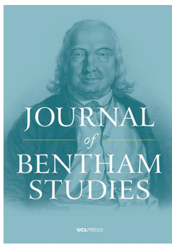

UCLPRESS

Journal of Bentham Studies

Memoriam

David Lieberman (1953–2022) and His Contribution to Bentham Scholarship

Philip Schofield[1,*]

How to cite: Schofield, P. 'David Lieberman (1953–2022) and His Contribution to Bentham Scholarship.' *Journal of Bentham Studies*, 2024, 22 (*1*), pp. 1–12.
DOI: https://doi.org/10.14324/111.2045-757X.054.

Submission date: 11 July 2024; Acceptance date: 15 July 2024;
Publication date: 19 September 2024

Peer Review:

This article has been through the journal's standard editorial review.

Copyright:

© 2024, The Author. This is an Open Access article distributed under the terms of the Creative Commons Attribution License (CC-BY) 4.0 https://creativecommons.org/licenses/by/4.0/, which permits unrestricted use, distribution and reproduction in any medium, provided the original author and source are credited • DOI: https://doi.org/10.14324/111.2045-757X.054.

Open Access:

Journal of Bentham Studies is a peer-reviewed open access journal.

*Correspondence: p.schofield@ucl.ac.uk
[1]UCL, London, UK

David Lieberman (1953–2022) and His Contribution to Bentham Scholarship

Philip Schofield

We lost David Lieberman (b. 21 May 1953) on 10 September 2022, aged 69, when he died while hiking in Lassen Volcanic National Park, California. He had recently retired as James W. and Isobel Coffroth Professor of Jurisprudence at the School of Law, Berkeley, where he had taught, administered and researched, gaining the respect, admiration and gratitude of his colleagues, since 1984. I first met David in the mid-1980s when he visited London, possibly to attend the first International Society for Utilitarian Studies (or rather International Bentham Studies) Conference, held at UCL in 1987. I remember being rather intimidated prior to meeting David, on account of the glowing terms in which he was spoken of by Professors J.H. (Jimmy) Burns and Frederick Rosen. I also remember my first conversation with David, which took place on a tube train as a Bentham Project group, which probably included Fred Rosen and Stephen Conway, went to some event. I do not remember the event, nor do I remember the topic of conversation, but I do remember what a friendly, unassuming, yet knowledgeable, thoughtful and intelligent person David was. Most of all he was, as far as Bentham studies is concerned, and as I realised as soon as I began to read his work, a brilliant scholar.

Those of us involved in Bentham studies have been fortunate to have known David as a friend and a colleague; we remain fortunate in having the body of his work to draw upon in our own scholarship. I am not sure how he ‘got into’ Bentham. He did his undergraduate degree at St Catharine’s College, Cambridge (first class honours, 1974), where he came under the influence of Quentin Skinner and his contextualist approach to history, and then moved to UCL to undertake his PhD (London, 1980) under the supervision of Burns. It is hard to imagine

a better combination of mentors, and the result was the appearance in 1989 of David's *The province of legislation determined: Legal theory in eighteenth-century Britain*, appropriately published in Cambridge University Press's Ideas in Context series. I am not discussing David's book here, but suffice it to say that it was part of a new appreciation of Bentham that emerged in the 1980s through the publication of a series of books that have become staple fare for Bentham scholars; namely, L.J. Hume's *Bentham and Bureaucracy*, H.L.A. Hart's *Essays on Bentham*, Rosen's *Jeremy Bentham and Representative Democracy*, G.J. Postema's *Bentham and the Common Law Tradition* and Michael Lobban's *The Common Law and English Jurisprudence 1760–1850*. These works were followed shortly afterwards by P.J. Kelly's *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Code*.

David was a staunch supporter of the Bentham Project. I am not sure how many times I asked him to write a referee's report for the Project, but he was always ready and willing to perform this burdensome duty. I last saw David on 2 November 2021, when he made a trip to the UK – in order, he told me, to see some old friends in Oxford, possibly for the last time. While he still had some physical difficulties resulting from the horrendous bicycle accident he had suffered in 2016, he was his usual bright, cheerful and engaging self, retaining his keen interest in Bentham and the work of the Project. As it happened, the British Academy had just asked me to prepare the Bentham Project's quinquennial review (even though it had been only four years since the last one), the successful completion of which would allow us to retain our status as a British Academy Research Project. I needed to nominate a referee to comment on the review. I asked David and he readily agreed. I thought no more about it, since I knew that I could rely on David to get the job done. Without going into the arcane administrative details, it transpired that David had not completed the review in time. When I chased him up, it turned out that, just after our meeting in the summer, he had undergone a course of medical treatment for prostate cancer. He apologised for letting the referee's report slip his mind, but then did it immediately and (as generous as ever) scored us 7 out of 7. Well, I would have scored David 8 out of 7.

