

Chapter 5

The Emergence of Utility

During the half century that began with the appearance of David Hume's *Treatise of Human Nature* (1739) and culminated in the publication of Jeremy Bentham's *Introduction to the Principles of Morals and Legislation* (and in the outbreak of the French Revolution, both in 1789), a school of thought developed that was to leave a lasting impression on every part of the world in which European ideas took hold. Bentham is widely and rightly considered the first rigorous theoretician of the utilitarian school, but his work was built on foundations that had been laid by a long series of writers who adhered to two beliefs they regarded as self-evident: first, that human institutions should promote the well-being of the people who are affected by them; and, second, that the well-being of *all* those people, from the least and lowliest to the most eminent, should be taken into account in any evaluation of how well those institutions serve their prescribed purpose. Many of these thinkers were fervent reformers. Collectively they developed a way of thinking about human institutions and justice that broke not only with Aristotle's assumptions about the naturalness of the *polis* and of human inequality, as Hobbes had done, but also with convictions Aristotle shared with most thinkers before and after him about the importance of reciprocity to justice.

In addition to Hume and Bentham, I shall here touch upon the writings of Cesare Beccaria and Adam Smith. These writers differ from each other in significant ways. For example, Hume deploys the term “utility” in a way that is distinctive and cannot be assimilated to the usage of Bentham and later utilitarians. Smith’s notion of sympathy departs substantially from Hume’s; and Smith’s entire system of ethics (including his theory of justice) is mediated through the hypothetical figure of an impartial spectator in a way that is unique to his moral philosophy. It is arguable that none of these thinkers except Bentham can be labeled “utilitarian” without major reservations. Nevertheless, as we shall see, these thinkers share several assumptions and objectives that distinguish them as a group from all the writers we have hitherto considered, and they are tied to one another by several lines of critical engagement.

I

Like Hobbes, these thinkers rejected the Aristotelian assumption that the contours or terrain of the social world – of what Hume, following common usage in his time, called “civil society” – are determined by a set of purposes inherent in nature. For Aristotle, as we have seen, these purposes guide the development of a nascent society into a mature one, in the same way in which the purpose inherent in a horse guides the growth of individuals of that species (at least individuals who develop normally) into a fully mature form. In contrast to this view, the progenitors of utilitarianism inherited from Hobbes the notion that the social world is a product of human actions that is subject to improvement by way of human design. For them, Hobbes’s analogy between civil society and a house that is well or poorly constructed depending on the knowledge and skills of its designer and builder was far more congenial.

As Hume, who regarded the institution of private property as the foundation of civil society and the basis of the virtue of justice, explains:

All birds of the same species in every age and country build their nests alike: in this we see the force of instinct. Men in different times and places frame their houses differently: here we perceive the influence of reason and custom. A like inference may be drawn from comparing the instinct of generation and the institution of property.

For Hume the family, which is a product of the (sexual) instinct of generation, is the locus of the most important natural – and essentially instinctive – human relationships, duties, and virtues. It is natural, according to this view, for people to be partial toward their spouses, children, parents, and other near relations, and these various family members stand in a set of natural roles in relation to one another. These roles define the most important of the natural moral duties, and perfect conduct in accordance with these duties would be the result of the perfection of natural moral virtues. Hume placed personal ties of friendship, together with the duties and virtues that accompany them, in the same category as familial bonds, though he believed that the latter are typically stronger than those of friendship. He also believed that human beings naturally develop a degree of sensitivity to the happiness or misery of their fellow beings, though this generalized sympathy was in his view weaker than our attachment to friends and a fortiori still weaker than our family bonds.

The duties and virtues on which civil society is founded stand in stark contrast to these natural attributes. Respect for private property is the principal and the characteristic virtue of civil society; but it is, Hume emphasizes, an “artificial” virtue, because, according to the standards of natural morality, we should seek goods for those whom we love without regard to the possessions or property rights of others. The artificial duties and virtues associated with respect for private property can come to govern human actions effectively – and

consequently enable civil society to flourish – only insofar as we successfully confine to a circumscribed *personal* sphere our instinctive inclinations to be partial toward those with whom we have personal ties, thereby creating a distinct *social* sphere within which the artificial duties and virtues can reign supreme. It is within this social sphere that economic behavior and governing institutions, which together comprise civil society, arise.

Hume's discussions of justice are dominated by the subjects of private property, exchange of goods, and contractual agreements. The duties of justice are defined by these practices; and the virtue of justice consists in fidelity to them or in the learned inclination to be faithful to them. The institutions of property, exchange, and contract are all products of human conventions that run against the natural human inclination to favor those with whom one has close personal ties. Hume believed that these conventions are adopted and enforced because people consider them useful despite their artificiality.

