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## EDITORIAL

It is intended to publish in a forthcoming issue of the *Newsletter* a bibliography of works on Bentham in Western European languages other than English. Any contributions to such a bibliography would be most gratefully received.

Meanwhile, Douglas Long is in the final stages of preparing for publication a chronological list of the contents of the UC Bentham manuscript collection, which is based on the 1962 edition of A.T. Milne's catalogue. Dr. Long follows the dating given there, but will present the correspondence separately and in a more detailed form. If anyone is interested in purchasing a copy of what we hope will be a most useful research tool, they should contact the Bentham Committee.

It will be of interest to many to learn that the autoicon is to undergo a 'spring clean'. In the coming months Bentham's clothes will be sent for refurbishing to the textile conservation department at Hampton Court Palace; his glass box will be cleaned and spot-lights will be installed. New postcards are to be issued to celebrate this event.

## THE DIMENSION OF HISTORY IN BENTHAM'S THEORY OF LAW

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Bentham was indifferent to history. So reads the scholarly literature. Students of Bentham such as Sir Henry Maine, Leslie Stephen and John Plamenatz all agree that Bentham's utilitarianism was divorced from history. Bentham himself provides direct evidence of this assessment. To be sure, he said, legal reform requires the use of history, but 'it is from the folly not from the wisdom of our ancestors that we have so much to learn'.<sup>1</sup>

Against this consensus, this paper directs our attention to Bentham's use of notions of time and history *against* history as conventionally understood. Three arguments are offered. The first is that Bentham's formal jurisprudence and proposals for legal reform incorporate elements of 'natural' or hypothetical history - an explanation of the past, present and future - in opposition to the uses of the past as authoritative. The second is that Bentham's schemes of indirect legislation and political-religious reforms presume this counter theory of history and seek to make it authoritative in the future. The last argument is that liberal interpreters of Bentham utilize elements of this same counter theory of history both in criticizing and in defending Bentham's legal theory. An examination of these three assertions require that we ignore, for the moment, Bentham's own repeated contrasts between the use of history made by his opponents with his own reliance on an a-historical 'principle of general utility [as] the justificative reason' for law.<sup>2</sup> Instead, we must first consider how Bentham employs a counter theory of political and legal history and then assess the ways in which this employment might intrude the dimensions of time and history into utilitarianism.

Bentham did not invent natural or hypothetical history. Its structure and basic characteristics were introduced in Locke's *Second Treatise* but were most fully developed in Hume's *Treatise of Human Nature*, the book Bentham credits with 'lifting the scales from his eyes' to behold utility. The main postulates of this history are familiar. According to Locke, systematic conflicts among men and thus the need for justice arise with the invention of money, the consequent rise of ambition and luxury and those 'necessary arts providing for....safety, ease and plenty'. Locke's pre- and post-monetary states of nature are capsule historical explanations of the origins of civil law and its increasing importance for social order. Hume restates this development in more systematic terms: justice is invented over time, beginning with the transformation of physical possession into property rights, continuing with the creation of legal modes of property transfers, and culminating in the invention of contractual exchange (promises) binding men to future performance. For Hume and Locke, money, market scarcity and inequality create in turn the need for magistrates with the power of adjudication and physical punishment. Hume's contemporary, Adam Ferguson, restates this process in symbolic terms: 'He who first said, "I will appropriate this field; I will leave it to my heirs"', unwittingly laid the 'foundation of civil laws and political establishments'.<sup>3</sup>

Running parallel to this natural history of civil history and law is a critical history of the autonomous rise of political power. Ferguson portrays a second and counteractor to symbolize political history: 'He who first ranged himself under a leader....[set] the example of permanent

subordination' wherein 'the rapacious were to seize [men's] possessions, and the arrogant to lay claim to their service'. Locke and Hume tell a more complex but parallel story of paternal authority transforming itself into political despotism.<sup>4</sup> In contrast to the utilities giving rise to civil law, the power of despotic kings and their allies is based on entirely separate motives flowing from religious belief, custom, memory of illustrious ancestors and sundry history myths, all of which serve to legitimate political power and to subvert justice and utility.

In his *Book of Fallacies*, Bentham draws the appropriate lesson from this counter history. Men create legitimating historical myths by becoming 'dupes of an illusion occasioned by the very nature of an extensive retrospect'. Illusion results by compressing the 'splendid instances of probity and self-devotion' of political rulers into an authoritative whole. So long as myth parading as authoritative history commands the political loyalties of men, the imperatives of civil society in natural history will fall on deaf ears. The irony of this conflict is that precisely when society requires coercive power to enforce contracts and punish criminals, the use of that power serves other and contrary ends. Natural history teaches men the values of utility; historical myths contravene that lesson. Locke's complaint anticipates Bentham's own: 'The knowledge of morality....makes but a slow progress and little advance in the world', because 'designing leaders, as well as the following herd, find it not to their purpose to employ much of their meditations this way'.<sup>5</sup>

Bentham, of course, adopts neither Locke's natural rights nor his theological solution to the problem of despotism. He does, however, appropriate one feature, its *prophetic* qualities. While hypothetical history cannot compete with the myths perpetrated by rulers in providing men with an 'extensive retrospect', it can promise an extensive prospect of man's future. Essential to this promise is the divorce of civil law as the ligaments of civil society from the mythic-historical sources of political power acting as a barrier to morality and justice. In Bentham's legal theory this divorce is the dominant intention and attests to its grounding in natural history.