I should also pay tribute to David's contribution to the International Society for Utilitarian Studies. As well as a long-serving member of the Society's Committee, he organised a wonderful conference at Berkeley in 2008. I do not remember much about the lectures or papers, but I do remember the excellent food, the wonderful weather, and how everyone

enjoyed themselves. I also remember that David issued an open invitation to Conference-goers to attend a reception at his house, adding very much to the friendliness and sociability of the event. The focus of this appreciation, however, is David's Bentham scholarship, with the particular purpose of reviewing the insights that I for one have found particularly helpful and from which I have drawn inspiration. I should add that David's work does not merely display exceptional scholarship; it is characterised by an elegance of style and clarity of expression that Bentham himself recommended, but in the eyes of many did not often achieve.

In 'Jeremy Bentham: Biography and Intellectual Biography' (1999), written for a special number of *History of Political Thought* in tribute to J.H. Burns, David considers Bentham's career from his return from Russia in early 1788 to the government's explicit rejection of the panopticon penitentiary scheme in 1803. This period was roughly bounded by the publication, with such contrasting fortunes, of *An Introduction to the Principles of Morals and Legislation* in 1789 and *Traités de législation civile et pénale* in 1802. David describes Bentham's manifold activities during this period – his writings for the French Revolution, on the panopticon and pauper panopticons and on finance and political economy – together with the scholarly assessments, ranging from those (Elie Halévy, Leslie Stephen and Werner Stark) who thought Bentham had been side-tracked from his core philosophical interests to those (Michel Foucault, Gertrude Himmelfarb and Charles Bahmueller) who saw these schemes as encapsulating that philosophy. As David judiciously comments in relation to this latter group:

> Their characterisations tend to mistake particular and selective institutional applications of Bentham's principles for his entire legislative programme. (193)

Scholars had generally argued that the importance of Bentham's work in this period had been that it had prepared the way for his later writings, whereas David wishes to consider it on its own terms. He specifically seeks

> to develop […] a non-retrospective assessment of Bentham's career during the period 1788 to 1802. A useful way into this treatment is to explore the crude yet obvious question of Bentham's need to secure an audience and reputation on the basis of which he would promote his ambitious and intricate codification programme. (194)

In David's view, Bentham, both before and during this period, and indeed afterwards, was pursuing opportunities to advance his career as a codifier, often in collaboration with his brother Samuel.

David goes on to outline the various routes that Bentham adopted in order to turn his legislative science into reality – namely, overtures made to sovereigns and governments, the use of aristocratic patronage, the issuing of publications and the claim to expertise. Hence, as David notes, in this period Bentham 'can be understood to have engaged […] in a number of stratagems for obtaining public notice'. This was also the case with the panopticon prison. The scheme was a means of making his reputation and so paving the way for what he ultimately wanted, which was law reform. On the one hand, David notes that Bentham 'appears far more realistic in viewing prison reform as a suitable vehicle for self-advancement' (200); on the other, he states that his 'obstinate perseverance' with panopticon drained his 'fortune and energies for the better part of ten years' (201), as well as leading him to engage in a whole variety of ill-considered projects on 'topics well beyond his jurisprudential expertise' (201). What David terms 'the biographical disaster of the Panopticon years' did, however, see Dumont working more or less alone on Bentham's earlier jurisprudential manuscripts 'while Bentham absented himself elsewhere', leading to the publication of *Traités de législation civile et pénale*, which created 'an audience for Bentham's legislative theory in a manner that Bentham himself singularly failed to achieve'.