Implicit in Hume's discussions of justice, especially in his discussions of the foundations of a right to private property, is the assumption that these institutions can be improved by careful human design. In principle, of course, these institutions are also subject to corruption, by reason of poor design or careless construction. But Hume's tone was optimistic – like that of the entire movement of thought on which the label of "Enlightenment" has been bestowed. In a rhetorical flight, Hume invokes the iconic scientist Isaac Newton, in order to draw a comparison between the role of justice in civil society and that of gravity in relation to the movement of bodies:

The necessity of justice to the support of society is the sole foundation of that virtue [i.e. the virtue of justice]; and since no moral excellence is more highly esteemed, we may conclude that this circumstance of usefulness has, in general, the strongest energy and most entire command over our sentiments [...] It is entirely agreeable to the rules of philosophy and even of common reason, where any principle has been found to have a great force and energy in one instance, to ascribe

to it a like energy in all similar instances. This indeed is Newton's chief rule of philosophizing.

We now grasp, Hume implies, the forces that drive human beings to behave as they do. From this knowledge we can develop a systematic understanding of the laws of motion that account for human behavior, as well as a set of prescriptions for the fundamental institutions that are capable of enhancing human well-being.

Like Hume, Cesare Beccaria insisted that the institutions and practices that comprise civil society are artificial or conventional, as distinct from natural. It is true that Beccaria opens his work *On Crimes and Punishments* (1764) by acknowledging three sources from which the principles of morals and politics are drawn, placing revelation and natural law alongside human conventions as the sources of, respectively, divine justice, natural justice, and political justice. Yet it is striking that, even though his work purports to be a comprehensive treatise on the subject of the rights and wrongs of crimes and punishments, he excludes both revelation and natural law from its scope, apparently on the ground that these sources are concerned with "that justice which flows from God and whose direct bearing is on the punishments and rewards of the after-life." Justice among human beings is based strictly on conventions to which they have agreed for their mutual benefit. Beccaria goes so far as to suggest that justice is not something "real." Rather, it "is simply a way whereby humans conceive of things, a way which influences beyond measure the happiness of all."

Smith, too, maintained that the social world is constituted by conventions that are products of human actions and of innumerable, expressed or tacit, human agreements; and he believed that that world is subject to improvement through carefully designed and executed reforms, undertaken for the sake of promoting human purposes. Smith differed from Hume about the source of the sentiments that help to uphold justice. Whereas Hume had considered these sentiments artificial, Smith argues as follows in his *Theory of Moral*

Sentiments (1759): “Nature has implanted in the human breast that consciousness of ill-desert, those terrors of merited punishment which attend upon its violation, as the great safe-guards of the association of mankind [...]” While the sentiment of justice is natural, however, the institutions through which it is promoted or enforced, as well as the many other institutions and practices through which human actions are coordinated, are not. The most celebrated example in Smith’s corpus, drawn from his *Inquiry into the Nature and Causes of the Wealth of Nations* (1776), is the division of labor. Although the division of labor “is not originally the effect of any human wisdom, which foresees and intends that general opulence to which it gives occasion” – in other words, it is not originally a product of deliberate human design – it is in fact a consequence of countless human agreements concluded over a great many years, some of which have given rise to established customs and practices, some of which have in turn developed into institutions. All these institutions and practices, though not originally the products of deliberate design, are subject to reform and improvement through human intervention aimed at advancing human purposes.

Bentham, a tireless advocate of legal and political reforms, likewise endorsed the broadly Hobbesian claims that the terrain of the social world is a product of human conventions, not of natural purposes, and that this world is, and should be, subject to reconstruction with the aim of promoting human ends. Perhaps the most famous piece of evidence of this view is his claim, in *Anarchical Fallacies* (1823), that “[n]atural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts.” Bentham was not, as is sometimes believed, railing against all appeals to the concept of rights. He was simply denying the claim that some rights are inherent in nature. For Bentham, rights, like all the other significant features of the human world of institutions and practices, are products of human conventions.

Hume, Beccaria, Smith, and Bentham also endorsed the proposition that human beings generally are roughly equal in capabilities, as

well as equally deserving of consideration from anyone engaged in administering or reforming human institutions or practices. In his essay “Of the original contract” (1748), Hume says:

When we consider how nearly equal all men are in their bodily force, and even in their mental powers and faculties, till cultivated by education, we must necessarily allow that nothing but their own consent could at first associate them together and subject them to any authority.