#### I. Analytic Jurisprudence and Legal Reform as Natural History

David Hume's theory of justice demonstrates that civil law, the rules governing ownership and exchange in civil society, has a coherent history powered by a consistent psychology. In civil society, the values men contend for are measurable, material and external; the contenders are private parties each claiming rights to objects of value. The 'punishments' of civil law are performance, reparation or compensation. To be sure the coercive sword of physical punishment must stand behind the civil law but its use is rarely required. As a linear story of progress, natural history is the increasing refinement of civil law and its attendant political requirements.

In contrast to civil law, the criminal law has always been the political engine of despotism. Criminal law loses all contact with the rational ends of civil law because its primary use in the past has been to protect the ideological basis of sovereign power rather than to enforce the civil law. This purpose results in the use of physical punishments either for actions innocent in themselves (no injury to others results) or as a mark of collective revenge added to what is properly a civil case. Even more dangerous is the direct political use of criminal law: laws of sedition, treason and blasphemy, for example, strike at the heart of civil law norms both directly, in attacking the property and safety of the

ruler's enemies or indirectly, in supporting a regime which redistributes material goods to the ruler's friends.<sup>6</sup> The use of criminal law for all of these purposes can turn the ruler himself into a criminal; Locke's leonine 'beast of prey' who is more to be feared than private criminals - mere 'polecats' and 'foxes'. The history of 'designing leaders' supported by the 'following herd' is manifest in criminal law.

The victory of the imperatives of natural history requires the separation of the two uses of criminal law, the one to serve the rational ends of civil law and the other to protect whatever historical values support the power of rulers. The reform of law must begin with an analytic jurisprudence which isolates civil from criminal law and then distinguishes the justifiable uses of political power and criminal law. In *Theory of Legislation and Of Laws in General*, Bentham's overriding intention is to distinguish between civil law and punishments and criminal law and punishments. In civil actions, the appropriate punishment is some form of compensation. Upon inspection, however, this punishment is not punitive at all: the loser in a civil suit pays exactly what he owes and what the winner deserves. For the winner to ask more satisfaction 'consecrated to the sole object of vengeance, would be pure evil'. From the standpoint of punishment, civil law is analytically isolated from all elements of public passion and even from the requirement that the *person* of the offender be judged and punished. This isolation flows logically from the operating assumption in civil cases that someone always has a right to every object of material value and that, until the court decides which party has 'a right to this right', no wrong has been committed. Indeed, it is only *after* the judgment of the court that it is known whether an offence has been committed at all. Thus, the issue of personal guilt or culpability - that fictitious entity known as 'criminal consciousness' - should not intrude in civil law at all, for, at the same instant a decision is reached regarding culpability, the wrong literally disappears in the compensation, 'becoming as if it had never been'.<sup>7</sup>

The import of this analysis becomes clear when contrasted to criminal law and its operating assumptions. In criminal law, the offence is presumed in the act itself. The actor (whoever he is) is presumed culpable - he intended the wrong by his very action and his person deserves punishment by the public.<sup>8</sup> The ascription of intention or 'criminal consciousness', however, opens the door to passions of vengeance and therefore to the entire panoply of historical beliefs which legitimate political sovereignty. Bentham's account of a single theft clearly reveals this process:

I compare all the pleasure, or, in other words, all the profit, which result to the author of the act, with all the evil, or the loss, which results to the party injured. I see at once, that the evil of the first order surpasses the good of the first order. But I do not stop there. The action under consideration produces throughout society danger and alarm. The evil which at first was only individual spreads everywhere, under the form of fear....reaches a thousand - ten thousand - all. This disproportion, already prodigious, appears infinite....and considering that if the act in question is not suppressed, there will result from it a universal and durable discouragement, a cessation of labour, and at last, the dissolution of society.<sup>9</sup>

It requires little imagination to conclude that the punishments of torture and death are miniscule compared to the aggregate pains suffered by all other men with the dissolution of society. The purpose of criminal law is indeed to prevent the dissolution of society, but men hold radically different beliefs regarding both the bonds of and the threats to civil society. Any religious, moral or political beliefs which are thought essential to society can provide pretexts for all of vengeance on those who challenge them.

