament is able to create legislation that entirely disregards public utility. Even if the rulers' interests were in line with the people as a whole, this would serve to thwart progress. Yet, as Schofield has argued, Bentham recognized that the rulers had interests opposed to that of the people, and only through making the rulers accountable to the people as a whole could their particular interests be ensured of harmony with the universal interest (i.e., the majority share of the aggregation of the interests of the individual members of the community).⁴² Giving self-interested rulers the veneer of infallibility would therefore doom the people to disutility: they would be incapable of modifying the rules that the legislators had created, which would inevitably reflect their particular interests.

Indeed, a primary rejection of immutable law comes on the grounds of sectional interests. The appeal to immutability was the product of the Assembly's interests in giving the "finishing stroke to the hopes of the Aristocrates."⁴³ Through enshrining their constitution, they could quash aristocratic incursions; yet, Bentham argued, there was little risk that the aristocracy would be able to modify the constitution given their numbers. By leaving the constitution capable of amendment, the assembly would have offered the aristocrats some possibility of eventually modifying the constitution – yet what would have been the harm in so doing, as the possibility of the aristocrats gaining sufficient force was quite remote? In fact, amendable law might have stabilized the constitution, Bentham suggested. By permitting the possibility of amendment, the aristocrats might have been able to accept the constitution and work through normal procedures with the hopes of eventually acquiring enough power to make changes. As a

⁴² Schofield 1996, p. 227.

⁴³ *NOL*, p. 277.

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consequence of the unamendable constitution, however, the aristocrats were driven to "desperation" and to fight, rather than to resignation and quiet endurance.⁴⁴

The effort to assert infallibility in creating immutable law is particularly egregious in light of Bentham's view of the Assembly as an aggregation of people with particular interests. In comparison, Bentham wrote, "The infallibility of the Pope *rentre dans l'ordre de la nature*. Twelve hundred infallible persons deriving their infallibility like the Bramins from birth, like the Popes from election, or like the Grand Lama from something between both, to all this I am ready to subscribe without difficulty."⁴⁵ To be certain, the Assembly itself is composed of fallible men, "brought into the world without a miracle, subject to human infirmities and passions."⁴⁶ But the idea that any product of the Assembly could be infallible, Bentham argued, was outrageous. Every act of the constitution emerged from a process of arguing and bargaining. The Assembly spent two and a half years "doubting, disputing, changing, struggling," and at some point, upon voting, "all of a sudden at a certain hour of a certain day have worked itself up into

infallibility.”⁴⁷ The product was the outcome of a series of compromises, and not a single member would have agreed to every provision in the document.

In this light, what can we make of the argument that Bentham, at his core, believed that an omniscient legislator should mold individual characters to as to secure the general happiness? As Schofield has noted, to argue that Bentham viewed the legislator as all-knowing and omnipotent would be to affirm the conception of the despot he so vehemently attacked in *The Influence of Natural Religion on the Temporal*

⁴⁴ *NOL*, p. 278.

⁴⁵ *NOL*, p. 279.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

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Happiness of Mankind. The legislator must recognize that the demands of utility will shift and, although he seeks to create a stable framework, he does not presume to be capable of maximizing the welfare of each individual. Yet the infallibility-assuming dimension of immutable law is not simply defective in light of its inclination to lock in a particular conception of utility, nor because of the tendency of legislators to reify their particular interests. The premise of infallibility subverts the possibility of learning altogether, and in this way artificially truncates the effort at attaining perfect happiness. Yet certain tensions remain, particularly when one acknowledges that, at times, Bentham accepted the use of unamendable law, despite the infallibility assumption, both in Spain and, perhaps, in his own code.

Infallibility and immutability accepted?

Bentham addressed the “Portuguese Nation” in his third tract on Spanish and Portuguese affairs, telling them that he was an “unexpected friend” who had spent 50 years considering these matters.⁴⁸ He encouraged them to adopt a slightly modified version of the Spanish constitution, superseding the “stale” constitution of 1640. The crucial insight of the Spanish, Bentham argued, is the harmony of interests between ruler and ruled: “The one thing needful is that by which the interest of ruler is made them same with that of subject; of representative of that with constituent. This is what the Spanish constitution may be brought to do for you.”⁴⁹ But a few changes to the Spanish constitution are necessary before it can be entirely useful for the Portuguese, and the first

⁴⁸ *TTSPA*, in Bentham, *Works*, ed. Bowring, VIII, p. 482.

⁴⁹ *TTSPA*, p. 483.