David's criticism of Bentham's various schemes is important in reminding us that Bentham's career might be interpreted as that of a projector – the sort of person that he defended in *Defence of Usury*. Indeed, the letters sent from Samuel Bentham to Jeremy, while the former was on his journey to Russia and while he was there, make it clear that the two brothers saw themselves as working together in order to make their reputations and their fortunes through innovation and improvement, whether it be in increasing the efficiency of machinery or drawing up a penal code for an empire.

In 'Economy and Polity in Bentham's Science of Legislation' (2000), David challenges the view that the model for Bentham was 'economic man', the rational calculator of costs and benefits; he rather suggests that more attention should be paid to the political animal. As David memorably puts it:

> Hitherto we have been so devoted to finding behind Bentham's legislative theory a nation of shopkeepers, that we have neglected his commitments to a nation of newspaper readers.

It is in this essay that David, in characterising the revisionist scholarship that had taken place as a result of the appearance of volumes in the new authoritative edition of *The Collected Works of Jeremy Bentham*, draws attention to the distinction between what he terms

> the 'historical Bentham' (meaning the figure known in the nineteenth century through the vehicles of Dumont's *Traités de législation civile et pénale* and John Stuart Mill's revisions) and the 'authenticity Bentham' (meaning the figure now recovered from the manuscripts and new edition). (108)

David's purpose is 'to identify some of the places where it would be fruitful to link the newly "rescued" Bentham and the extensively revised intellectual history of eighteenth- and early nineteenth-century Britain' (108) – revised, that is, from the accounts of Leslie Stephen and A.V. Dicey.

This is an agenda that is just as pertinent, perhaps even more so, than it was when David was writing more than twenty years ago. We have 'recovered' much more of the 'authentic' Bentham (fourteen *Collected Works* volumes have appeared since 2000). One of the strengths of Bentham scholarship is that its practitioners represent a wide range of disciplines. While it is perhaps stating the obvious to say that any interest in Bentham must be to some degree and in some sense historical, not everyone is engaged in contextual history, in the mode of Quentin Skinner and the Cambridge/Sussex schools of intellectual historians. Having said that, it is encouraging that Bentham is being taken much more seriously, and it appears to me much more often, by non-Bentham specialists across a range of disciplines. The 'authentic Bentham' seems to be of much more interest to more scholars than the 'historical Bentham' has ever been.

This brings me back to David's essay, since he is attempting to show that there was rather more to Bentham than the standard characterisation recognises. This characterisation places the science of political economy as the master science that underpins Bentham's utilitarianism. While David accepts that Bentham embraced political economy as part of his science of legislation, he argues that political economy was not the ordering principle of the four sub-ends of the principle of utility – namely, subsistence, abundance, security and equality – but rather his 'axioms of mental pathology'. This explains why security was by far the most important element in these four sub-ends. In contrast, abundance, which was the sphere of political economy, was characterised by 'a remarkably

meagre set of governing principles' (115). In other words, the major task of the legislator was to promote security and subsistence, for there was very little that the legislator could in fact do to promote abundance. While security was necessary for the creation of wealth, it was not for that purpose that security was primarily instituted.

David then goes on to consider the view, famously put forward by Marx, that Bentham's theory of human nature encapsulated the mentality of the petty bourgeoisie – the self-interested pursuit of gain. Drawing on the work of Ross Harrison and his own knowledge of 'authenticity Bentham', David shows that Bentham's claim that the legislator needed to assume that individuals were predominantly motivated by self-preference did not mean that they were not also motivated by extra-regarding interests, sympathetic interest in particular, and moreover that the legislator, and more particularly the moralist, had a role to play in promoting benevolence. David recognises that Bentham often discusses the balance of pleasures and pains in terms of market value, even on occasion suggesting that they can be transformed into monetary values, but there are also passages that suggest that this was not a view that Bentham wholeheartedly entertained. David points out that the reduction of Bentham's psychology to that of

> economic man […] is misleading […] in its tendency to overshadow other, no less critical assumptions about social conduct Bentham made in his legislative programme. (124)

As one example of these 'critical assumptions', David goes on to discuss the operation of public opinion within Bentham's *Constitutional Code*, his blueprint for representative democracy. In fact, freedom of the press and public discussion had always been regarded by Bentham as bulwarks against despotism, but in his mature democratic writings, with the development of the notion of the Public Opinion Tribunal and its institutional encouragement, it became an active force in promoting good government. The corollary was 'administrative transparency and rigorous accountability' on the part of government officials. The crucial role would be played by the press, and in particular daily newspapers, in feeding information on political affairs to what Bentham assumed would be a voracious public. This aspect of Bentham's thought, David concludes, requires more attention than it has hitherto been given.