In his *Enquiry Concerning the Principles of Morals* (1751), Hume suggests that relations of justice are necessarily relations among people who are at least relative equals to one another, so that, if a species of creatures who were rational, yet sharply inferior to humans in strength of body and mind, were to be intermingled with humans, our relations with the members of that species would be ones of command and obedience, not of justice. This premise is strictly traditional; it goes back at least as far as Thucydides and is central to Aristotle’s theory of justice. But Hume draws a conclusion that is diametrically opposed to that reached by Aristotle and innumerable other thinkers. For Aristotle, the implication of this premise is that the proper relations between some categories of human beings are relations of command and obedience, not of justice, since some human beings are naturally inferior to others. For Hume, the implication is the opposite: since virtually all human beings are, approximately, each other’s equals in bodily and mental powers, it is appropriate that relations among them should be conducted in a just manner. In his *Enquiry*, Hume immediately goes on to criticize Europeans for throwing off “all restraints of justice and even of humanity” in their treatment of “Indians,” which is based on the vain presumption of their (the Europeans’) categorical superiority. In like fashion and on similar grounds, he criticizes men in “many nations” for subjecting women to what amounts in practice to slavery. For Hume, these denials of basic human equality are simply unjust.

Similarly, Beccaria seems to endorse the proposition that all human beings are roughly equal in capabilities as well as equally deserving of consideration. For example, in an age when the privilege of being eligible to give testimony in a court of law was rigorously withheld from many people, he argued that any reasonable person, including women, should be accepted as a witness. Beccaria also argued in favor of supplementing judges with jurors selected by lot and endorsed the practice of having every accused person tried by peers. He argued vigorously that noblemen and commoners should be subject to the same forms of punishment, effectively criticizing the practice of imposing fines on the wealthy, who could easily afford to pay, while inflicting corporal punishment on the poor. While Beccaria, who was intensely engaged in efforts at legal reform, did not enunciate a general principle of equality, he seems to have assumed that no human being should be held worthy of greater consideration than any other, at least in matters of law.

As we saw in Chapter 4 above, Smith energetically voiced similar views about human equality. In *Wealth* he argues:

The difference of natural talents in different men is, in reality, much less than we are aware of [. . .] The difference between the most dissimilar characters, between a philosopher and a common street porter, for example, seems to arise not so much from nature, as from habit, custom, and education.

Smith was in fact a major champion of the idea that the differences in natural talent among human beings are relatively trivial. Smith was well aware that men who earn their keep by manual labor usually appear to be markedly inferior in mental capacities to those who have benefitted from an extensive education and leisure time. But this appearance is a product of the fact that, in a complex division of labor, “the employment of the far greater part of those who live by labour [. . .] comes to be confined to a few very simple operations,” and this confinement has a seriously degrading effect on the

knowledge and intellectual capacities of the working poor. That effect, he observes, can be mitigated only by active governmental intervention geared to provide educational resources and the like – intervention that Smith championed in *The Wealth of Nations*.

Bentham, too, believed that talents are generally distributed in a roughly equal way across human beings and that all persons merit equal consideration:

What seems very frequently not to occur in these zealous promoters of the public good in the ardour of their zeal is that as a faggot is comprised of sticks, so is the public of individuals: that one individual is as large a portion of the public as another individual: and the happiness of the one as much a portion of the happiness of the public as is the happiness of the other.

The substance of Bentham's claim here is essentially the same as that of John Stuart Mill's much later and more famous proclamation of what he calls Bentham's dictum (though we have no record of these words in Bentham's writings): "Everybody to count for one, nobody for more than one."

II

If the thinkers we are examining here agreed that the contours of the social world are products of human conventions rather than of inherent natural purposes and that those contours are subject to reform in light of human design, what did they think should be the aim of that design? How did justice relate to that design? We know that these proto- and early utilitarians postulated that human beings are roughly equal in capabilities as well as equally deserving of consideration. Taking this postulate as a premise, what ultimate objective should the architects and builders of a social world pursue?

Hume's argument about justice is emblematic of the answers to these questions that would be offered by this entire line of thought. Hume assumes that the proposition that justice is useful to society commands widespread agreement. He undertakes to demonstrate a more radical proposition, namely that "public utility is the *sole* origin of justice, and that reflections on the beneficial consequences of this virtue are the *sole* foundation of its merit." This claim provides a significant clue to Hume's conception of the objectives that should be at the center of the institutions of civil society.

I have noted above that, for Hume, the virtue of justice is defined essentially as respect for private property. For this reason, it is sometimes claimed that Hume's conception of justice is exceptionally narrow. This claim underestimates the centrality, in Hume's view, of the institution of private property to civil society. A brief elaboration of Hume's argument for private property will suggest why he considered that institution to be the foundation of civil society, and at the same time it will clarify his conceptions of utility and justice.

Hume argues as follows:

We are naturally partial to ourselves and to our friends; but are capable of learning the advantages resulting from a more equitable conduct. Few enjoyments are given us from the open and liberal hand of nature; but by art, labour, and industry, we can extract them in great abundance. Hence the ideas of property become necessary in all civil society; hence justice derives its usefulness to the public; and hence alone arises its merit and moral obligation.

This excerpt, while brief, offers an accurate sketch of Hume's main line of reasoning. The fundamental purposes for which human beings associate with one another in civil society are to secure peace and to obtain the goods that enable them to enjoy life. Nature offers us few of these goods through her "open and liberal hand." Instead we must obtain them by purposeful work, through which we transform the raw materials nature offers into goods fit for human consumption.

