

12-1960

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Recommended Citation

Clarence Morris, Four Eighteenth Century Theories of Justice, 14 *Vanderbilt Law Review* 101 (1960)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol14/iss1/5>

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FOUR EIGHTEENTH CENTURY THEORIES OF JUSTICE

CLARENCE MORRIS*

This paper is about an important facet of the justice theories of four eighteenth century European philosophers. The earliest of the four, Hume, thought justice and law were purely human inventions.¹ The next, Montesquieu, said that justice preceded laws because possible relations of justice existed before human ordinances were enacted,² and that man, who lives peacefully in the state of nature,³ invents unjust exploitation after he enters a state of society.⁴ Then followed Rousseau who pronounced that contemporary governments had enchained freedom and subverted justice,⁵ and whenever a just government did come to power its excellence was doomed to fade.⁶ For the fourth, Kant, justice was part of human rationality achieved whenever and wherever pure practical reason freed men's wills.⁷ A fifth jurisprudential great, Bentham, whose life spanned the close of the century, lumped injustice with all other pains and had no theory of justice-as-such. His views, however, are closely allied in an important way to the earlier four and he too will come in for discussion.

An organizing thread running through all these diverse philosophies is that each of the five authors took the position that no concrete problem involving justice could be *decided properly before* the formulation of a general rule to govern that kind of problem. Indeed the writings of Hume, Montesquieu, Rousseau agree on one further step; *i.e.*, justice requires that an appropriate principle be laid down *before* a problem *arises*. If Kant was not exactly in step at this juncture he was walking in the same direction and was not far off the cadence.

Before the legislative process as we know it today was developed, these thinkers were thus stressing the value of, and need for, enacted

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1. 2 HUME, TREATISE OF HUMAN NATURE 190 (Everyman's Library ed. 1930) (first published in 1739) [hereinafter cited as HUME]. Nearly all of the philosophic materials cited in this paper are reprinted in MORRIS, THE GREAT LEGAL PHILOSOPHERS (1959), which will hereinafter be cited as G.L.P. The above is found therein at 194-201.

2. 1 MONTESQUIEU, L'ESPRIT DE LOIS 2 (Nugent transl. 1873) (first published in 1748) [hereinafter cited as MONTESQUIEU]; G.L.P. 161.

3. 1 MONTESQUIEU 4; G.L.P. 162.

4. 1 MONTESQUIEU 5; G.L.P. 162.

5. ROUSSEAU, THE SOCIAL CONTRACT 3 (Everyman's Library ed. 1935) (first published in 1762) [hereinafter cited as ROUSSEAU]; G.L.P. 215.

6. ROUSSEAU 87-88; G.L.P. 231.

7. KANT'S PHILOSOPHY OF LAW 13-34 (Hastie transl. 1887) [hereinafter cited as KANT]; G.L.P. 239-41.

and promulgated rules of law. In the twentieth century American legislative enactments are both formidable and command new respect. A look back to the eighteenth's hopes for legislative accomplishment seems appropriate now.

I. HUME

David Hume published his *Treatise of Human Nature*, part III, in 1740. Two main strands of seventeenth century thought were still in the forefront of political discussion of his day: (1) Hobbes' apology for a strong sovereign legitimately exercising its every whim, and (2) Grotius' and Locke's theologically-based natural law theories. Hume rejected both.

His repudiation of natural law as a God-given source of justice is explicit. In consonance with the scientific temper of the times, Hume looked for existential aspects of morality and justice. From his own introspection he concluded that man's "reason" is an instrument that can be used only to discover "what is," and throws no light on "what ought to be." Man discovers truth (according to Hume) by deduction from given premises or observation of happenings in his presence. His actions, however, are neither true nor false.⁸ Characterization of conduct as praiseworthy resembles appreciation of Beauty and differs from discovery of Truth—such characterization is a recognition of immediately sensed pleasure, not a discovery of knowledge. The diversity and uncertainty of such pleasures prove that appreciation of the good is neither instinctive nor inborn.⁹ Therefore each man's sense of justice is artificial; justice, like the wheel, is part of acquired culture.¹⁰ This artifact, justice, would have been neither needed nor invented if men were utterly unselfish or had no needs not met by the bounty of nature. But in the real world (where wants exceed satisfactions and men put their own comfort above their neighbors') men learn they can serve themselves best by inventing law and teaching the young to obey it. In this way property is stabilized, its orderly transfer by consent is facilitated, and its production is nurtured by commerce based on legally binding contracts. This, in fact, happens (according to Hume) in all advanced societies.