To escape the dangerous logic of criminal law, Bentham proposes instead to remove entire categories of crimes out of the reach of law and to subsume the remaining criminal law under the passionless rubric of civil law. The purposes of Bentham's accounting, therefore, are not to demonstrate the need for draconian criminal law with its attendant ideologies, but to show, instead, that this entire logic must be avoided. Notwithstanding the difficulty of these tasks, Bentham acquits them through three strategies. The first is purely analytic, beginning with the proposition that 'whatever right is capable of being determined upon in a penal action is equally capable of being determined upon in a civil action'.<sup>10</sup> This proposition stipulates that no act can qualify as a crime unless there are determinate victims who suffer measurable monetary damage or its equivalent. All alleged crimes which yield no such injury must be stricken from the books. Analytically speaking, then, any act within the reach of criminal law could be placed under the rubric of a simple civil injury, to be judged and punished apart from the intentions or character of the defendant. And when judged solely as a civil offence, there is 'no need of annexing any extraordinary species of degree of punishment'. All crimes thus transformed into civil injuries can be resolved by 'pecuniary compensation to those [directly] injured'. In all cases, therefore, where 'compensation is certain' - even though the defendant manifestly intended harm - civil procedures should prevail over criminal procedures and indemnity should prevail over physical punishment. Offences committed within pre-established contractual relationships - fraud and embezzlement are examples - fall within this category. Offences of this type require 'very specific occasions and pretexts' to occur at all and, once discovered, are quickly remedied. In these cases, it is only because of the 'arbitrary principle of sympathy and antipathy' that the injured parties bring penal actions. They seek unjustified revenge out of a 'natural partiality....in their own favour and... [a] natural propensity to be angry'.<sup>11</sup>

Bentham's second strategy, legal reform, parallels his analytic solution. Having urged that many crimes be stricken from the books entirely and others transferred into the civil code, Bentham then proposes the establishment of public indemnification for victims of crimes which remain. The money required for this compensation can be obtained from the property or labour of the 'authors of the evil, or, in their default, upon the public'.<sup>12</sup> Indemnification serves as a surrogate for ordinary civil remedies by preventing the evil of the offence to spread to society at large. Societal danger and alarm will cease and, with them, the calls for vengeance and physical punishment - calls which only dangerous forms of political power can heed.

In answer to the obvious objection that the reduction of the scope and severity of punishment for crime will also reduce deterrents to the commission of crime, Bentham proposes "indirect legislation" to curb both motives and opportunities for crime. Crime prevention, then, is the third and final part of his strategy, constituting the most innovative and extensive part of Bentham's programme. Some of his proposals such as

vegetable gardening, the encouragement of non-alcoholic beverages, and diverting public entertainments are as amusing and innocuous, in retrospect, as are his plans for theatrical trials and symbolic punishments. More unsettling are his schemes for registration/identification, his proposals for gathering evidence in criminal trials, his hostility to protections against self-incrimination and his reliance on confessions and informers.<sup>13</sup> Bentham's most controversial crime prevention proposal and one which was a lifelong project, concerns prisons and charity houses. Both of these institutions are designed to confine and reform men - to prevent crime - but not to punish the criminal. It is this part of his indirect legislation which clearly reveals his intention to do away entirely with the need for criminal law and thus assure the victory of civil law and the imperatives of natural history.

When viewed in reverse order, Bentham's analytic jurisprudence, his proposals for legal reform and his schemes of indirect legislation point to a single end: to rid political life of public passion expressed in the criminal law and political loyalties. Crime prevention obviates the need for most criminal punishments. Panopticon prisons substitute rehabilitation for punishment and are complemented by indemnification schemes to dampen collective motives for vengeance. Were these reforms effected, the law could be modelled on a rational basis, with no need for the fiction of 'criminal consciousness'. Freed from superstition, custom and fictitious entities, we are spared the theoretically impossible task of measuring the feelings of men in order to apportion punishments. Criminal law - and the history of political power which it symbolizes and codifies - will no longer be required. In its place will be an internally coherent legal code in which every private legal right is constructed from correlative legal duties. Rational codification of law, in turn, has the effect of radically transforming the nature of political power. Without criminal law and punishments, public power is stripped of passion as well as the myths and gods which justify its exercise.

Natural history is both critical and prophetic. Viewing Bentham's three strategies to isolate and destroy criminal law merely as critical exercises permits us to see only the timeless standard of utility. Viewing these same strategies as prophetic and anticipatory permits us to see an historical dimension in utilitarianism mandating the destruction of the historical basis of political power for the prophecy to be fulfilled. Bentham most strongly suggests this historical dimension when he states that law in civilized countries progresses through three 'ages'. The first age of law is vengeance, requiring extensive criminal law and religious-mythological forms of political legitimacy. The second age is one of impartial punishments. The norm of impartiality, however, is soon discovered to be incompatible *per se* with criminal law, physical punishments and its supporting ideologies. This incompatibility sets the stage for the last age of law, 'The Age of Prevention'.<sup>14</sup>

Bentham framed his theory of law to anticipate this third and highest stage of law. In his formal jurisprudence, outlined most fully in *Of Laws in General*, the word 'criminal' literally disappears from rational legal discourse; it cannot characterize, says Bentham, 'any branch of law subsisting in contradistinction to that which is called civil'.<sup>15</sup> All legal rights and duties and all definitions of offences are contained in the civil code. His most influential and widely read book on legal reform, compiled from his writing by Etienne Dumont under the title *Theory of Legislation*, is equally anticipatory. The work does include a volume on the penal code, but more than one-fourth of the discussion is devoted to indemnification schemes, almost one-half is devoted to 'indirect means of



preventing offences', and less than one-eighth addresses punishment. In that short section, Bentham's reticence is astonishing: he is against statutes of limitations, shows where punishments ought not to be applied, speaks of mistaken punishments and the misuse of the pardoning power and, finally, proposes a system of securities for good behaviour.<sup>16</sup> The answer to the obvious question of why Bentham even bothers to address the topic of a penal code - by definition a catalogue of punishments beyond compensation - and then refuses to frame one, can only be found by examining more closely his prison and charity house proposals. Strictly speaking, Bentham's prison and charity house reforms replace the need for a penal code. Their establishment would at once prove that the 'age of prevention' has arrived and that the age of punishment for crime has passed.