However, most people will be reluctant to allocate time and effort to the production of goods, unless they can be assured that they will benefit from their own labors. The institution of private property offers that assurance. When people obtain rights to the goods they have produced or to the land they have occupied, and when a government has been instituted that effectively enforces those rights, people acquire an incentive to be industrious and productive. When enforceable rights to goods or land, obtained through transactions with others, have been added to these rights, then, along with the effective enforcement of promises regarding future transactions (contracts), the foundations for a commercial society – one whose members typically engage in the production of goods for consumption by others, in the reliable expectation that they will enjoy an increased quantity of goods in exchange – have been laid.

In short, in addition to securing peace, the fundamental aim for which people associate among themselves in civil society is to create conditions that are conducive to their enjoyment of life. The institution of private property, along with conventions regulating the practices of exchange and contract, are instrumental to that objective. The virtue of justice is defined by respect for the rights of private property, exchange, and contract; and the inclination to be just – an inclination that is contrary to nature – is inculcated in order to secure the advantages of a society that will generate ample wealth through commerce for the purpose of enhancing human beings' enjoyment of life. Governments are instituted primarily to enforce the rights of private property, which in turn make it possible for a society to create wealth. "The use and tendency of that virtue [justice] is to procure happiness and security," and Hume supposes that the production of goods is one of the principal means that tend to promote happiness.

Adam Smith placed even greater emphasis than Hume on the creation of wealth as a central objective of legislation. Smith disagreed with Hume about the ultimate foundations of civil society and justice. Where Hume offers a strictly naturalistic account of the origins of the

institutions and sentiments that constitute civil society, according to which those institutions and sentiments are products of a civilizing process through which human beings gradually learn to adapt themselves in order to obtain the benefits of security and wealth, Smith identifies God as their ultimate source. At the pivot of this difference lies the fact that, while Hume, following Hobbes, dispensed with the idea of final causation, Smith revived the Aristotelian scheme according to which final causes have their appointed place alongside efficient causes in any complete explanation. In a passage that might almost have been penned by Darwin, he remarks:

In every part of the universe we observe means adjusted with the nicest artifice to the ends which they are intended to produce; and in the mechanism of a plant, or animal body, admire how every thing is contrived for advancing the two great purposes of nature, the support of the individual, and the propagation of the species.

Yet, in a distinctly un-Darwinian move, he goes on to observe that

in these, and in all such objects, we still distinguish the efficient from the final cause of their several motions and organizations. The digestion of the food, the circulation of the blood, and the secretion of the several juices which are drawn from it, are operations all of them necessary for the great purposes of animal life. Yet we never endeavour to account for them from those purposes as from their efficient causes, nor imagine that the blood circulates, or that the food digests of its own accord, and with a view or intention to the purposes of circulation or digestion.

Smith has no inclination to imagine, as Darwin did after him, that the intricate workings we observe all around us could have come into existence in the absence of some being's intention that they should be as they are. According to Smith's view, the being who intentionally sets these workings into motion is God, who, like a watchmaker, contrives to arrange the innumerable parts, both of nature and of society, to work toward an end that he has determined.

In an implicit criticism of Hume, Smith argues:

When by natural principles we are led to advance those ends, which a refined and enlightened reason would recommend to us, we are very apt to impute to that reason, as to their efficient cause, the sentiments and actions by which we advance those ends, and to imagine that to be the wisdom of man, which in reality is the wisdom of God.

Smith's target here appears to be Hume's account of the origins of the inclination that enables us to live in accordance with the principles of justice. Like Hume, Smith distinguishes between beneficence and justice. Again like Hume, he believes that, while human beings commonly have strong feelings of beneficence toward their families and friends and weak ones toward others, a powerful inclination to requite the actions of others with justice is far more important for the subsistence of society than beneficence is. Yet Smith parts ways with Hume in his account both of the source and of the content of this inclination. Whereas Hume argued that the sense of justice is learned gradually, as human beings become increasingly aware of its usefulness, Smith insists (in a passage already quoted in part, above) that the sense of justice is implanted in human beings:

Nature has implanted in the human breast that consciousness of ill-desert, those terrors of merited punishment which attend upon its violation, as the great safe-guards of the association of mankind, to protect the weak, to curb the violent, and to chastise the guilty.

By way of proof, he observes that this innate sense of justice sometimes conflicts with what is required by the public utility. Public utility may demand that a sentinel who falls asleep in wartime be put to death, even if no harm is caused by his negligence, in order to give a powerful disincentive to others to do the same. But an impartial spectator would likely regard the sentinel as an unfortunate victim of circumstances rather than as a vicious offender and would be far more

comfortable permitting the sentinel to go unpunished than allowing a murderer to escape punishment. There is often a discrepancy between what the sense of justice demands and what the public utility requires, and in Smith's view this discrepancy counts as evidence in favor of his – and against Hume's – theory of the source and character of the sense of justice.