Hume's government of enacted laws differs from Hobbes' government by the man (or men) named sovereign. Hobbes' prescription to cure disorder and promote civil peace was legitimation of unlimited governmental power, making it worth the sovereign's while to terrorize his subjects into quietude.¹¹ Hume also craved tran-

8. 2 HUME 172-78; G.L.P. 189-91.

9. 2 HUME 166-68; G.L.P. 188.

10. 2 HUME 184; G.L.P. 192-94.

11. HOBBS, *LEVIATHAN* (1651). See especially chapter 18; G.L.P. 120-22.

quillity. Nearly a century elapsed between the writing of *Leviathan* and the writing of the *Treatise*; both happened to be written in France. Hobbes fled there to avoid the Civil War and wrote *Leviathan* while Cromwell subdued the Scots at Dunbar and Charles II at Worcester; Hume went to France from an orderly Georgian England to live in scholarly economy in the small college town of La Fleche. Hume, not unnaturally, compounded a prescription different from Hobbes' for tranquillity, i.e., stability resulting from inflexible administration of promulgated laws. This stability would be seriously impaired if judges individuated cases and considered their special merits; even the most objective judges set adrift without inflexible rules could not maintain the stability pre-requisite to civil peace.¹² These rules, of course, could not be just any rules; they must be good instruments of guidance for a particular society with its own special problems; they would be clumsy tools unless they disposed wisely of problems likely to occur in the society regulated.¹³ As conditions changed Hume was, no doubt, in favor of revision of legal rules. But he was dead against allowing judges to make exceptions for atypical cases for fear that their sympathies would push the law onto erratic courses and destroy the certainty pre-requisite to peace, prosperity, and economic integration.

II. MONTESQUIEU

Montesquieu was over fifty when 29-year-old Hume published part III of his *Treatise of Human Nature*. Eight years later Montésquieu's spicy, disorderly *L'Esprit de Lois* came out. How much Hume influenced Montesquieu is hard to tell. But Montesquieu, too, said that just law had to be promulgated first and thereafter applied to the cases that come up. He broached this point by criticizing anonymous admirers of Turkey's informal and speedy justice. "In Turkey," he says, "where little regard is shown to the honor, life, or estate of the subject, all causes are speedily decided. . . . The bashaw, after a quick hearing, orders which party he pleases to be bastinadoed, and then sends them about their business. . . . But in moderate governments . . . no man is stript of his honor or his property but after a long inquiry."¹⁴

Montesquieu did not, however, prize deliberateness for itself alone; a phlegmatic tyrant may work even greater injustice than an im-

12. 2 HUME 231-32; G.L.P. 210.

13. "As the obligation of promises is an invention for the interests of society, it is warped into as many different forms as that interest requires. . . ." 2 HUME 226; G.L.P. 207.

14. 1 MONTESQUIEU 84; G.L.P. 165. This was not Montesquieu's first use of the Near East for irresponsible illustration. In his first book, the witty and popular *Persian Letters* (1721), he made conditions in a strange land whatever he wished to advance his political satire.

pulsive one. At root Montesquieu was another rejector of Hobbes' legitimation of a great concentration of sovereign power. All officials given power, says Montesquieu, are likely to abuse it. The government—as a whole—must have much power, but each man who wields power as a government official should have but a limited sphere of authority. Separation of powers reduces functionaries' temptations to abuse their offices. A legislature only enacting general laws cannot control citizen's lives so arbitrarily as it could if it also tried cases. Judges who apply enacted general law to the suits they hear do not humor their own private opinions and so are not self-willed tyrants.¹⁵

Montesquieu, like Hume, believed that the cause of justice was best served when preformulated general rules of law were applied to concrete cases. But his motive was different. Montesquieu (who had exercised minor judicial powers as an officer of the Parliament of Bordeaux) opposed individuation of cases because he feared judges with authority to individuate would become tyrants. Hume opposed individuation because he feared that judges' sympathy for some of the parties involved in litigations would unsettle property and commerce and destroy civil order.