In wider view, Bentham's prisons and charity houses institutionalize the victory of natural history - the logic of civil society - over political-mythological history and the political power which it serves. These institutions confine men, but Bentham claims that they do not *punish* them. Proof of this claim is that within the prison and charity house walls, the processes of civil society prevail. Each inhabitant, whether an indigent who volunteered, a child remanded by the state, a suspect awaiting trial or an offender committed after trial, is treated essentially the same way. Each is provided subsistence and permitted to work beyond that level. The distinction between potential offenders, proven offenders and simply the voluntary poor is blurred, for each is subjected to a regime teaching the rewards of systematic labour within the framework of voluntary exchange.<sup>17</sup> The punitive dimension of these institutions is further eroded when one compares the condition of their inhabitants to that of ordinary members of civil society. The legal duties of both classes of people are voluntarily assumed through contractual exchange within a framework of coercion. Bentham's response to the claim that many of the former did not choose to enter this particular framework of coercion is that neither did the latter; political society is, like the prison, a framework of coercion, albeit on a larger scale. From the standpoint of utility, rationally constructed prisons and civil societies are both net producers of happiness; within their respective walls, each inhabitant willingly labours in its production, for each contractual bargain marginally increases the utilities of both parties. The more serious claim that citizens have political freedom denied those in prisons and charity houses raises a more difficult issue. This issue recalls the Lockean image of 'designing rulers' and 'following herds', namely, the conditions under which the exercise of political choice can subvert both the processes of natural history and the norms of utility in civil law.

## II. Jurisprudence, Politics and Sacred History

Thus far, Bentham's jurisprudence, legal reforms and indirect legislation have been surveyed to reveal the historical dimensions involved in the destruction of criminal law and the emergence of civil law as the sole repository of legal rights and duties. The requirements of such a legal order also would seem to require an equally utilitarian basis of political power. A major deduction from Bentham's legal writings is that politics should be subservient to law and law, in turn, to the psychological engine of natural history, man's incessant desire for the means of self-preservation. This deduction rests on the controlling premise of individual utility stipulating the measure of moral good as aggregate utility guaranteed by civil law enforced by the state. The legal result of this chain of logic is the destruction of criminal law and physical punishments and, with it, the destruction of any separate *legal* obligation either to

the public at large or to its sovereign representative. This same conclusion can be expressed in the more technical vocabulary of Bentham's jurisprudence. The civil code defines the entire scope of legal rights and duties. Each and every legal right and duty are relative in that every individual right is constituted by the assumption of specific duties by other individuals. Political sovereignty and political obligation, in contrast, stand completely outside this system of legal rights and duties. Political duties, like the duties of criminal law, are not relative, but absolute, whether one is in prison or in civil society. John Austin carried Bentham's jurisprudence to its obvious political conclusion: by virtue of its sheer power, 'the state has a right to all things within its territory' but 'strictly speaking, it has no legal right to any thing, or is not the legal owner or proprietor of any thing'. The logic of Bentham's jurisprudence is now complete. Within the framework of sovereign compulsion, all strictly legal obligations are purely voluntary. Again in the precise language of Austin: 'We cannot be [legally] obliged to that which depends not upon our desires, or which we cannot fulfil by desiring or wishing to desire it'.<sup>18</sup> Panopticons and the civil law have struck the word criminal from the code of law. The question which now presents itself is the relationship between criminal law and political obligation: if the two are identical, does the disappearance of criminal law mandate the disappearance of political rights and obligations? Can political obligation, like the law, be severed from its ties to mythological history or does this history, now purged from law, reappear again as the panoply of whatever beliefs and values happen to buttress sovereignty in any particular regime? This question is critical because there is no guarantee that the prevailing moral values and ethical maxims supporting sovereignty will correspond to the ends of civil law.<sup>19</sup> If they do not correspond, the victory of natural history would be a pyrrhic one. We will have come full circle: the logic of law vindicates natural history; the necessity of political power holds the imperatives of natural history hostage to the historical values and beliefs which enforce law.