That challenge has since been taken up by a variety of scholars and we now have a much keener appreciation of the importance that Bentham

assigned to public debate. Indeed, this is a theme that David takes up in 'Declaring Rights: Bentham and the Rights of Man', which appeared in *Philosophy, Rights and Natural Law*, edited by Ian Hunter and Richard Whatmore (Edinburgh University Press, 2018). Here David contextualises Bentham's essay 'Nonsense upon Stilts', written in 1795. This was Bentham's celebrated critique of the French Declaration of the Rights of Man and the Citizen, which had been first issued in 1789, but on which Bentham did not comment until the issue of a new French Declaration of Rights and Duties in 1795, when the French were retreating from the extremes of the Jacobin period. David points out that Bentham had developed his critique of natural rights in some of his early jurisprudential writings, in particular in his discussion of William Blackstone's *Commentaries on the Laws of England* and the American Declaration of Independence and other constitutional documents issued by the individual American states. David explains that, for Bentham,

> the natural rights theorist confused the foundational logic of legal ordering. Rather than preserve natural freedom, law created security by restricting liberty. Legal rights were among the most important features of this structure of legal security. (308)

The theorist of natural rights also 'typically (and often purposefully) confused a statement of moral preference for a statement of fact' (309). In other words, declarations of rights might sensibly be understood as moral claims, but not as existing rights, unless such rights had been enacted by a legislator and the correspondent duties imposed. In the 1770s, and in *A Fragment on Government* (published in 1776) in particular, Bentham developed a critique of the theory of the original contract, with its attempt to bind the legislator, on the grounds that it was a fiction that deflected attention away from the proper question; namely, the promotion of the general happiness. Bentham also rejected Blackstone's celebration of English rights and liberties as founded on custom that, according to Blackstone, was probably 'introduced by the voluntary consent of the people' (310). For Bentham, any such rights and liberties rested on restrictions on freedom imposed by law and enforced by punishment. In 'Comment on the Commentaries', Bentham had also drawn attention to the anarchic potential of natural rights, a theme that would come to the fore in 'Nonsense upon Stilts'.

Hence David argues that many of the themes developed in 'Nonsense upon Stilts' had been foreshadowed in earlier writings, as indeed had the

absurdity of imposing restrictions on legislatures that Bentham criticised in 'Necessity of an Omnipotent Legislature' of 1791. Yet in his later democratic phase, as David points out, Bentham recognised that there might, in certain situations, be some political advantage in issuing a declaration of rights. Drawing attention to *Constitutional Code* and related writings, in particular 'Securities against Misrule' written for Tripoli, David argues that Bentham supported such declarations insofar as they had a tendency to promote the liberty of the press and critical public opinion, which he had long identified as one of the key components of a free government. Bentham was prepared, for instance, in his writings on parliamentary reform and democratic ascendancy, to make use of traditional ideas of English liberties in order to mobilise critical public opinion, and thereby further his own programme of utilitarian reform. In *Constitutional Code* there would be no entrenched rights and no limited legislature, but the sovereignty would be in the people; David notes that 'the feature [Bentham] singled out as the most important for the realisation of democratic government was [...] critical public opinion'. The main point of the Legislator's Inaugural Declaration was thus not to declare rights, but to counter sinister interest, with the relevant measures enforced by the moral sanction of public opinion. The striking point here, David observes, is that the stated purpose of the French Declaration of Rights – namely, to provide a public statement of the rights and duties of citizens, to remind rulers of the purposes of political institutions and to maintain the constitution for the promotion of the happiness of all – was 'embraced and extended' by Bentham in his own radical constitutional programme (332).