III. ROUSSEAU

In *The Social Contract* (1762) Rousseau, too, decried *ad hoc* judicial law making. He shared both Montesquieu's and Hume's fears—that judges not controlled by legislation would be tempted to further their own interests on some occasions and to favor litigants arousing their irrelevant sympathies on others. But Rousseau's attitude was prompted by still other considerations. He had spent his youth as an inept and impoverished wanderer. He basked in the warmth of a middle-aged widow in his teens and graduated to more moral and affluent patronage as he matured. When he wrote *The Social Contract* a grand dame was furnishing him and his mistress with bucolic comforts. He truculently accepted as little as he could and still have a chance to write, think, and commune with nature. He saw the western world as a congeries of systems arrogating power over the many to the few. Rousseau had first attracted the attention of the cognoscenti when his essay won a prize awarded by the Dijon Academy; the essay's spectacular theme was that civilization had degraded mankind.

Rousseau held out hope for a better life in small peasant states, governed by pure democracy—affording all of their clear-headed and pure-hearted citizens full participation in policy making. He advocated a dispersal of power still greater than Montesquieu's separation

15. 1 MONTESQUIEU 172 *passim*; G.L.P. 169-70.

of governmental functions. Rousseau favored universal participation in legislation; he would give each citizen a share in policy making so that all unselfishly govern themselves by formulating "the general will."¹⁶ Rousseau championed the rule of promulgated law not only on Hume's ground—to avoid the instability resulting from erratic decisions of concrete cases—but also to capture the earthy, instructive wisdom of averaged group-opinion. Rousseau did not espouse delegation of the powers of government with the consent of the governed and in their interest; he espoused government by the governed themselves—at least insofar as determinations of policy are involved. The state originates in a social contract which, according to Rousseau, binds each citizen to subordinate his person, property and power to the general will. The general will, as sovereign, speaks for all who have composed it; it can have no interest adverse to theirs. All citizens not only help in its formulation by right; each has a duty to do so. The general will is infallible because the average response of simple but informed minds to questions of general policy (arising on an occasion when no concrete case is in contention) is, in fact, invariably wise. This wisdom vanishes when a concrete problem occurs before an applicable general rule has been formulated.¹⁷

This general-will-system will work, in Rousseau's view, only in small archadian states. There it may work well. He says: "When, among the happiest people in the world, bands of peasants are seen regulating affairs of state under an oak and always acting wisely, can we help scorning the ingenious methods of other nations which make themselves illustrious and wretched with so much art and mystery?"¹⁸

Rousseau, too, then champions a rule of law, not a rule of men; but again we find a philosopher preferring special ends served by pre-formulation. He wants to tap sources of earthy wisdom, avoid exploitation and favoritism, and most of all to dignify the common man by affording him a working role in government. A suitable speaking part for the common man cues him in only when general rules are formulated. Were enactment foregone he would lose the only role in which he can properly be cast.

IV. KANT

While all of the philosophers dealt with were "inner directed" (to borrow Reisman's overworked but expressive phrase) none was so solitary, self-contained and introspective as Immanuel Kant. When he died at 80 he had never ventured further than 60 miles from his

16. ROUSSEAU 13-16; G.L.P. 218.

17. ROUSSEAU 26-27; G.L.P. 221.

18. ROUSSEAU 102; G.L.P. 233.

birthplace, Königsberg. As his skill with abstractions matured, his hopes for mankind's perfection of reason grew. His own steady self-discipline fed his conviction that mankind can control its fate.

Justice's source, in Kant's view, is "pure practical reason." A man by *à priori* thought can know how to act justly—even when no one has experienced concrete problems like those confronting him. Man's goal should be a life of free will, but his will is unhampered only when he steels himself against his emotions and when he holds aloof from the search for happiness. Each person's freely-willed actions harmonize with the conduct of all others who exercise free will—because free will always accords with universal law promulgated to all by pure practical reason.¹⁹

According to Kant two closely related principles guide users of pure practical reason.

(1) *The Categorical Imperative*: "Act according to a maxim that can be adopted as a universal law."²⁰ Some say this is a form of the golden rule. That characterization understresses Kant's insistence on reason. The golden rule advises warm considerateness; the categorical imperative demands cold consideration.