Yet the final cause that God intended when he implanted the sense of justice as well as other inclinations in human beings is to promote well-being, in large part by bestowing on us motivations that lead us to generate goods for our own enjoyment and that of others. Just as the parts of a watch and the circulatory system of an animal accomplish their purpose without intending to do so and without knowing what that purpose is, human beings are motivated both to punish injustice and to create wealth without understanding the objectives toward which their actions are aimed. In the case of wealth creation, the inclination that leads to this result is the famous “propensity to truck, barter, and exchange one thing for another,” a propensity that, according to Smith, “is common to all men, and to be found in no other race of animals.” Since people's active benevolence usually extends only far enough to encompass their families and friends, they must look to other motives to provide for the needs and wants that cannot be met within those circles. The motive on which they can rely is the self-interest of others. If people can produce things that are wanted by others and can exchange them for the goods they desire for themselves, they will be able to improve their well-being by doing so. If they can increase their productivity by specializing narrowly, they may be able to reap even greater benefits through exchanges with others. So arises that great division of labor, which Smith identifies as the principal source of wealth in commercial societies.

Even though God has implanted in human beings inclinations that generally work to promote their well-being without requiring their carriers to understand how or why those inclinations are designed to accomplish this end – inclinations that lead a person “by an invisible hand to promote an end which was not part of his intention” – once

that design becomes accessible to human intelligence, it is incumbent on legislators and policy makers to promote it. Smith's *Wealth of Nations* is, from beginning to end, a plea for legislation that will support the "system of natural liberty," an early version of the idea of a relatively free market system, which Smith regarded as the best means humans can contrive to generate wealth and thereby enhance human well-being, along with additional legislation and governmental actions designed to correct the adverse effects of that system on the working poor. Smith believed that the principles of justice, which he construed, much as Hume had done, as a set of rules based on respect for the institution of private property, tend to this end. He held that the system of natural liberty does so as well. Hence, while Smith's break with the Aristotelian view that the basic terrain of the social world is a product of inherent natural purposes is far less clear and sharp than the break of the other three thinkers we are considering here, he allies himself with his contemporaries in emphasizing the role that human agency can and should play in re-grading that terrain. The aim of his second and more famous book was to show the renovators of the social world, the legislators (for God was the architect, and human beings, unaware of the designs toward which their actions tended, were the initial builders), how they might design legislation that would abet God's plans for the happiness of human beings by promoting the creation of wealth.

Beccaria, too, championed the claim that the central objective of civil society should be to promote happiness. Hume and Smith trained their sights on achieving this aim by increasing the stock of goods available for human enjoyment. Beccaria, in contrast, focused on minimizing the pains associated with crime and punishment – an area of law and policy to which Hume and Smith gave only cursory notice. Beccaria maintained that existing laws regarding crime and punishment were "the residue of the most barbarous centuries," drawing on the legal codes of the ancient Roman Empire, the customs of the Lombards, and "the rambling volumes of obscure academic interpreters." While laws should be based on contracts among free men,

nearly all the laws that have actually existed have been “the tools of the passions of a few men or the offspring of a fleeting and haphazard necessity.” To this disarray Beccaria aimed to bring a kind of order that would serve the interests of all members of society rather than merely those of a privileged few.

Beccaria’s proposals for legal and penal reform seek to accomplish three aims: to reduce the severity of punishments generally; to equalize punishments across classes of people, from the most privileged to the most deprived; and to channel punishments in directions designed to enhance the happiness of society’s members. In a fashion reminiscent of Hobbes, Locke, and other social contract theorists, he argues that society’s right to punish its members derives from each member’s transfer of a portion of his natural rights to the whole, in the act of creating a civil society. Any punishment that goes beyond the need to preserve the bonds of that society is therefore unjust by nature. Beccaria asserts, for example, that severe punishments can be justified only if they can be shown to contribute positively to the public good – which in his view they rarely do. He argues strongly against the use of torture, which he regards as a relic of the barbarian practice of trial by ordeal, on the ground that this method of obtaining evidence is ineffective as well as unjust. He launches a vigorous polemic against the death penalty, which he views as an act of war on the part of society against the citizen. In one area after another, Beccaria attempts to persuade his readers that many of the practices of punishment that existed in his day are unjustifiably severe, and that (as we saw earlier in this chapter) both privileged and ordinary people should be punished in the same ways, for example by inflicting corporal punishment on privileged offenders too, if such punishment is inflicted on the less fortunate.

