

**JEREMY BENTHAM
AND THE
USURY LAW**

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Jeremy Bentham and the Usury Law by A Rhode-Islander

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U S U R Y L A W.

THE object of the remarks which I mean to make upon this subject is, not to discuss the subject of the Currency, nor to say one-half that may be said upon the subject of the Usury Laws; but merely to make an attempt to remove the prejudices which prevail (to a limited extent) among some men in trade, on account of the gross misrepresentations which have been made by Mr. Bentham, and others of his school. I am satisfied that most men have not given themselves the trouble of investigating the true policy and design of those laws, nor the principles upon which they are founded.

IN 1787, Mr. Jeremy Bentham presented the world with a book which he termed "A Defence of Usury, showing the impolicy of the present legal restraints of the terms of pecuniary bargains." I presume that Mr. Bentham considered himself entitled to the sole credit of the views then taken of the subject, for he begins by declaring that he "does not recollect ever seeing any thing yet offered in behalf of the liberty of making one's own terms in money bargains."

He then proceeds to state the general proposition which he means to establish, which, he says, rather jeeringly, was the result of an odd notion of his. It is in these terms:

"That no man of ripe years and of sound mind, acting freely, and with his eyes open, ought to be hindered, with a view to his advantage, from making such a bargain in the way of obtaining money, as he thinks fit; nor (what is a necessary consequence) any body hindered from supplying him, upon any terms he thinks proper to accede to.

"That contracts in general ought to be observed," he says, "is a rule the propriety of which no man was ever yet found wrong-headed enough to deny. If this case is one of the exceptions (for some doubtless there are) which the welfare and safety of society require should be taken out of the general rule, in this case, as in all those others, it lies upon him who alleges the necessity of the exception, to produce a reason for it."

This would have been a fair statement of the question, had the exception contended for been a new one. But after admitting, as he explicitly does, that the exception is as old as the general rule, that it had gone into the legislation of almost all nations, ancient and modern, that it had "taken hold of the imagination and passions of men," and "that custom was the sole basis which, either the moralist in his rules and principles, or the legislator in his injunctions, can have to build upon," one would have supposed that he who sought to overthrow an exception practised upon through all time, by both moralists and legislators, would have had the diffidence to believe that the chance that all the world was right, was tolerably good, until he established the contrary. But Mr. Bentham was a theorist in the largest sense of the term, and ought not to be severely censured for believing all the world wrong in this particular instance, inasmuch as he believed they were wrong in almost all others.

Mr. Bentham thus divides the subject. "In favor of the restraint opposed to the species of liberty I contend for, I can imagine but five arguments:

- "1. Prevention of usury.
- "2. Prevention of prodigality.
- "3. Protection of indigence against extortion.
- "4. Repression of the temerity of projectors.
- "5. Protection of simplicity against imposition."

He then devotes several chapters of his book to the refutations of these five reasons, which are all that he can "*imagine*" in favor of the restraints proposed upon the loan of money.

The substance of the second chapter consists in a successful attempt to show that there can be no such thing as usury in the absence of all previous legal restraint;—that usury is the excess over the rates established by law. This proposition might have been taken for granted.

In the third letter Mr. B. proceeds to demolish the second reason which he "*imagines*" to be one of the reasons in favor of usury laws, the prevention of prodigality. He says, what in general is true, "that no man, prodigal or not prodigal, will ever think of borrowing money to spend, so long as he has ready money of his own, or effects which he can turn into ready money without loss." That if he is a prodigal "the usury law will not prevent him from spending what he has." And that after he has spent his all, "and has no security to offer, it will be as difficult to obtain money at an extraordinary rate as at an ordinary rate," and thus, therefore, the usury laws can be no protection to him.

In his fourth letter he undertakes to show that the *Indigent* derives no beneficial protection from these laws, because, supposing him of sound understanding, he is a better judge than the legislature what he can afford to pay.

The protection of simplicity forms the subject of the fifth letter, and is the only remaining reason upon which Mr. B. imagines the usury law to rest.