Bentham suggests a variety of answers to this dilemma. His earliest answer is that purging the law alone of the need for historical and irrational elements is enough. Whatever may be the beliefs supportive of sovereignty, once public power is used to enforce this law, the benefits will be so apparent to all that neither the public nor the sovereign would conceive of acting otherwise. Whatever its historical foundations, any modern government is capable of legislating an enlightened civil and penal code and every modern society would benefit from their enforcement. Who would resist such an offer? This earliest answer by Bentham presumes that the primary danger is anarchy which can be avoided by insuring strong and unchallengeable sovereignty, even if that means protecting whatever historical and religious beliefs anchor it. In *Anarchical Fallacies*, for example, Bentham asserts that government rests on obedience, not consent. In response to French revolutionary claims for complete freedom of beliefs 'even in matters of religion', Bentham holds that the natural rights doctrines on which these claims rest are dangerous fictions. 'All governments have been gradually established by habit, after having been formed by force'; indeed, he adds, the entire question of 'how governments are formed' is finally irrelevant.

Is it the less proper....that the happiness of society should be the one object kept in view by the members of government?  
 Is it the less the interest of men to be happy...less the moral duty of the government to make them so...?<sup>20</sup>

With the failure of Bentham's effort to make the laws of England mirror his jurisprudence, however, the issue of the basis of political power becomes highly relevant. Bentham's later answer to the problem of rational law and historically-based politics is radical political reform involving the destruction of opinions and beliefs inhibiting that reform. Bentham's later democratic constitutional reforms - universal suffrage, annual elections, single administrators and widespread publicity<sup>21</sup> - seek to destroy loyalty to the norms of historically justified institutions and reward the expression of historically unmediated individual interests. Even more to the point is his recognition that religion constitutes the core of historical modes of legitimacy standing in the way of rational legal reform. No significant constitutional reforms can be achieved without the destruction of religion, both as a dangerous form of history and as powerful ecclesiastical institutions. It is here that the conflict between law and political power is most marked. Religious belief, political power and criminal law are indissolubly linked; the chain can be broken only with the destruction of religion.

At the most obvious level, religion in the form of established churches is always 'a state-engine' legitimating 'depredation, corruption, oppression, hypocrisy'.<sup>22</sup> This recognition of the inherent conflict between utility and church establishments is neither new to Bentham nor necessarily hostile to all forms of religious belief. Hobbes and Locke, for example, draw on the biblical theology of Reformed Protestantism to construct a critical history of the Christian Church. Both writers reject the institutional history of Christianity, but substitute in its place a reading of sacred history which they believe vindicates the teachings of natural history. For Hobbes and Locke, an originally pure and inward faith was transmuted by designing priests and kings into a rule-dominated and corrupt theology of 'works' - 'a kingdom of darkness' prostrating men's reason and preventing it from constituting the definitive standard of morality and law. In this earlier liberal tradition, periodized and apocalyptic sacred history converge with the imperatives of natural history: the emerging 'faith' of the radical Reformation powers the destruction of corrupt political-religious establishments, making possible a reason-based standard of 'works' to which all Christians are religiously obligated to follow. For Locke, especially, the restoration of pure biblical Christianity re-enacts the meaning of Christ's first appearance that breaks the power of paternal/despotic rule. The Gospel affirms the logic of natural history. Significantly, for both Hobbes and Locke, prophetic religion is required not to define the civil law, but to justify the vengeance and punishments of the criminal law and the political power which protects it.<sup>23</sup>

David Hume's essay *Natural History of Religion* posits a secular and psychological connection between the history of religious belief and the emergence of utility. Men's early fear of the unknown leads to supernatural explanations of events symbolized by paganism and theocratic politics. Over time, paganism yields to monotheism, with intervening saints. Finally, through a process of abstraction, more civilized societies come to conceive of one unmediated God as a dispenser of heavenly rewards and punishments. Causing and running parallel to these changes in religious belief are man's increasing mastery over nature and his increasing understanding of the rational means of attaining happiness in this life. Hume's conclusion for the relationship of politics and law, however, is a disquieting one. Because all religion is ultimately based on fears of what can never be known - the prospects for happiness after death - no religious belief, however purified will be unambiguously supportive of utility. Reason teaches that the true purpose of religion is to

enforce 'motives of morality and justice'; fears of an avenging but unknowable God establish religion as a 'separate principle' where it inevitably corrupts politics by serving as 'a cover to faction and ambition'. Given the choice, men will prefer to derive their highest obligations from the tradition of remembered stories rather than from timeless philosophy.<sup>24</sup>

Hobbes, Locke and Hume hope that religious toleration, a multitude of contending sects, or simply latitudinarian theologies may blunt the harmful political effects of religious beliefs without wholly eradicating them. For Bentham, however, this is not sufficient. As long as any belief in supernatural rewards and punishments constitutes active springs of human actions, the norms of civil law and the rational pursuit of self-interest which the law presumes will remain in jeopardy. While toleration, institutional pluralism or diluted theology may temporarily check the political threats to rational law, the fact remains that religion subverts the motives required by this law. So long as religious belief affects men's actions - even independently of the problem of established churches - political coercion must supply the deficiency of proper motives. Until men are freed from religious beliefs, the enlightened state will be in the paradoxical position of 'forcing men to be happy' and will therefore refute a purely utilitarian justification for political obligation.