Beccaria’s basic rule of punishment is that “the harm of punishment should outweigh the good which the criminal can derive from the crime.” The rationale for this rule is that the purpose of punishment should be to prevent the criminal from committing additional crimes and to deter others from doing the same. Even though Beccaria offers a

contractarian, rights-based account of the right to punish, a view that is in principle backward-looking (since, according to this account, the *right* to punish at any given time is based on events that must have happened prior to that time), his explanation of the *purpose* of punishment is strictly forward-looking:

It is evident from the simple considerations already set out that the purpose of punishment is not that of tormenting or afflicting any sentient creature, nor of undoing a crime already committed. How can a political body, which as the calm modifier of individual passions should not itself be swayed by passion, harbour this useless cruelty which is the instrument of rage, of fanaticism or of weak tyrants? Can the wailings of a wretch, perhaps, undo what has been done and turn back the clock?

The laws in general and penal laws in particular should be evaluated “from the point of view of whether or not they conduce to *the greatest happiness shared among the greater number*.” It is better, Beccaria observes, to prevent crimes than to punish them. “This is the principal goal of all good legislation, which is the art of guiding men to their greatest happiness.”

Jeremy Bentham was the great systematizer of the entire utilitarian approach to legal and institutional reform. Drawing heavily on Hume and acknowledging Beccaria, whose book on penal jurisprudence he called “the first of any account that is uniformly censorial” (in other words, the first book about laws that is critical and evaluative rather than merely expository), Bentham developed a theory that is rigorous and comprehensive and takes as its founding assumption the proposition that the architects, builders, and reformers of a civilized social world should aim to create laws and institutions that will maximize the happiness of its members.

Bentham is famously associated with the principle of utility. In a relatively early work, *A Fragment on Government*, he asserted that “it is the greatest happiness of the greatest number that is the measure of

right and wrong.” In his later works, Bentham modified this formulation significantly, speaking only of the “greatest happiness principle.” Bentham never explained in print the reasons for this change, but it is plausible to surmise that he came to realize that his original statement was ambiguous and therefore lacking in rigor. When told to maximize aggregate happiness as well as to maximize the number of people who are happy, we are left to wonder what to do in cases where these two commands point toward divergent policies. Suppose, for example, the best available way to maximize aggregate happiness is to adopt laws or policies that would make many people extremely happy while making a few miserable, while the best way to distribute happiness to the greatest number of people would not result in maximizing aggregate happiness (perhaps because the happiest people under the latter scheme would not be *as* happy as they would be under the former). Bentham’s initial statement of the principle of utility is flawed because it does not tell us which of these courses of action it entails.

Whatever his reasons for this change, Bentham went on to develop a highly systematic utilitarian theory, which has a great deal to say both about the legal and institutional arrangements that are likely to increase the enjoyment of a society’s members – the subject on which Hume and Smith focused – and about reforms of criminal and penal law that could minimize the pain societies inflict on their own.

Bentham’s theory is widely caricatured and poorly understood. Before touching on its most essential points, I’d like to dispel a few misconceptions about the theory.

First, although he opens his *Introduction to the Principles of Morals and Legislation* by asserting:

Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne [...]

– Bentham does not claim that all human beings directly or consciously pursue pleasure as an objective. Like John Stuart Mill after him, Bentham believed that the *object* of a person's actions may be anything whatsoever. Ultimately, he believed, the *cause* of those actions is the pleasure they bring to the person (or the pain they enable him or her to avoid); but Bentham does not maintain that all people deliberately pursue pleasure in all their actions.

Second, Bentham does not hold that *individuals* are under an obligation to seek to maximize social well-being or the happiness of their societies as a whole – to say nothing of the happiness of every person in the world – all or any of the time. The impression that he did hold this view has been fostered both by recent critics of utilitarianism such as John Rawls and by recent global utilitarians like Peter Singer; but this impression is erroneous.

Third and perhaps most importantly, Bentham did not advocate that legislators should attempt to implement the greatest happiness principle directly, by adjusting or fine-tuning the outcomes of legislation and policy to that end. He avoided this direct approach to the maximization of utility for at least two reasons. For one, he did not think that legislators in general are in a position to make accurate calculations of aggregate utility. He recognized that many people have what he called “idiosyncratical values”; in effect, he recognized, at least in a general form, what writers much later would come to call the problem of interpersonal comparisons of utility (or welfare). He was not, in short, the advocate of a simplistic “political arithmetic” he has often been made out to be. Further, Bentham believed that, in general, public utility can best be advanced when legislators lay the legal foundations on which human beings can build a secure pattern of expectations. Like Hume and Smith before him, Bentham was strongly inclined to think that people can best enjoy their lives if they are able to act freely within a stable system of rules, which minimize the contingent surprises that sometimes upset even the best laid of human calculations.