He says, "Here, in the first place, I think I am by this time entitled to observe, that no simplicity short of absolute idiotism, can cause the individual to make a more groundless *judgment* than the legislature, who, in the circumstances above stated, should pretend to confine him to any given rate of interest, would have made for him."

That even admitting the judgment of the legislature to be better than that of the individual, still the usury laws can be no protection to him, because there are many other ways by which a simple man may ruin himself, which the legislature has not protected him from, such as buying goods at exorbitant prices, buying more than he wants, and other similar cases.

This ends the work of demolishing the five reasons which Mr. Bentham has imagined were the only reasons upon which the usury laws were based.

Mr. Bentham then proceeds to an enumeration of the positive mischiefs of the usury laws.

"The first I shall mention, is that of precluding so many people altogether from getting the money they stand in need of, to answer their respective exigencies. Think what a distress it would produce, were the liberty of borrowing denied to every body." I confess myself unable clearly to understand what the author means by this mischief. I believe it was never before pretended that usury laws lessened the quantity of money or prevented any one from borrowing.

The second mischief is, that if any man is not permitted to borrow, he must sell his property at a greater loss than the extra interest would occasion. Here, again, he imagines that the usury laws prevent men from borrowing.

But the third and last mischief is somewhat extraordinary, and proves not only how bold a man must be who opposes the deliberate verdict of mankind by novel and unfounded theories, but how deeply he will plunge into error, who draws entirely upon his imagination for information which can be nowhere found, but in the practical business of life. He says—

"The last article I have to mention in the history of mischief, is the *corruptive influence* exercised by these laws on the *morals* of the people, by the pains they take, and cannot but take, to give birth to treachery and ingratitude.

"To purchase a possibility of being enforced, the law neither has found, nor what is very material, must it ever hope to find in this case, any other expedient, than that of hiring a man to break his engagement, and to crush the hand that *has been reached out to help him*."

This is too bad even for a writer who draws entirely upon his imagination. Had Mr. Bentham taken the pains to understand and state the reasons upon which these laws really are founded, and to overthrow those reasons as successfully as he has the cob-houses of his own imagination, he might have been entitled to the indulgence of a little sentiment of this sort. But to steer clear from the beginning to the end of his book of the sole questions upon which the policy or expediency of such restraints depend, and then to end with a poetical triumph of this sort, is a liberty which perhaps no other man but Jeremy Bentham would have indulged in.—I say to end, because I have given the substance of his book. If it had been my object to attempt to overthrow the reasons given to support the propositions advanced, a more detailed statement would have been required in order to give a fair view of his side of the question.

But with this reasoning, (though I by no means assent to some of it,) it is unnecessary to consume time, because I shall endeavor to show that the propositions, to support which that reasoning is employed, have but a remote connection with the usury laws. If the men of Mr. Bentham's days, either by their writings or conversations, induced him to believe that the laws against usury were enacted only for the protection of the prodigal, the indigent, the projector, or the simple, they must have abounded in ignorance, and be in credulity.

The policy and expediency of usury laws must depend mainly, if not entirely, upon two questions.

1st. Supposing the parties to stand on equal terms, and the bargains which they make to be, in general, perfectly fair as between themselves, is it, or is it not for the interest of the public to allow money to be converted into merchandise, and bought and sold at any price the parties may choose to stipulate?

2d. Do the parties, in general, meet on equal terms, and are the bargains, in the absence of usury laws, as fair as bargains usually are, in relation to merchandise?

These two questions involve substantially all the other questions that relate to the usury laws, for if perfect freedom as to the price of money, neither injures the public nor individual borrowers, any more than the same freedom in relation to merchandise, then Mr. Bentham is right.