This paradox is addressed in Bentham's essay *The Influence of Natural Religion on the Temporal Happiness of Mankind*. Bentham's essay - despite its title and early disclaimers - is addressed to the problem of revealed religion, i.e., religion as history and prophecy. Leslie Stephen's judgment, 'it is superabundantly obvious that the word "natural" is superfluous', is confirmed in Bentham's brief against 'natural' religion, namely, its promise of 'posthumous Pleasures and Pain' and its tendency to produce an organized clergy. He concludes that the ultimate conflict between the historical basis of political power and the imperatives of natural history can only be resolved with the destruction of religious belief. Religion is the last refuge for the historical legitimation of criminal law and arbitrary political power. The inducements of heaven and hell provide 'no rule of guidance whatever' for the pursuit of earthly happiness and, in fact, suggest 'rules of action very pernicious to' its attainment. Such is the nature of man that fears of future punishment clearly outweigh the hopes of future reward, yielding a net loss of happiness computed as the 'disquietude occasioned by the prospect of death'. Moreover, this 'prospect of other [wordly] pains affects our conduct' in this life by preventing us from learning and obeying the rules which experience alone can teach for achieving earthly happiness.<sup>25</sup>

The individual effects of religious belief on temporal happiness are multiplied through collective religious opinions. Shared belief inevitably becomes institutionalized in 'a particular class of persons incurably opposed to the interests of humanity'. Priests and kings, the products of this belief, 'enslave and lay prostrate the whole community', because they are given 'a general power of attorney....of predicting future events' and therefore a power to make rules and allot punishments and rewards. The result is despotism. Offences are multiplied, punishments and pardons are arbitrarily granted and the community is 'degraded to the level of slaves'. The entire edifice of power destructive of the general happiness is constructed on religion. Religion as stories of the past and prophecies of the future, 'thickly and authoritatively spread abroad' are 'a preparation and a medium for the effective dominion of this class [of] rulers'.<sup>26</sup>

A comparison of Bentham's critique of religion to Hobbes' *Leviathan*

further clarifies the historical dimension of Bentham's theory of law. The imperatives of civil law in natural history seem to culminate in the legal relationships outlined in the first half of *Leviathan*: politics is *de facto* power obeyed by men who fear violence and death. The only 'god' in this kingdom is that known by reason and experience, namely, a god of nature who is in reality the causal mechanisms of nature itself. This god and these mechanisms have no supernatural ends and no ultimate purposes. Hobbes' assertion that 'law is the only reason we have' is achieved in the first half of *Leviathan*. Unlike Bentham, however, Hobbes did not rely on reason and law as the basis of political obligation. The second half of *Leviathan* reintroduced sacred history and biblical revelation so summarily removed from the first half. For Hobbes, political power is expressed through criminal law; both the power and the 'right' of the sovereign to punish physically - even to kill - require religious belief. 'No commonwealth can stand', says Hobbes, unless the sovereign is believed to have 'a power of giving greater rewards than life; and of inflicting greater punishments, than Death'.<sup>27</sup> The timeless reason of law requires a politics of historical faith.

Bentham's attempt to rid society of crime and to deny to political power the right to punish criminals radically changes the relationship between politics and law established by Hobbes. Bentham's attempt is only conceivable if the religious and historical basis of politics is destroyed and the nature of political obligation is brought within the confines of legal obligation. The timeless logic of utility predicted by natural history must penetrate into man's innermost motives in order to establish political values supportive of civil law. In contrast to Bentham, Hobbes confined the limits of reason to civil law defined as contractual exchange;<sup>28</sup> religious motives and supernatural belief must rule both the deepest motives of men and the ultimate grounds of their political loyalty. In extending the reach of reason to man and politics, Bentham is compelled to renounce the 'history' of the second half of *Leviathan* as well as the psychological postulate on which this history rests. This postulate, from the first half of *Leviathan*, states that man's concern for future happiness creates anxiety - the 'seed of religion' and thus, the need of man to view his life as an historical whole, with a past, present and future. Religious belief answers to this psychological need in the form of prophetic history - the story of God's periodic intervention into natural time signalling the fact of final judgment and the hope of personal redemption. While the content and moral meaning of this prophecy might vary, the psychological basis of its need remains. As Hobbes puts it, the seeds of religion 'can never be so abolished out of human nature, but that new Religions may again be made to spring out of them'.<sup>29</sup> In the *Leviathan*, the legal necessities dictated by reason are dependent upon the political freedom to institute them. Motive to exercise this freedom requires faith in biblical prophecy.

Bentham's jurisprudence is constructed on the assumption that law should be based on the universal motives of man's desire for the means of self-preservation. Bentham's legal reforms are grounded in a theory of natural history postulating a future which closely resembles the condition of a state of nature. If future men resemble men in the state of nature - without religion, memory, custom and tradition - future society can be understood and organized on the basis of a timeless and universal science of politics. Lacking any binding connections except self-interest and the fear of death, such men require pure compulsion to keep them to their duties. Only within this framework of coercion can the civil law stand as guarantor of individual freedom and aggregate utility. Bentham's prisons and charity houses stand as mute monuments to the victory of natural history.