Also like Hume and Smith, Bentham believed that a stable, legally ordered framework is a prerequisite for the development of expectations that are a direct source of a great deal of pleasure (think of the hours people often spend planning and fantasizing about a sub-tropical holiday, or the time they imagine spending with an intimate friend), as well as for any large scheme of social cooperation (including a complex division of labor) that can yield a great deal of additional pleasure through the creation of goods. Unlike Hume, he argued that such a framework should be informed by what he called a “security-providing principle,” which imposes on legislators an obligation to guarantee means of subsistence – the material conditions of freedom – to all members of society who could not provide these for themselves. (Smith did not explicitly argue that legislators have an obligation to provide for people who are so disadvantaged, though it seems clear that he believed such provisions would be good policy). Ultimately, for Bentham as well as for Hume and Smith, a central pillar of any strategy to promote the public utility was to devise a set of rules of property that would lead to the creation of great wealth, though Bentham (contrary to some modern misconceptions) laid a good deal of emphasis on the distribution of wealth as well.

Bentham also endorsed principles of punishment that were strikingly similar to Beccaria’s. Bentham’s first rule of punishment was that the “*value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence.*” Since the first purpose of penal legislation should be to deter people from committing crimes, the suffering imposed on a wrongdoer should outweigh the good he can expect to incur from his crime – but, Bentham adds, only by the minimum margin necessary to deter crimes effectively. Bentham’s theory of punishment is cut from the same cloth as Beccaria’s. While they differ on points of detail, they agree that the objective of any system of criminal and penal law should be to arrange incentives so as to reduce the rate of crime to the lowest possible level,

while also inflicting on the perpetrators the smallest amount of pain that may be sufficient to accomplish this aim.

III

The proto-utilitarians and the early utilitarians whose ideas we have considered here agreed, then, that the architects, builders, and renovators of the social world should be guided by the objective of enhancing human well-being, conceived as happiness or enjoyment of life. Beccaria focused on the contributions to this objective that he believed to be attainable through reforms of the criminal and penal laws and practices. Hume and Smith devoted the lion's share of their attentions to the means that could be used to enhance the production of goods for consumption and enjoyment. Bentham picked up both lines of argument and welded them into a general utilitarian theory.

This conception of the objective that should be pursued by those who are in a position to reshape the terrain of the social world was very much in keeping with its times. During the mid- and late eighteenth century in the parts of the world with which these writers were most familiar poverty was commonplace. Periods of famine and starvation were not exceptional. So the importance of maintaining a productive, commercial society that could provide for the needs and some of the wants of its members seemed self-evident to these writers. At the same time, the knowledge required to shape social arrangements in a way that would enhance the production of goods for human enjoyment seemed for the first time in history to be at hand. Hume was not alone among these thinkers in finding inspiration in Newton's apparently definitive grasp of the laws of motion that account for the movements of celestial and terrestrial bodies alike. The idea that a similar grasp of the laws of motion that apply to human societies was within reach appeared to require no great leap of faith, and with those laws in hand

there seemed to be no reason to doubt that human beings would be in a position to reconstruct their institutions and practices in a way that would best be suited to meet human needs and wants.

Hume, Beccaria, Smith, and Bentham essentially defined justice by reference to this objective. For Hume, the essence of justice consists of respect for the rights of private property. But private property itself is justified because its adoption enhances the productivity of human societies. Neither Smith nor Bentham wandered far from Hume's conception of justice, although Bentham broadened his definition considerably.

Moreover, Smith raised the stakes by asserting that the premier source of productivity and wealth is a highly developed division of labor, in which producers acquire extremely specialized skills and great efficiency. Like Hume, Smith argued that "[c]ommerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice," which he equated with enforcement of property rights and contracts. But, while Smith agreed with Hume that enforcement of property rights and promises is a necessary basis for any successful commercial society, he went beyond Hume in suggesting the opulence that can flow from a well-developed division of labor. In the opening sentence of his magnum opus, Smith argues as follows: "The greatest improvement in the productive powers of labour, and the greater part of the skill, dexterity, and judgment with which it is any where directed, or applied, seem to have been the effects of the division of labor." The improvement made possible in this way, which can be observed in the developed countries of Europe, is so great, Smith avows, that "the accommodation of an European prince does not always so much exceed that of an industrious and frugal peasant, as the accommodation of the latter exceeds that of many an African king [. . .]."

Smith's confidence in the power of the division of labor to increase productivity spread quickly among political economists and more gradually beyond those circles. His was an epoch-making discovery that recast basic assumptions about the aims of legislation and about the shape a flourishing civil society should take.