(2) *The Universal Principle of Right*: "An action is right only if it can co-exist with each and everyman's free will according to universal law."²¹ Kant's definition of free will makes this principle, too, a guide only for the coldly rational—applicable only when impulse is under control and happiness is not yearned for.

The philosophers heretofore discussed all advocated some system of government in which legal rules are preformulated; they were concerned with the guidance and control of judges or the allocation of power; they attempted definition of proper state-craft. Kant's starting point is different; he was more concerned with the improvement of the individual and less concerned with the state; he was interested in defining the life of the just man more than he was in delimiting the form of a just government. Free will is not corporate will; the capacity for it is the capacity of individuals—who, because they have that capacity, merit infinite respect. Kant develops this point adopting Ulpian's three rules of the "realms of universal right and duty."

The first rule is: "Do not be a means, because each man is an end in himself."²² A liege to promulgated law might allow himself to be a means serving the law giver's ends.

The second rule is a demand that each of us prize the right more

19. KANT 12-17; G.L.P. 239-40.

20. KANT 34; G.L.P. 241.

21. KANT 45; G.L.P. 242.

22. KANT 54; G.L.P. 244.

than we prize the law. It is: "Exile yourself from society if you must to avoid wrongdoing."²³ The first two rules together imply, I suppose, that a man whose own rights are threatened by law should withdraw from the state.

Even though Kant has thus required each individual to envision justice for himself, he has not advocated individuation of the solutions of concrete problems in justice. The categorical imperative and the universal principle of right both demand that the solver of a concrete problem in justice apply an abstract "maxim" to the case in hand. If Kant does not require *preformulation* of a general policy before the decision of a case, he at least calls for settling general policy in the process. This reduced demand for rules, however, is consonant with thoughtful, objective judicial law making; it does not put Kant in the posture of requiring legislation.²⁴

Kant's adoption of Ulpian's third rule, however, reduces the force of his implied toleration of judicial law making. The third rule is: "Enter society to avoid wronging others."²⁵ This injunction is neither a Humean recognition of the utilitarian value of government by law nor a Rousseauian call to participate in formulation of the general will. On the contrary, Kant demonstrates by *à priori* reasoning the soundness of this third rule. He says that society unregulated by right implies violence; society and violence are a contradiction in terms; hence reason compels compatriots to form a union regulated by compulsory laws; peace will flow from laws derived by pure reasoning from the idea of juridical union under public laws.²⁶ Kant concludes that a rule of law, not men, is metaphysically sublime and may lead to the highest political good.²⁷

I hesitated in my introductory remarks to align Kant with the advocates of government by pre-announced legal rules; I still hesitate to do so. Certainly Kant looks on some—perhaps much—codification as desirable and inevitable. But he does not disdain another method of doing justice—the development of suitable maxims at the time concrete decisions are made. He insists on the settling of policy in all cases; but even though he favors legislative policy pronouncement, he does not demand it.

Kant's requirement of maxims of conduct, then, is prompted by motives different from the earlier philosophers' advocacy of a system of rules. He was neither, like Hume, concerned with stability, nor, like Montesquieu, afraid of tyranny, nor, like Rousseau, intent on widening the common man's participation in government. Kant urged

23. *Ibid.*

24. Cf. Morris, *Law, Reason and Sociology*, 107 U. PA. L. REV. 147 (1958).

25. *Ibid.*

26. *Id.* at 163; G.L.P. 253.

27. *Id.* at 230-31; G.L.P. 260.

maxim-formulation to ensure reason's direction of conduct, to perfect man's free will in action so that he could live according to universal law.

V. BENTHAM

Bentham's utilitarianism affords some approval for any movement tending to advance the public good. The legislative branch of government was in Bentham's eyes an important social asset, and his view is especially significant because of his competence in law.

Bentham sat (in boredom) at Blackstone's feet as an Oxford student. He often played truant to attend court at Westminster when Mansfield was on the bench. He "ate meals" at Lincoln's Inn. He did not ask to be called to the bar, however, and became a political philosopher rather than a practicing lawyer.