In the course of this essay, David notes:

> The *Constitutional Code*'s elaborate programme for courts and judicial procedure expressly denied the judiciary any power to nullify legislation and any capacity to create a body of judge-made law. (329)

It was this theme that David took up in detail, in what I presume is David's final contribution to Bentham studies, 'Bentham, Courts, and Democracy', which appears in *Bentham on Democracy, Courts, and Codification*, edited by Xiaobo Zhai and myself (2022). David's concern is to understand the place of the courts in Bentham's mature democratic theory. The third proposed volume of *Constitutional Code* was devoted to this subject, with the aim of securing readily available and affordable

adjudication of disputes, but not 'the protection of entrenched rights and the preservation of constitutional norms' for which courts are traditionally given responsibility in theories of liberal constitutionalism. David points out that, compared, for instance, to the French Constitution of 1791, Bentham devoted a significantly greater amount of space to the judiciary establishment. He goes on to ask why did Bentham devote such considerable attention to it in his constitutional design, and what were 'the specifically democratic dimensions of his plan for the courts and [judicial] procedure'?

David also notes that Bentham's various works on law reform, which dominated his output in the last seven or eight years of his life (including *Indications respecting Lord Eldon*, *Justice and Codification Petitions*, *Equity Dispatch Court Proposal* and *Lord Brougham Displayed*) and attacked the abuses and corruption of the existing legal system, should be seen as complementing the alternative plan that he put forward in *Constitutional Code*. Moreover, Bentham was able to draw on a lifetime of thinking about law and judicial procedure, including judicial evidence, and, notes David, in comparison with

> such canonical figures as Rousseau, Sieyès, Paine, Condorcet, Madison, Godwin – [Bentham] is exceptional in coming to constitutional creation following such profound engagement with this particular branch of public authority. (263)

David gives a lucid account of Bentham's proposal for the network of 'publicly funded, single-seated judiciar[ies] utilitising natural procedure' (268) – each with its complementary quasi-jury, and each subject to unrelenting publicity and the accountability associated with it that Bentham proposed in place of the common law, with its obscurities and complexities designed to increase the opportunities for charging fees and hence lining the pockets of judges, court officials and professional lawyers. The main characteristics of Bentham's scheme, David concludes, were 'legal access, legal aid, and equal justice' (273).

And so, asks David, 'what was specifically democratic about this programme?' After all, Bentham had been criticising the existing legal system and had been making similar proposals for its amendment since the 1770s, long before he had committed himself to democracy. Indeed, these earlier writings on the judicial establishment, legal procedure and judicial evidence 'left unexplored precisely how these designs advanced democratic interests or the sovereignty of the people' (275). The point,

for David, is not that Bentham revamped his existing programme for law reform on account of his becoming a political radical, but rather that his radicalism 'led [him] to recognise and emphasise the democratic promise in what was already there' (275). The democratic framework in which the Benthamite courts were to operate would allow the alignment of the interests of judges with those of the community as a whole: in short, each judge would dispense justice, which consisted in making correct decisions according to the existing law, to all who came before him, not just to those rich enough to pay for his services, as was the case under the common law:

> Bentham's *Constitutional Code* and final set of law reform polemics thus supplied a democratic gloss on reforms that predated the embrace of political radicalism. (279)

The reform of the judicial establishment had come to be regarded by Bentham as a means of serving the interest of the community as a whole, that is a democratic interest.

Having recently spent eighteen months working on Bentham's correspondence from July 1828 to his death in June 1832, I can only agree with David's view that law reform, within a democratic context, dominated the final years of Bentham's life. What David reminds us is that Bentham had demanded the radical reform of the law, and in particular the codification not only of the substantive but also of the adjective law, since the beginning of his career. Bentham's understanding of the ills of the English legal system deepened over time, and in particular with his development of the notion of sinister interest. Indeed, it is worth remembering that the development of the notion of sinister interest, the key feature of his democratic theory, emerged from his discussion of the complexities of the law of judicial procedure in 1804–6 or thereabouts. David has therefore given us a prompt to take more seriously the relationship between Bentham's views on law and on political reform. Indeed, it might be that a large part of Bentham's commitment to democracy arose from the fact that he saw it as the only means of securing law reform.

The elderly Bentham told John Bowring that, 'I have done my part for Law Reform. The subject is more likely to be taken up when I am dead, and I shall reap the profit of it, even in the way of reputation' (Bowring, x. 582–3). Well, David has done his part for Bentham studies and I salute him as a great scholar, colleague and friend.