If, on the contrary, this freedom would be injurious to the public, or so generally to borrowers, as to call for protection from the law, then it is equally clear that he is wrong. I say it is equally clear that he is wrong, if the latter supposition is true, because no one admits the evils, and complains of the remedy. The complaint is not that usury laws, as they now exist in England, do not constitute the best remedy for the supposed evils, but that the supposed evils have no existence. All that I shall attempt to show, therefore, is, that these evils always have existed and probably always will, unless checked by some legislation of some kind or other. If any

discovery of a better remedy than that resorted to by nearly all the civilized nations of the world, should be pointed out in this inventive age, let the new remedy be applied. Until such discovery, the old remedy must be deemed the best, if the evils complained of really exist.

The little book of Mr. Bentham on this subject was one of the first, if not the very first that contains a systematical attack upon the whole policy of the usury laws.

No reformer before his day was bold enough to recommend so wide a departure from the legislation which ancient and modern nations have been obliged sooner or later to resort to. Adam Smith dealt pretty freely with many of the usages and much of the legislation of his own and other countries. But, intelligent and fearless as he was, he expressly admits the necessity of the laws in question. When Mr. B. therefore undertook the arduous task of showing that all mankind were wrong in the conclusion to which they had arrived, one would have supposed that at least he would, from a regard to his own reputation, have informed himself upon what questions the policy of those laws depended. At the present day at least, it will be admitted that they mainly depend upon the two which I have stated. Yet, from the beginning to the end, Mr. B. nowhere states, either formally or substantially, either of these questions. I have given the substance of his book so far as it relates to the laws against usury. In letter 10, he undertakes to ascertain the grounds of the prejudices against usury. This attempt I shall remark upon by and by. The other letters may have a bearing upon the subject, but so remote that, at my time of life, I am unable to discern it.

Still I hear the advocates of free trade in money matters exultingly refer to Mr. Bentham's book, as settling all the difficulties which surrounded this intricate and perplexing question. All I ask of the public is to read this book, after first deciding in their own minds what the questions are upon which the policy of those laws depend, and if they find those questions any where stated or discussed, I have been unfortunate enough to overlook the page which contains it.

I shall take but a brief view of the subject, because nothing but brief views on any subject, in this busy age, stand a chance of being read, and also because I hope to provoke a discussion of the important questions which it involves, by those better informed than I pretend to be.

1st. I think I cannot be mistaken in saying that the first question upon which the policy of these laws depends, is, whether it would or would not be injurious to the *public* to allow money to become the subject of unrestrained traffic, like any other article. If such a traffic would not injure the public, then one of the reasons which have been supposed to exist, is removed. If it would, then all will agree that they ought to be reinvested with their original security.

How is it to be decided that such a freedom would injure the public? The answer is a very plain one. If such a freedom from restraint would inevitably increase the average rates of interest, it would be a serious evil to the community. If its tendency should be to reduce the rates below what they formerly were when the usury laws remained in force, it would be a blessing. If on the other hand they neither increased nor diminished the rates, then so far as the public is concerned, the restraints ought to be entirely withdrawn, because all penal laws are odious, and when they have no effect of any kind, are also useless.

The advocates of the free trade principle, at least those with whom I have conversed, agree that, so far as the public is concerned, the whole policy of the laws depends upon the questions I have stated. They consequently contend very earnestly that interest would be lower if the restraints were all thrown off, than they now are, under the partial restraints

that remain. Those who contend for this effect from a total repeal, are principally money lenders, men who are interested in keeping up the rates as high as possible. I have had some difficulty in discovering what should induce men to wish for the repeal of a law, which, as they say, is sure to lessen the income or interest of their money; still, as I know many of them to be conscientious and upright men, I have never questioned their sincerity, although it is a sincerity very liable to be turned wrong end foremost.

I cannot find that Mr. B. anywhere discusses this question, but he repeatedly states opinions from which others of his school infer, that he thought that the usury laws have a tendency to increase the rates of interest. I draw precisely a contrary inference from all that has a bearing on the subject. For instance, in his second letter, page 13, he states, "And in Hindostan, where there is no rate limited by law, the *lowest* customary rate is 10 or 12." "In Constantinople, in certain cases, as I have been informed, 30 per cent. is a common rate. Now of all these widely different rates, what is there that is intrinsically more proper than another?"