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is the “*immutability*-enacting, *alias* the infallibility-assuming clause.”⁵⁰ Bentham began his discussion by explaining the mechanism by which a timelimited entrenchment of the constitution turns into the unamendable status of the constitution as a whole.

This is what my respect for Spain makes me almost ashamed to name. Amendment – none for eight years to come, and nobody can say for how much longer! As well might it have been said, no amendment till the end of time. The longer the thing continued without change, the stronger would be the reasons against change: the longer would be the experience of the needlessness of change.⁵¹ (*Works*, VIII, 483)

Amendment, like all other legal practices, requires the cultivation of habits. For constitutional flexibility, a law permitting amendment must be included initially, so that there can be a general belief in the potential utility of change on which future reformers could draw in proposing changes. A habit of amendment should develop alongside a habit of obedience. In the absence of the premise of fallibility, when combined with a temporary institutional ban on change, there would be a failure to amend even once it becomes permissible, and eight years would quickly become forever. Moreover, the fallibilist premise need not be explicit: “*immutability* in the work, assumes infallibility in the workman.” The rapidity with which the decision was made, Bentham argued, makes

the matter all the more grave. He would not have thought about establishing a year's immutability, despite the fact that he had been thinking of these matters for more than fifty years. It would not even be coherent: how could we defend the idea that an infallible legislator ceased to be infallible once ordinary politics began to unfold, Bentham asked.

⁵⁰ Ibid.

⁵¹ Ibid.

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The need for immutable law, on Bentham's account, derived from the risk of constitutional collapse: "to anchor the constitution at the highest mark at which the flux should carry it, and thus to guard against the reflux which the remnant of despotism could not but labour to produce."⁵² A transitional political society, in which habits of obedience are not fully developed, may not be able to provide the legal certainty necessary for its citizens to anticipate the outcomes of actions. On Kelly's reading, expectation utilities -- the prospect of receiving a future pleasure -- require laws that stabilize patterns of behavior. In the absence of such laws, not only can a person not expect to have her desires satisfied in the future, she cannot even contemplate such future benefits. In this transitional period, unamendable law may be necessary; security of expectations requires time, just as a habit of obedience does not develop immediately. Yet once this framework is developed, enabling these expectations, it should certainly be possible to amend it to maximize general welfare. Though the laws, even if imperfect, ought to be respected, the need for amendment may well arise; however, since the habit of modification requires time to develop, as a consequence the laws may err on the side of excessive stability.

"Portuguese! Thank heaven!" Bentham wrote, "this reason applies not to you.

You are not cursed with the ever lasting presence of an arch-enemy."⁵³ He reformulated his opposition to immutability in the Portuguese case at the end of the Third Tract, arguing that unamendable law inevitably makes outlaws out of legislators. Since changes will undoubtedly be required, the legislator is forced to violate the law in so doing, and since he is the "highest and most impressive of all examples," this will encourage others

⁵² Ibid.

⁵³ Ibid.

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to break the law in a variety of ways. "Such, then, is the tendency, at least of an immutability-exacting clause, to plant anarchy, and to destroy confidence."⁵⁴ Yet if Bentham believes that immutable law is "infallibility-assuming," inhibits adjustment in light of human progress or circumstantial change, and even foments anarchy, the acceptance of these risks in the Spanish case may seem surprising, even though the Spanish are accursed with the threat of despotism.

Does this story prioritize the security of expectations over the commitment to legislative fallibilism? Bentham seemed to suggest that the consequences of a transition from absolutism might be so far-reaching as to require extraordinary devices. In "On the Influence of Time and Place in Matters of Legislation," Bentham wrote that only certain types of changes would require modifications in the laws. Physical changes, such as erosion or climate change, should have little effect on well-formed legislation, he argued, as long as these laws were formed using sufficiently "generic terms." Indeed, he doubted that even economic and social development would generate a need for fundamental changes in a well-formed legal code; that is, unless their "habits of obedience" had been seriously altered -- and in the transition from despotism, this may well have occurred.⁵⁵ The mere possibility of immutable law in this context, however, suggests a graver question. Is a perfect code -- infallible and for that reason immutable -- conceivable? Is the premise of fallibility only salient insofar as all existing codes are in some sense defective, but through the process of correction and the progress of reason on legislative matters, could an ideal code be achieved? As Letwin argued, there is textual evidence that suggests Bentham thought an ideal code was in principle achievable, and, indeed,

⁵⁴ *TTSPA*, p. 485.