The great European codes had not yet been under consideration when Bentham championed complete codification—*i.e.*, an enactment of statutory rules covering all aspects of law.²⁸

Like Hume, Bentham advocated codification to promote stability and order. But again a difference. Bentham, who had watched strong judges in action and heard about Blackstonian respect for common law doctrines from the master's mouth, did not fear that judges' partialities would affect their determination of the abstract rights of concrete litigants. He did not believe that preformulation of rules of law could completely do away with judicial lawmaking; he knew that the most detailed and carefully drafted statutes are often in some unforeseen way subject to competing interpretations—between which the judges must and can choose.²⁹ His distaste for case-by-case judicial lawmaking was rooted in his keen perception of the logic of *stare decisis*. No court, said Bentham, may decide more than the case before it. Even though a judge's holding should be and usually is based on a policy, he cannot lay down that policy as *the* law. His holding is only a precedent when the same facts recur. The reasoning in his written opinion by which the judge justifies his holding may be useful, wise, and helpful in cases differing from the one he has decided, but it is his holding, as such, that deserves special respect and not his justification of that holding. So policies emerging in a line of common law decisions are constantly weakened by anomalies. Bentham describes the havoc wrought by an unprecedented decision in these words: "[T]he anomalous decision . . . gives a shock . . . felt by the whole future of customary law. Nor is the mischief cured until a strong body of connected decisions, either in

28. BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED* 329-43 (1945) [hereinafter cited as BENTHAM]; G.L.P. 285-88.

29. BENTHAM 167-76; G.L.P. 280-81.

confirmation of the first anomalous one or in opposition to it, have repaired the broken thread of analogy and brought back the current of reputation to its old channel."³⁰ In other words Bentham does not believe judicial lawmaking can establish principles firmly and readapt the law smoothly. By its very nature a court holding is *ad hoc* and it cannot transcend this characteristic. Legislation, on the other hand, can and does establish general policies; these policies remain in force until repealed or revised; legislative revision establishes new policies—clearly, quickly and certainly. Bentham concludes that judicial legislation should therefore be curbed by statutory anticipation insofar as possible.

The significance of Bentham's views is not that they illustrate another motive for favoring preformulated rules; his predilections are so close to Hume's that he could have been omitted were his goals the only reason for including him. His value is that his advocacy of legislation has a practical dimension that the others' lack.³¹ Bentham is concerned with how a good system of legislated rules can come into being. There were no such systems in Eighteenth Century Europe. Therefore he had to imagine a process of codification, little resembling the product of the parliaments of his times. He, like many enthusiasts for untried reforms, greatly underestimated the difficulties in getting the job done.

VI. THE EIGHTEENTH CENTURY—UNIQUE?

It is not my thesis, of course, that the case for preformulated laws was voiced first in the eighteenth century. If Hammurabi's Code was not a collection of legal rules, and if the Ten Commandments were something more, the Roman Twelve Tables and Praetorian Edicts were, indeed, preformulated rules for guidance in settling disputes.

I have searched unsuccessfully for a system of free decision. One must look to fable, rather than history, to find a persistent reliance on a rule of men unchanneled by law. Pound, to illustrate this point in his *The Task of Law* recounts tales about some legendary characters like "Harun al Raschid,³² walking the streets . . . in disguise and administering a rough and ready justice to all comers."³³ But in his next paragraph Pound concludes: "Experience of so-called justice without law has shown that it is incompatible with human psychology

30. BENTHAM 281; G.L.P. 285.

31. Is Rousseau an exception? Was his little-arcadian-state-solution practical when he proposed it? Is it now?

32. Whose life spanned from 764 to 809 A.D.; He was Fifth Abasside Caliph, the most famous of the Caliphs of Baghdad.

33. POUND, *THE TASK OF LAW* 15 (1944).

in any advanced society and with the exigencies of any developed economic order."³⁴

So it is not my point that our eighteenth century philosophers were unique when they advocated promulgated law. They were, however, early in favoring preformulated rules in modern national states where promulgation of general laws is a function of legislatures. It might be said that Hume and Kant did not explicitly call for enactments by legislative bodies. Montesquieu, Rousseau, and Bentham clearly did. And the idea of codification was so much in the air that Savigny in 1814 published a jurisprudence based on the theme, "beware of legislation in general and codification in particular."³⁵ Nineteenth century American judges often displayed the same attitude.³⁶ Antagonism to statutory law has thinned out in the twentieth century but was still a force in the German "Free Law" school—that favored judicial rejection of statutory rules whenever such a course seems wise.³⁷

VII. LEGISLATION IN THE TWENTIETH CENTURY

Serious consideration of Bentham's plan of complete codification for American jurisdictions would be unprofitable since no legislature is likely to entertain it in our time. More modest codification is, however, constantly suggested; the value of systematic wide-reaching legislation is, therefore, a timely topic.