Bentham's liberal predecessors stopped far short of this logic. The sphere of civil law and individual utility might constitute, in Locke's metaphor, a small patch of light in the surrounding darkness, but the need for criminal law and the reliance on supernatural religious belief mandated a politics forever shrouded in half-light and darkness.<sup>30</sup> At best, the light of reason could only illuminate the appropriate limits on politics, the proper restraints on the reach of religion, and the constraints on the use of criminal sanctions. Reason can neither illuminate nor define the meaning of political obligation and the sources of political freedom.

Bentham's attempt to extend the clearing to embrace politics and religion - indeed the entire scope of historical culture - not only constitutes a significant departure from his predecessors, but elicits a series of critical responses from those who come after him. The variety of these responses ranges from resuscitating the limits of reason outlined in Hobbes, Locke and Hume, to formulating new kinds of limits to the imperatives of utility and, finally, to interpreting Bentham's programme in such a way as to transform it from a vindication of reason into simply another stage of man's history, a way-station on the road to a more noble future. All of these critical responses represent attempts to restate the truths of utility in historical terms. An examination of these responses to Bentham by 19th-century liberals shows us the dimension of history they saw in his jurisprudence even as they suggest to us that Bentham's attempt to attain a timelessly rational world of law might entail a loss of older forms of history serving as repositories of our political, mental and moral freedom.

### III. History Redux: The Liberal Critics of Bentham

John Stuart Mill, like other critics of Bentham in the 19th century, directs his attention to Bentham's moral theory and not specifically to his jurisprudence. This focus results in part because Bentham's jurisprudential writings were not available to them in published form and in part because John Austin's *Lectures on Jurisprudence* provided a more systematic account. Nevertheless, writers such as Sir Henry Maine and James Fitzjames and Leslie Stephen, share with Mill an immediate recognition of the close relationship between analytic jurisprudence and a utilitarian theory of morals and politics. As stated by Mill, the task of explicating 'the logic of law' is 'theoretically distinct' but 'practically indispensable' to Bentham's larger programme of justifying the 'morality or expediency' of law. It is important to underline this perspective because it clarifies both the direction and content of liberal 19th-century responses to Bentham.

All of these critics attest to the simple truth of Austin's (Bentham's) jurisprudence. The price they exact for this approval, however, is that we must view jurisprudence as strictly ahistorical. The application of 'logic to law', said Mill, yields a form of knowledge independent of 'the accidental history of any [particular legal] system'. This scientific understanding of law is superior to mere historical analysis because it 'goes deeper down to the roots of law' than does an understanding dependent upon features 'peculiar to one system'. A freedom from historical contingency gives to this jurisprudence truths grounded in necessity. The purpose of analytic jurisprudence, in Mill's words, is

that of clearing up and defining the notions which the human mind is compelled to form, and the distinctions which it is necessitated to make, by the mere existence

of a body of law of any kind [in] a civilized and complicated state of society.<sup>31</sup>

Mill's historical qualification - civilized and complicated states of society - does, however, introduce some significant problems. Sir Henry Maine states one of them:

But if the Analytic Jurists failed to see a great deal which can only be explained by the help of history, they saw a great deal which even in our day is imperfectly seen by those who, so to speak, let themselves drift with history. Sovereignty and Law, regarded as facts, had only gradually assumed a shape in which they answered to a conception of them formed by Hobbes, Bentham and Austin, but the correspondence really did exist by their [*sic*] time and was tending constantly to become more perfect.<sup>32</sup>

Leslie Stephen puts the dependence of timeless legal truth on politics and history in even more critical terms. All law rests on coercion, and coercion, on political authority. This authority, in turn, is sustained by 'the entire mass of...historical antecedents...the whole enormous aggregate of opinions, sentiments, beliefs, superstitions, and prejudices, of ideas of all kinds'. Even though restricted to the 'facts' of modern law, analytic jurisprudence cannot escape this dependence:

The law itself, in fact, ultimately rests upon 'custom', upon the whole systems of instincts, beliefs, and passions which induce a people to obey government, and are, so to speak, the substance<sup>33</sup> out of which loyalty and respect for the law is framed.

Each of these critics begins his task by echoing a dilemma raised earlier by Locke and expressed in Bentham's treatment of criminal law and political power discussed above. Locke's statement of the dilemma is found in the *Second Treatise*. The general in war, he says, cannot 'dispose of one farthing of [a] soldier's estate or seize one jot of his goods', and yet, as a representative of political sovereignty can command that soldier 'to march up to the mouth of a cannon or stand in a breach where he is almost sure to perish...and hang for the least disobedience'.<sup>34</sup> Locke's solution to this dilemma rests on the presumption that the soldier, believing in biblical history and prophecy, prefers heaven to his farthing and will therefore be religiously obliged to defend with his life a legal order based on mundane self-interest. Presumably too, the general receives his right to enforce martial law on religious grounds - the same grounds, indeed, on which rest the power of their common sovereign to enforce criminal law. The historical qualifications Mill and Maine introduce in their assessment of jurisprudence include consideration of Locke's dilemma. In Mill's review of Austin's *Lectures*, he makes clear that the timeless logic of law applies only to civil law conceived as a system of relative rights and duties among private individuals, but not to criminal and political duties. Surely, he says, though it is the 'duty of the hangman to inflict capital punishment', it makes no sense to say that the culprit has a 'right to be hanged'. Criminal law lies outside the logic of law and utility and within the realm of duties which have a necessary historical content. The questions Mill asks of Austin's jurisprudence are the same which Bentham's wider theory of politics left unanswered, namely, 'to what authority is it for the good of the people that they should be subject' and 'how are they to be induced to obey that authority?' Like Leslie Stephen, Mill maintains that answers to these questions cannot be found by examining 'the simple tendencies of universal human