Yet, in focusing tightly on the objective of enhancing happiness, these thinkers displaced reciprocity from the center of thinking about justice. To be sure, the idea of justice had been associated with protection of property rights since long before Aristotle's time. But in these earlier incarnations the concept of reciprocity had virtually always been central to the way in which that idea was defined. Corrective justice was thought of as *corrective*, not *ameliorative*. Its aim was not to enhance happiness, nor even to improve well-being conceived in some other way. Rather, as imagined, the aim of corrective justice with reciprocity at its center was to restore an order that had been violated either by forcing an offender to return property that he had wrongly acquired or by inflicting harm on a perpetrator in some proportion to the harm he or she had inflicted on a victim. When Hume and his followers redefined justice as an instrument in the service of utility, they pushed reciprocity to the margins of the idea of justice. Instead of thinking of reciprocity as fundamental to that idea, they re-imagined justice as a tool, whose purpose was either to provide a framework that would encourage the production of goods for human enjoyment or to underpin a set of rules designed to minimize the pain some members of a society inflict on others, or both. This observation is true even of Smith, who argued that retributivist emotions are implanted in human beings by nature, but who ultimately accounted for these emotions by their tendency to promote the public utility and invoked a principle of deterrence much like those which Beccaria and Bentham sketched as the rightful basis for determining the severity of punishments. In the theory of punishment, the notion of retribution – which is one application of the concept of reciprocity – was essentially abandoned. As Beccaria says (in a passage quoted at greater length above), in this re-imagined view, “the purpose of punishment is not that of tormenting or afflicting any sentient creature, nor of undoing a crime already committed [. . .].” Of course, no defender of retributive justice had ever asserted that the purpose of punishment is to undo a crime in the literal sense. In an ethical or rightful sense, however, that is exactly how earlier writers had envisaged that purpose.

At first exposure, the utilitarian conception of justice strikes many people as more sensible and humane than the older view emphasizing reciprocity. Why should people suffer more than they must, or be deprived of goods that might bring them enjoyment? But the utilitarian approach is afflicted with problems of its own. One of the most celebrated alleged problems is that the utilitarian conception would in some circumstances provide a justification for punishing innocent persons. Suppose a vicious crime has been committed. The perpetrator cannot be found, but the crime has received widespread publicity and the public demands that the wrongdoer be identified and punished, to allay its fear that the perpetrator might strike again. This fear is so powerful that it has a paralyzing effect, far beyond any rational response: people refuse to venture from their houses, commerce has dwindled to a trickle, factories and other places of work shut their doors because many people are too frightened to come to work. Under these circumstances, the greater good may be served by falsely identifying someone as the perpetrator, arresting him and either convicting or merely detaining him until calm can be restored. Critics of utilitarianism have often alleged that the utilitarian approach to criminal justice would endorse this scenario and have pointed to this implication as a fatal flaw in the utilitarian approach to justice. Some writers have argued that the most plausible and most widely held versions of utilitarian theory are immune to this charge, but the moves that allegedly insulate that theory from this criticism raise difficult questions of their own, and it is not clear in any case that they succeed.

The pre- and early utilitarian writers we have considered above thought of human beings as free and responsible agents. This is true even of Bentham, who is often wrongly caricatured as someone who considered human beings to be automata, or animals who respond to stimuli in a Pavlovian manner. But these writers did not draw from this conception of persons the inference that Aristotle and many others have drawn, namely that relations of justice among free and responsible persons are relations of reciprocity. Their re-imagination

of justice was fundamental. Justice for them took on a teleological cast, as it had done for Plato, whose theory is an outlier in the history of ideas about justice prior to the eighteenth century. The objective they imagined for justice has little in common with the *telos* (goal) Plato conceived. For Plato, justice has to do primarily with the cultivation of rightly ordered souls and secondarily with the construction and maintenance of a city that is oriented toward the cultivation of these souls. The early utilitarian thinkers rejected both Plato's conception of the role of nature in determining the character of justice and his assumptions about categorical human inequality. But they substituted an alternative *telos*, that of aggregate happiness, that was equally inhospitable to the concept of reciprocity. This re-imagining of the idea of justice left a powerful impression, which remains vigorously influential today.

Smith's realization that the division of labor accounts for the bulk of productivity in highly developed commercial societies left its own significant legacy on ideas about justice. For the notion that it is the division of labor itself, rather than the efforts of individual workers taken singly, that accounts for the great bulk of the wealth generated in complex economies seriously undermined the contribution principle, a broad form of which Aristotle had placed close to the heart of thinking about justice and which had remained there ever since his time. Of course, all the goods that are products of labor are ultimately produced by the actions of individual workers, even if those actions are parsed into undetectably small slices. But if the skills and efficiencies that individuals contribute to a production process, whether within a single enterprise or, more importantly, within a society's division of labor as a whole, are made possible only by the fact that innumerable other persons possess and deploy their own specialized skills and achieve their own efficiencies, the goods all these people produce are largely social products rather than merely the creations of individuals. How much sense, then, does it make to base judgments about justice on the contribution principle, when the largest

contributions in a complex division of labor are actually made by the division of labor itself? Smith's discovery of the role that the division of labor plays in the creation of wealth set the stage for a series of puzzles about how this social product should be distributed. In essence, that discovery gave rise to the modern problem of social justice.