The mass of any bulky bill tends to hamper its enactment. The proponents of the Uniform Commercial Code have shepherded it through six state legislatures; but they are likely to find that other legislatures are reluctant to allocate their resources to the processing of so large a piece of legislation.³⁸ Some sections of the code tidy up muddy branches of commercial law and have made powerful friends for the proposal. Enthusiasts for these sections become log-rollers or support the code *in toto* because they have been persuaded of the excellence of the rest of the code. Legislators ready to vote for its enactment put faith in committees, legislative councils, the Commission on Uniform State Laws, The American Law Institute, or lobbyist friends of the code.

Two common forms of state codification of pre-existing common law are penal codes and codes of procedure. Penal codes typify

34. *Ibid.*

35. SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (Hayward transl. 1831).

36. See Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908).

37. See, e.g., EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 183-84 (Moll transl. 1936); G.L.P. 458.

38. The 1957 official edition of the act is 223 pages of solid statutory material, *i.e.*, without annotations or comment.

the rule preformulation advocated by Hume and Montesquieu. Legislators are not reluctant to codify criminal law for a number of reasons. They feel familiar with the subject matter and even a long criminal code does not seem forbidding to them. They recognize a need for giving statutory warning to those tempted to commit crimes. They may have less fear of making mistakes in criminal codes than in other statutes because juries, prosecutors, judges and other officials have wide powers to deal leniently with those who are legally guilty but morally innocent. For the same reason they need not be greatly concerned about criminal statutes becoming obsolete before they get around to revising them; an old blasphemy statute subjecting curse utterers to punishment is not likely to put anyone behind bars. All these comforting aspects apply not only to codes defining serious crimes; they also promote the codification of traffic, sanitation, and building codes and the like.

Codes of civil procedure are also a special case. Their enactment usually has been effected by the pressure lawyers exert on their brethren in the legislature. Once the bar develops a consensus on procedural reform the likelihood of its enactment is high. This kind of codification is foreign to the competence of lay legislators, and they have been willing in many states to turn the whole job over to the courts, who are granted rule making powers affording them and the bar an opportunity to develop their own codes of procedure and to revise these when they see fit. This practice conserves valuable legislative energies for other important matters. Montesquieu would not have been likely to oppose this legislation-by-courts as obnoxious to his separation of powers theory.

Legislative dissatisfaction with common law usually is not rooted in its instability (the defect which led Bentham to advocate codification). Usually a common law topic attracts the legislature's attention because the courts' holdings are unjust rather than erratic. Common law judges, for example, refused to entertain a tort action after either the injured person or his injurer died. Most American legislatures were dissatisfied with and revised this stable but unjust law.³⁹ These statutes are too short to be called codes. However, longer statutory chapters on insurance and workmen's compensation were largely inspired by the unjust substance of settled common law rather than by the common law's uncertainty.

The impetus behind another kind of code is also quite different from the stimulus back of eighteenth century advocacy of preformulated rules. The eighteenth century conception of the functions of law was narrow. Bentham said that all law was penal at base; it

39. See PROSSER, *TORTS* § 105 (2d ed. 1955).

simply defined rights that the government would protect by criminal punishment.⁴⁰ This view is too cramped even for his contemporaries, but our other philosophers only exceeded it to add that the law also has the function of settling disputes between private litigants. The law kept criminal and civil order; it was not thought of as having dynamic aspects; it was protective, not creative. Hume (who was in some ways more utilitarian than Bentham himself) saw the state preserving commerce—as it developed privately—through law. But he voiced no appreciation of the need for invention by the state of new rights and duties that would develop or reshape commerce.⁴¹ The business corporation, for example, is a creature of legislation—useful indeed in the promotion of business and industry. The courts had not (and probably could not have) invented it. Early legislation granting corporate charters was not bulky. But development and regulation of corporations has inspired more and more legislation; most states now have “corporation codes.” Dynamic law making is not, of course, limited to promoting private enterprise. Social security legislation and school law codes are examples of extensive dynamic legislation in other fields.