⁵⁵ *On the Influence of Time and Place in Matters of Legislation [ITPML]*, Bentham, *Works*, ed. Bowring, I, p. 189.

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that the complete code might have a claim to such.⁵⁶ Because the principle of utility has been uncovered, the possibility of the discovery a perfect code and “all the fundamental truths” is now conceivable; prior to the recognition of the principle of utility, “it was impossible to form any precise notion of a perfect system of legislation. But if at length these different objects have been accomplished, the idea of its perfection is no longer a chimera.”⁵⁷ Although none of us may be able to accomplish the creation of such a perfect code, “he who shall contemplate it in its vastness and its beauty may rejoice, as did Moses, when on the verge of the desert, from the mountain top, he saw the length and the breadth of that good land into which he was not permitted to enter and take possession.”⁵⁸ On the other hand, in *On Laws in General*, Bentham suggested that although the laws might be “really perfect” and might require no changes for an instant (though this was unlikely, since “a greater share either of information or judgment or of probity might make it better”), changes in “national affairs” would generate in short order a need for adjustments.

Accepting the possibility of human infallibility for just a moment, then, let us examine the reasons that legal changes might be necessary even in the event of a perfect code. Modifications in the background conditions will in turn generate shifting demands of utility. As Nancy Rosenblum has argued, for Bentham, “Lawmaking must be recognized as a continual process in response to diverse and changing desires that require adjustment.”⁵⁹ For example, a category of laws typically identified as immutable – those

⁵⁶ Letwin, however, maintained that Bentham thought that his complete code might require changes only 100 years for linguistic modification (as at *Works*, III, 210), yet Bentham clearly preceded this discussion with an acknowledgement of the possibility that “blemishes” noticed by a judge should be reported to the legislature for correction. S. Letwin, *The Pursuit of Certainty* (Cambridge, 1965).

⁵⁷ *ITPML*, p. 194.

⁵⁸ *Ibid.*

⁵⁹ Nancy Rosenblum, *Bentham’s Theory of the Modern State* (Cambridge, 1978), p. 9. Rosenblum’s claim 21

viewed as regulating acts that were *mala in se* (intrinsically wrong) – was in fact meaningless, given that actions in general ought to be assessed in light of their consequence, and this may fluctuate. The only principle that should be taken to be unchanging, Bentham argued, was that of utility, and the legal concepts, such as punishment, immediately derivable from the utilitarian foundation. Given the likelihood of changes in the background conditions, two disastrous consequences will follow: the habit of obedience may be weakened as people suspect that the laws in general are unworthy of adherence or are unlikely to be enforced, and law in general may become less certain. If laws that are no longer useful are enforced, then the general legal system is entirely corrupt; but if these laws remain on the books but are not enforced, the ability to discern valid law and plan actions accordingly is impeded.

A second possible source of ambiguity in the law derives from judicial interpretation. Postema has argued that Bentham “seems to believe that there will be a significant number of occasions on which deviations from the line marked out by preestablished

law will be justified on utilitarian grounds,”⁶⁰ and as a consequence, the law will fall prey to the same uncertainties that caused Bentham to reject the common law in the first place. Just as the common law is a muddle of judicial responses to distinct circumstances, with the effect of little certainty about the law and, as such, unpredictability about the consequences of one’s actions, a system of codified law that requires judges to interpret the law in light of the best utilitarian judgment will generate a body of precedent alongside the complete code.

that in contrast to a classical notion of a perfect legal order, that Bentham believed that “legislation must be continuously added to and changed,” at p. 15, may perhaps insufficiently account for the Bentham’s competing emphasis on legal certainty.

⁶⁰ Postema 1986

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J.R. Dinwiddy has persuasively responded to Postema’s claim on these grounds, and in so doing enables us to respond to the question of whether the *Pannomion* ought to be viewed as an embodiment of the triumph of human reason. In Constitutional Code, Bentham described the “emendative” and “sistitive” or “suspensive” functions of the judge: under emendation, a judge would propose an alteration for the legislature to decide upon, and under the sistitive function, the judge would suspend execution of a law pending a legislative decision on emendation. Moreover, under the Contested-Interpretation-Reporting Function, in case of differing interpretations, a standing committee of the legislature could modify the code to clarify the meaning of a given provision. In these provisions, Dinwiddy argued, the role of the judiciary was, in part, “to ensure that the Pannomion was open to continuous *improvement*”, given that “legislators were not infallible and could not be expected to provide satisfactorily for every contingency that might arise within the legal system.”⁶¹