He had previously stated that in Ireland it was six, and in the West Indies eight per cent. If Mr. B. contends that 30 per cent. is intrinsically as proper as 6, he does not agree with most other advocates of the free trade system, that high rates are injurious to the public—for if they are injurious to the public they are not proper.

But can it be seriously questioned by any practical men that high rates are injurious to the public?

Mr. Bentham, in p. 14, says, "For him who takes as much as he can get for any other sort of thing, a house for instance, there is no particular appellation, nor any mark of disrepute; nobody is ashamed of doing so, nor is it usual so much as to profess to do otherwise. Why a man who takes as much as he can get, be it 6 or 7, or 8 or 10 per cent. for the use of his money, should be called usurer, should be loaded with an opprobrious name, any more than if he had bought a house with it, and made a proportionable profit by the house, is more than I can see."

Why a man always has been, and always will be, loaded with an opprobrious name, who takes as much as he can get for his money, I will consider when I come to remark on the fairness of the bargain between the lender and the borrower. At present I cite this passage as the foundation of the notion that money is to be treated like an article of merchandise, and that, in both cases, it is right to take all that the lender or seller can get. My view of the subject, both as it regards its effects upon the public and upon the borrower, is, that money is *unlike* any other article, and so unlike it that the possessor has neither the legal nor the moral right to take for it all that he can get. Mr. B. seems never to have given a moment's attention to the difference between money and merchandise. I will endeavor to point out what he says he cannot see.

In the first place, all merchandise is, in some form or other, the product of individual labor or skill. The farmer who produces a hundred bushels of wheat, the manufacturer who fabricates his bale of cloths, and the mechanic who constructs a ship, become the *absolute* owners of the products. Their right is unqualified, for they are not produced for any specific purpose, but originating solely in individual labor, they are to be used solely to gratify individual caprice or individual love of gain. When the original producer sells them, he conveys all his right to dominion over them, and all this right and dominion over them passes with the article into whose hands soever it may come. The original or any subsequent owner may destroy them if he pleases, and neither the public nor any other individual has a right to complain. So absolute is his right that even the government cannot take it from him for public use, without making an adequate compensation.

On the other hand, money is not originally the product of individual labor or skill, but is brought into existence by the government. The metallic currency must pass through the mint, or receive in some other way the sanction of the government before the character of money is impressed upon it. Our paper currency is the creature of State governments, who authorize certain agents of theirs, called Banks, to issue certain amounts. Thus the *origin* of the metallic and paper currency is with the government of the country.

2d. The *object* of these products of the Government is as different from the products of individual labor, as is their origin. The object is a specific one, to benefit the common country at large, by affording them a medium for facilitating the exchange of all the commodities in which men usually deal. It is sent out as an *instrument* to represent the value of all other articles.

Its main object then was for the *public good*, as a *currency* to which all men might have access. It was never intended as an article of trade—as an article possessing an inherent value of itself, any further than as a representative or test of the value of all other articles. It undoubtedly admits of private ownership, but of an ownership that is not absolute, like the product of individual industry, but qualified and limited by the special use for which it was designed. The first purchaser from the Mint or the Bank of a portion of this currency, purchased with a knowledge that it was the currency of the country, and that it was designed for that particular purpose. All the title which he acquired by the purchase, was to use it for his own benefit, *provided* he did not interfere with the main object of its creation, to wit, a currency. It is analogous to the use which individuals may make of any other property created for public purposes. A public or navigable river is undoubtedly the property of the public, destined for specific purposes and uses. An individual, one of the public for whose use this public river or other high-way was intended, may acquire a particular kind of property in it. He may use it in any way that does not interfere with the grand object of all high-ways, but if he exceed that object, and undertake to prevent others from using it in the same manner, he exceeds his right. The owners of the land adjoining a high-way are the owners to the centre. If a mine should be discovered under it, they alone could claim it. But this private right must be so used as not to interfere with the travel of the public. Many other modes of illustrating the limited nature of individual title to the currency of the country, will occur to every one.