Bills introduced compete for the limited energies of the legislature. No session of any modern legislature could consider all meritorious bills introduced. In every session appropriations must be made and pressing current problems must be taken up. Bills of lesser importance are processed and reported out only when they attract devoted attention of some legislator-champion. A just and beautiful demand to change the state flower is honored only when its proponent is both powerful and determined.

This limitation on legislative energy has a double importance. It not only means that bills must compete for attention when they are introduced. It also means that the legislature should act with caution on topics that once dealt with, are likely to need, but not get, revision at later sessions. Once a misguided but clear and constitutional statute has been enacted, no court has authority to repeal it. Sensible interpretation sometimes prevents an outmoded statute from doing harm, but when a statute stands in need of legislative revision no court has authority to do the legislature's job. For example, the dollar benefits scheduled in a workmen's compensation act can be just when enacted and become unjust because of inflation or defla-

40. BENTHAM 53-56; G.L.P. 274-75.

41. Hume, after making the point that our natural inclinations lead us to selfish disorder which we find we can avoid by organizing society, pictures that society in these words: “[It is] a convention entered into by all the members of society to bestow stability on the possession of . . . external goods, and leave everyone in peaceable enjoyment of what he may acquire by his fortune and industry. By this means everyone knows what he may safely possess. . . .” 2 HUME 195; G.L.P. 196.

tion. Only the political power of labor and management makes such perishable legislation tolerable. The legislators need not fear that their successors will never revise such a statute. Lobbyists will help to keep these statutes up to date. Proposers that automobile accident victims be entitled to a scheduled scheme of benefits⁴² may be overlooking the lack of political forces to keep these schedules up to date.⁴³ Perhaps such benefits could be tied to a price index to supply this lack.

Another way a legislature can guard against obsolescence and conserve its successors' energies is to formulate policies in general terms and allow courts or administrators to settle on specific applications. For example, the Uniform Commercial Code provides that when a court is asked to enforce a contract embodying an unconscionable clause, it may either refuse to enforce the contract, enforce all of the clauses other than the unconscionable one, or limit the force of the clause in a way that will avoid an unconscionable result.⁴⁴ The code formulates no criteria of unconscionability. Changed conditions are not likely to outmode so flexible a statute. But such a statute would win no plaudits from the eighteenth century philosophers; they advocated advance determination of results more rigid than such a rule affords. Though this statute, indeed, leaves to the courts implementing it a major share of lawmaking, its flexibility is not limpness. It stops courts from ruling that mere unconscionable overreaching is no basis for governmental interference, and it reminds courts dealing with unconscionability of several alternatives, some of which might not be recognized by courts not prompted by such legislation. Perhaps there is little need for this general rule, but after all our Bill of Rights is no more certain and much of the protection it affords would have been approximated by the common law if it had never been adopted.

Sometimes, however, the wisdom of legislation lies in inflexibility—in achieving stability that courts operating on a case-by-case basis are not likely to achieve. A five-year statute of limitations may be no better or worse than a four or six-year statute, but its virtue is primarily in its precision rather than in the choice of the time period settled. Courts have been equally precise (remember “lives in being plus 21 years”), but the temper of the judicial process usually favors more functional, less precise rules. In some jurisdictions a child under seven is incapable of negligence, but in most the courts prefer

42. See, e.g., Marx, *Compensation Insurance for Automobile Accident Victims: The Case for Compulsory Automobile Compensation Insurance*, 15 OHIO ST. L.J. 134 (1954).