Although legal perfection may be a distant aim, Bentham seemed to acknowledge the unlikelihood that a code of laws could ever achieve infallibility, certainly for no longer than a fleeting moment and likely not even for that. Indeed, the search for perfect happiness in our legislation will almost certainly elude us, Bentham wrote, as a consequence in part of our imperfection as human beings. “Perfect happiness belongs to the imaginary regions of philosophy, and must be classed with the universal elixir and the philosopher’s stone. ... It may be possible to diminish the influence of, but not to destroy, the sad and mischievous passions.”⁶² Elsewhere, Bentham mused, that although “the perfection of the law will be at its acme” in part when “palpable injuries are unknown

⁶¹J.R. Dinwiddy, “Adjudication under Bentham’s Pannomion,” *Utilitas* 1 (1989), pp. 283-89; p. 289; p. 286.

⁶²ITPML, p. 194.

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except by means of the laws by which they stand prohibited,” ultimately even then “fire will burn, frost pinch, hunger gripe ... and ... coercion must still be felt.”⁶³

Although Kelly’s emphasis on the security of expectations that stable laws provide is of grave importance, the goal of an immutable legal code does not seem to have been Bentham’s. Under certain circumstances a period of immutability may be advisable, as in the Spanish case, but this is a case for serious moral regret. The assumption of infallibility in the use of immutable law was a form of absolutism that Bentham could not countenance, and there is no reason to ascribe to Bentham such a tendency.

Conclusion: Bentham’s legacy

In conclusion, I wish to suggest a few lines of commonality between Bentham and John Stuart Mill on the matter of infallibility. Mill identified as a major contribution of Bentham’s legal thought the creation of a code that had “a perpetual provision for its own emendation and improvement.”⁶⁴ Hart noted that Mill thought that the account of fallibilism was an important element in Bentham’s thought and in fact attributed the discussion in *On Liberty* to Bentham’s influence.⁶⁵ (Indeed, Mill thought Bentham himself quite fallible, as he had offered an account of human nature grounded on the “empiricism of one who has had little experience.”⁶⁶) In particular, what parallels may be

⁶³ Bentham, *Bentham’s Political Thought*, B. Parekh, ed. (New York, 1973), p. 324.

⁶⁴ J.S. Mill, *Mill on Bentham and Coleridge*, F.R. Leavis, ed. (Cambridge, 1980), p. 80.

⁶⁵ Hart 1982, p. 12.

⁶⁶ Mill, in Leavis, ed. 1980, p. 62.

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drawn between Mill's account of fallibility in *On Liberty* and that the account I have offered of Bentham's views?

Setting aside the ontological and epistemological questions about the origins of Mill's fallibilism, treated thoroughly by Skorupski,⁶⁷ I wish to isolate the claim, described by C.L. Ten, as the "Assumption of Infallibility" argument. Ten characterizes it as follows: although the belief we wish to quash may indeed be false, we cannot know that it is true until it has been discussed: "to claim that we know it to be false is to make an implicit claim to our own infallibility," and since we are in fact fallible we require debate to be relatively secure in the rationality of our beliefs.⁶⁸ Mill's primary concern at the beginning of *On Liberty* was, of course, the tyranny of the majority's opinion, and the necessity of protection of dissent: "All silencing of discussion is an assumption of infallibility."⁶⁹

Although discussion had a centrality for Mill that it did not for Bentham – notwithstanding Bentham's concept of the public opinion tribunal⁷⁰ – infallibility served as a counter-tyrannical device both for Mill and, as we have seen, for Bentham. For Mill, this manifested itself in several ways. In the religious context, the assumption of infallibility extended to those who wished to forbid any debate over the existence of God. Mill argued that it was not certainty about God's existence that he wished to dispute, but simply the effort by some to "decide that question *for others*" without permitting them to hear a contradictory argument.⁷¹ Mill, however, was more charitable toward organized

⁶⁷ J. Skorupski 1989, pp.376-383.

⁶⁸ Ten 1981, p. 126.

⁶⁹ J.S. Mill, *On Liberty* [OL], J. Gray, ed. (Oxford, 1991) p. 22.

⁷⁰ The role of discussion in Bentham is usefully explored in F. Cutler, "Jeremy Bentham and the Public Opinion Tribunal," *Political Opinion Quarterly* 63:3 (Autumn 1999), pp. 321-346.

⁷¹ OL, p. 28.