1. David Lieberman's major writings on Bentham

- 'Bentham's Digest', *The Bentham Newsletter* 9 (1985), 7–20.
- 'From Bentham to Benthamism', *The Historical Journal* 28 (1985), 199–224.
- *The Province of Legislation Determined: Legal Theory in Eighteenth-century Britain* (Cambridge University Press, 1989; paperback edition, 2002).
- 'Jeremy Bentham: Biography and Intellectual Biography', *History of Political Thought* 20 (1999), 187–204; and in Janet Coleman (ed.), *Scholastics, Enlightenments and Philosophic Radicals* (Imprint Academic, 1999).
- 'Economy and Polity in Bentham's Science of Legislation', in Stefan Collini, Richard Whatmore and Brian Young (eds), *Economy, Polity, and Society* (Cambridge University Press, 2000) (reprinted in Frederick Rosen (ed.), *Jeremy Bentham* (International Library of Essays in the History of Social and Political Thought) (Ashgate, 2007)).
- 'Bentham's Democracy', *Oxford Journal of Legal Studies* 28 (2008), 605–26.
- 'Bentham on Codification', in S. Engelmann (ed.), *Jeremy Bentham Selected Writings* (Yale University Press, 2011).
- 'Bentham's Jurisprudence and Democratic Theory: An Alternative to Hart's Approach', in Xiaobo Zhai and Michael Quinn (eds), *Bentham's Theory of Law and Public Opinion* (Cambridge University Press, 2014).
- 'Bentham's Limits and the Theory of Legislation', in Guillaume Tusseau (ed.), *Jeremy Bentham's Of the Limits of the Penal Branch of Jurisprudence* (Routledge, 2014).
- 'Declaring Rights: Bentham and the Rights of Man', in Ian Hunter and Richard Whatmore (eds), *Philosophy, Rights and Natural Law* (Edinburgh University Press, 2018).
- 'Bentham, Courts, and Democracy', in Philip Schofield and Xiaobo Zhai (eds), *Bentham on Democracy, Courts, and Codification* (Cambridge University Press, 2022).

2. Other major writings

- 'The Legal Needs of a Commercial Society: the Jurisprudence of Lord Kames', in Istvan Hont and Michael Ignatieff (eds), *Wealth*

and Virtue: The Shaping of Political Economy in the Scottish Enlightenment (Cambridge University Press, 1983).

- 'Blackstone's Science of Legislation', *Journal of British Studies* 27 (1988), 117–49, reprinted in *Law and Justice: The Christian Law Review* 98/99 and 100/101 (The Edmund Plowden Trust) (1988 and 1989).
- 'Property, Commerce, and the Common Law', in John Brewer and Susan Staves (eds), *Early Modern Conceptions of Property* (Routledge, 1995).
- 'Contract before "Freedom of Contract"', in H. Scheiber (ed.), *The State and Freedom of Contract* (Stanford University Press, 1998).
- 'Codification, Consolidation, and Parliamentary Statute', in J. Brewer and E. Hellmuth (eds), *Rethinking Leviathan: The Eighteenth-Century State in Britain and Germany* (Oxford University Press, 1999).
- 'Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence', in N. Landau (ed.), *Law, Crime and English Society, 1660–1840* (Cambridge University Press, 2002).
- 'Law/Custom/Tradition', in M. Phillips and G.J. Schochet (eds), *Questions of Tradition* (University of Toronto Press, 2004).
- 'Legislation in a Common Law Context', *Zeitschrift für Neuere Rechtsgerschichte* 27 (2005), 107–23.
- 'Adam Smith on Justice, Rights, Law', in K. Haakonssen (ed.), *Cambridge Companion to Adam Smith* (Cambridge Univesity Press, 2006).
- 'The Mixed Constitution and the Common Law', in Mark Goldie and Robert Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge University Press, 2006).
- 'Professing Law in the Shadow of the *Commentaries*', in A. Page and W. Prest (eds), *Blackstone and His Critics* (Hart, 2018).

3. David Lieberman's main academic appointments

1978–82	Research Fellow, St Catharine's College, Cambridge
1982–3	Fellow and Director of Studies in History, Christ's College, Cambridge
1984–9	Acting Professor, UC Berkeley School of Law
1989–2000	Professor, Berkeley Law
2000–13	Jefferson E. Peyser Professor of Law, Berkeley Law
2013–22	James W. and Isabel Coffroth Professor of Jurisprudence, Berkeley Law