43. See MORRIS, *TORTS* 374 (1953).

44. Section 2-302.

to try as an issue of fact the capacity of each young child to use care.⁴⁵

The most questionable aspect of eighteenth century advocacy of codification was the belief that after wise rules of law are laid down their application is mechanical. Bentham was alternately knowing and gullible on this point. After remarking that legislators must couch statutes in general or "class" terms, he says: "This class . . . is composed of a certain number of individuals. . . . [B]y what means is it that they have come to be aggregated to this class? . . . By whatever means . . . such event either depended or did not depend upon the will of a human being. . . . To juries, in most cases, belongs in conjunction with the regular Judges as also with prosecutors, witnesses and individual officers of justice . . . the power of aggregating persons . . . to the disadvantageous class of delinquents. . . . The power of legislating *de classibus* even though it be supreme, can never of itself be absolute and unlimited."⁴⁶ However, after approving of liberal interpretation of statutes ("that delicate and important branch of judiciary power, the concession of which is dangerous, the denial ruinous")⁴⁷ he says: "Laws that are hasty have often been cited in proof of the necessity of interpretation: but methinks it might also have been well at the same time to have observed that they are indications equally strong of imbecility and short sightedness on the part of the legislator: that they bespeak the infancy of the science; and that when once it shall have been brought to a state of tolerable maturity the demand for interpretation will have been in great measure if not altogether taken away."⁴⁸

Bentham, then, after advocating both more and wiser use of legislative power, advances a view calculated to deaden governmental wisdom whenever—in the judicial process—statutes touch life. Even though improvement in the legislative process can indeed produce wiser foresight, better policies, and clearer statement, legislative prescience will never eliminate disputes on the ambit of statutory terms. These are the statutory issues that are litigated. Seldom do lawyers advance utterly unfounded statutory interpretations, and still more rarely are such arguments countenanced by courts. Therefore when a court pauses over the meaning of a statute a real problem of interpretation has usually arisen. Widespread wooden application is likely both to thwart legislative purposes in particular cases and impair the progress of the legislative process in the future.

Bentham would have better advanced the cause of legislation had he recognized not only the judicial obligation to respect, fathom and effectuate legislative purposes, but also the judicial obligation

45. See PROSSER, TORTS § 31, at 128-29 (2d ed. 1955).

46. BENTHAM 167-75; G.L.P. 280-81.

47. BENTHAM 336; G.L.P. 286.

48. BENTHAM 342; G.L.P. 287.

to recognize and respect legislative silence, and where the legislature has not occupied the field to proceed *judicially* as well as judiciously. A judge performing this second function must not follow Aristotle's false advice and guess at what the legislature would have done had it tried to solve a problem that it did not, in fact, consider.⁴⁹ The judge must, on the contrary, keep in mind that the problem before him has not been scrutinized by legislative committees and their staffs, has not been subjected to the molding force of hearings and debate. This recognition will turn him away from the sterile exercise of trying to guess what the legislature would have done and turn him to the real task at hand—*i.e.*, determining what he, as a judge with a judge's resources should do with a problem that the legislature has not considered. This is not to say that judges should spurn useful legislative analogies. On the contrary, this indeed should be a recognized source of hypotheses for judicial lawmaking.⁵⁰ But if he sees clearly when such is the case that the legislature has not acted on a problem before him, he then will recognize both his responsibility and his duty to use the valuable and developing techniques of the judicial process, with all of its strengths and limitations. Such a judge advances Hume's hope for stability through legislation; he gives statutes all of the meaning that they have; when the legislature has not acted he uses the stabilizing power of the rational judicial process. Such a judge effectuates Montesquieu's democracy of separation of powers by honoring both the legislature's intent when it has legislated and the legislature's silence when it has not. Such a judge will be guided, not by a Rousseauian general will, but by the purposes of the people's elected representatives expressed in legislation; and when that voice is silent, by the traditions of the common law—which include at least one of the qualities promoted by Kant's categorical imperative, *i.e.*, objectiveness. When the legislature is silent the common law can only work case-by-case. Nevertheless, it is not incapable of formulating rules which are "clear, clearly applicable and clearly just." Indeed, common law traditions even provide room for some revision of clear rules that have become out-moded. A court that properly revises the common law may leave the legislature time to do important work which would otherwise be postponed while legislators are unnecessarily freshening the justice of the common law.

49. "When . . . the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement is defective and erroneous, to rectify the defect by *deciding as the lawgiver would himself decide* if he were present on the occasion, *and would have enacted if he had been cognizant of the case in question.*" ARISTOTLE, *NICHOMACHEAN ETHICS*, bk. V at 315-16 (Rackham transl. 1926); G.L.P. 25.

50. See Pound, *Common Law and Legislation*, 21 HARV. L. REV. 333 (1908).