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religion on this score than was Bentham: "The most intolerant of churches, the Roman Catholic Church, even at the canonization of a saint, admits, and listens patiently to a 'devil's advocate.'"⁷² Yet political tyranny, for Mill, is linked to the premise of infallibility. Mill suggested that while all acknowledged human frailty, they were disinclined to view themselves as fallible, particularly rulers: "Absolute princes ... usually feel this complete confidence in their own opinions on nearly all subjects."⁷³ Those without such authority tend to suggest that the premise of fallibility ought to be limited to those topics about which the truth has not yet been discerned. Mill addressed the challenge that to permit untruths to remain uncorrected is not an argument from infallibility, which paradoxically resembles Bentham's concerns about risks associated with the propagation of incorrigible error. Mill responded that only through testing opinions may we be assured of its rationality, and wrote in response: Strange that they should imagine that they are not assuming infallibility, when they acknowledge that there should be free discussion on all subjects which can possibly be *doubtful*, but think that some particular principle or doctrine should be forbidden to be questioned because it is so *certain*, that is, because *they are certain* that it is certain.⁷⁴

Mill argued that a habit was necessary for corrigibility to become a useful tool for verification: "The steady habit of correcting and completing his own opinion, by collating it with those of others, so far from causing doubt and hesitation in carrying it into practice, is the only stable foundation for a just reliance on it."⁷⁵ The reference to habit returns us to Bentham's argument in the legal context that habits of amendment must be instilled from inception lest slavishness to one's laws develop, and we may draw a

⁷² OL, p. 26.

⁷³ OL, p. 22.

⁷⁴ OL, p. 26.

⁷⁵ OL, p. 25.

parallel between the two in the sense that through correction we acquire a solid foundation, for the Mill, of the rationality our beliefs, and for Bentham, of the quality of our laws. On Mill's epistemological account, we can only accept beliefs that we have subject to rational inquiry, yet a habitual inclination to do so is necessary for these modifications to our prior beliefs to "sink in" and be confident in the rationality of our current beliefs. On Bentham's account, only through developing a habit of legal modification can we ensure that when adjustments become critical on utilitarian grounds that we will be capable of enacting them, and only through experiment can we be assured of the promotion of utility through our legislation. Although Bentham did not provide Mill with his argument that we can only be assured of the rationality of our beliefs through testing them, his empiricism certainly included the argument that experience was the only true test, and that the premise of infallibility thwarted this effort.

As Ten argued, a second argument, "Avoidance of Mistake," links up with the "Assumption of Infallibility" claim: in the concluding pages of chapter 2, Mill wrote, "First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility."⁷⁶ The exemplary victim of the "Avoidance of Mistake" claim is Socrates, although "History teems with instances of truth put down by persecution."⁷⁷ Yet let us return now to Bentham and the claim that the assumption of infallibility entails the rejection of the possibility of erring in one's judgments.

Bentham suggested that the creation of immutable laws entailed the assumption of infallibility, and by this he meant that the legislator asserted not only his authority to

⁷⁶ *OL*, p. 59.

⁷⁷ *OL*, p. 33.

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create laws for eternity – making himself akin to the divine – but that these laws were of *unquestionable* validity. Obeying immutable laws, and the acceptance of the infallibility of an absolute ruler, either monarch or parliament, requires the suspension of judgment of one's interest on the part of an individual. Under an authoritarian reading of Bentham, this is of little consequence; the legislator will harmonize her interests with the community's in dictating the proper legislation for the community. Yet on a "democratic" conception of Bentham, the assumption of infallibility on the part of one's rulers cannot coexist with the possibility of self-direction, and for that reason, immutable laws cannot exist in a fully functional utilitarian society.

In sum, I have argued that the logic of fallibility in Bentham's political and legal thought is consistent with that developed in his religious thought, on one hand, and, on the other, is derivable from his theory of logic and language more generally. The critique of infallibility in his political works, particularly the linkage between infallibility and immutability, is a manifestation of the anti-absolutist character of Bentham's political radicalism. In turn, the appeal to fallibilism in Bentham's legal writings – taken in conjunction with his arguments in favor of mutable law on utilitarian and interpretive grounds – provides evidence for the claim that Bentham desired a relatively flexible legal system, and was skeptical about the possibility of a legal code to achieve perfection.

Taken as a whole, the logic of fallibilism provides significant supporting evidence for an account of Bentham that does not rely on the concept of an omniscient legislator. It also suggests the potential for further fruitful inquiry on the connection between Bentham and Mill on this score.