Can an individual owner of a portion of the currency use it as he pleases, without regard to the object of its creation? The individual producer of the 100 bushels of wheat may throw it into the sea if he pleases, and neither the government nor any individual has a right to complain. But suppose forty or fifty capitalists should buy up all, or nearly all the metallic currency of the country, (which it is in their power to do,) so that all the paper currency must of necessity be withdrawn from circulation, and consequently all the business of the country come to a stand; suppose they should insist upon their right to use it as merchandise, and keep it locked up in their warehouses, would any lawyer among us say that they had either the legal or the moral right so to do?

In a general sense the Government has the right to prevent an individual from using any property over which, according to common parlance, he has an absolute right, from using it to the injury of the public. But this is a general power, to be exercised by general laws, and in no other manner. It is wholly unlike the case supposed, for until those general laws are enacted, the individual may legally use his property in any way he pleases. But the right which the Government has to the currency is not a general right to pass all laws required by the public good, but a *specific interest* in

the thing itself which constitutes the currency. The public is a partner with the individual. It has a joint interest in the thing itself, and an undoubted right to restrain the individual from using it, except for partnership purposes. The elder right is in the public, and the individual purchased merely the power of using it, subject to the elder right.

Again—the inherent and inseparable qualities of money are different from those of any other article. It possesses a power which no other commodity does or can possess. It is beyond the ability of individuals or of the Government, to confer that power upon land or merchandise. The Government possesses the power of converting lead, or rags, or silks, into a currency, but the moment that is done the lead, or rags, or silks become money, and this superadded character, conferred upon it by the government, clothes it with a power, different in kind, and greater in degree, than *can* exist in any other article without that character.

This power is separate and distinct from its value. One hundred dollars in land possesses as much value as one hundred dollars in gold, but much less power. The land, though of the full value of one hundred dollars, will not, like money, at all times, and in all places, *command* one hundred dollars value, in any of the thousand different commodities which its owner may want. This power to command every thing else, does not exist in the gold, or the silver, or the paper constituting the materials of money, but it arises out of the Act of the Government which impresses the character of money upon it. Should the Government ordain, that certain peculiar shells should constitute the currency, and be a lawful tender in payment of debts, that currency would possess the same power, though probably not the same value as gold and silver. The power of money, then, over every other article, arises out of the artificial character given to it by the state, and not out of the qualities of the material of which it is composed. This power consists mainly in its convertibility, in the facility with which it may be exchanged for any other commodity. If an individual should invent a machine capable of performing what no other machine could perform, not only would the materials of which it might be composed be his property, but its powers and capacities would also be his. The law would protect him in the enjoyment of this latter species of property, and prevent any other individual from constructing or using a similar one, without his consent. This power and capacity being the fruit of individual skill, becomes the subject of individual right and property. In theory, therefore, it would seem that the power of money being the fruit of the industry and skill of the government, would necessarily become the property of the government. But in point of fact, this power was conferred upon it for the *benefit* of the *public*, and becomes the property and right of those for whose benefit it was invented.

In the next place, it must be admitted that power thus conferred upon the currency by Government, is not only different in kind from the power which the ownership of other commodities confers, but that it is almost unlimited in extent and degree. This extent of power arises out of the fact that money is indispensable to the business of every man, because every man is in the community. It being the representation of the value of all other articles, it is indispensable to the business of all men, because every man must deal in some one or other of those articles. When I say indispensable I do not mean useful, convenient, or desirable, but indispensable in its strictest sense, for a man who is deprived of access to money entirely, must stop his business. Should he resort to a barter trade he would find so much of his time consumed in making his exchanges, and so many other obstacles to encounter, that a rival in the same business, who could command a sufficiency of money, would undersell him.

Money, then, is the subject of want to *every* man in the community, and of a want so pressing as to be indispensable.