nature', but rather by exploring 'the accumulated influence of past generations over the present'. This historical task is mandated because all notions of 'absolute duties' - what Stephen termed 'the substance out of which loyalty and respect for the law is framed' - are dependent upon historically shaped ideals regarding the highest ends of life, ends quite separate from individual utility and self-preservation. Mill concludes that a 'right to be hanged' is contradictory (no man desires his own death), but that it is 'consistent with the meaning of words to call that desirable to us, which is required for the fulfilment of our [historically defined] duties'.<sup>35</sup>

Sir Henry Maine raises this same dilemma in an explicitly historical context, but in ways which first appear to lend support to Bentham's position. His famous statement in *Ancient Law* that the progress of law moves from 'status to contract' summarizes both legal and political phenomena. 'Status' is an historically determined category linking the concept of legal personality to political legitimacy. The progress of law results in the 'decomposition' of historically imposed and unequal legal status, until the civil law finally emerges as an autonomous and internally coherent system of private property and contractual relationships. Another result, however, is that civil law becomes quite removed from the historically transmitted moral and political values which had previously shaped and justified political power. In the past, the legal order both mediated and ameliorated the relationship between public power and individuals because the status elements in the law dispersed political power into the society by grouping men into layers of privileged orders. In the development of Roman Law and in the parallel development of modern European law starting in the late Middle Ages, devices such as legal fictions, equity and, finally, all-powerful legislatures, not only destroyed status and privilege, but also destroyed the system of values binding together law and political life. Both in Rome and now in modern Europe, the result of this decomposition is that law loses

the assistance of superstition, probably that of opinion, certainly that of spontaneous impulse. The force at the back of law comes therefore to be purely coercive force to a degree quite unknown to societies of a more primitive type.<sup>36</sup>

The twin shadows of Hobbes' Leviathan and Bentham's Panopticons fall over the remainder of Maine's story. In the last chapter of *Ancient Law*, Maine asks why legal systems infused with status elements have such a skimpy and poorly arranged body of criminal law. His answer is incomplete, but contains two elements. The first is that crimes are rare in highly stratified societies and that, in any case, punishment for crimes usually falls under the jurisdiction of family units (*pater potestas*) or is handled *ad hoc* by popular political assemblies. The second element of his answer is that only with the emergence of contractual values in civil law and *imperium* in politics, did extensive criminal law and the need for a death penalty arise.<sup>37</sup> The progress of civil law tears asunder the bonds among men and nothing remains to bind them together politically but the sword. In this light, then, Bentham's prison and crime prevention schemes appear not necessarily as signs of increasing humanity or moral progress, but as desperate expedients to absorb the political costs of the victory of natural history.

On reflection, the historical analysis which Maine uses to criticize the allegedly non-historical legal theories of Bentham and Austin, not only confirms their visions, but lends additional support to the natural history assumptions they incorporate. This conclusion holds



true even with respect to Hobbes. Recall that Maine criticizes the analytic jurists because 'sovereignty and law, regarded as facts, had only gradually assumed a shape in which they answered to the conceptions of them formed by Hobbes, Bentham and Austin'. This same criticism, however, is transformed into praise for their prescience when Maine adds that 'the correspondence really did exist by their [*sic*] time and was tending constantly to become more perfect'. Almost two centuries separate Hobbes from Austin. Does this make the first half of *Leviathan* prophetic and the natural history assumptions of Bentham a *post hoc* testament to its accuracy? Maine depicts Hobbes and Bentham as the two modern geniuses who 'completely divorced themselves from history' and yet he makes them the most accurate 'historians' of their day.<sup>38</sup>

This paradoxical conclusion prompts us to re-evaluate both the patterns of 19th-century criticism and the relationship between the claims of scientific truth and historical assumptions in earlier liberal and utilitarian legal theory. In the case of Hobbes, we would turn to the sacred history and prophecy found in the second half of *Leviathan* for his explanation of the religious causes of political changes making obligatory the creation of a reason-based politics. In the case of Bentham's implicit reliance on the necessities of natural history, we would look to the difficulties he encounters and avoids on the subject of criminal law, prisons and political obligation. The difference between Hobbes' use of sacred history and Bentham's use of natural history is reflected in a highly visible tension in 19th-century criticism of Hobbes. One pole is represented by John Austin. He borrows heavily from Bentham's jurisprudence, but reserves his highest praise for the modern, scientific approach to law and politics. Austin, however, faults Hobbes' reliance on religion in the latter half of *Leviathan*, because this both detracts from and dilutes his scientific teachings. The other pole is James Fitzjames Stephen, who wrote widely in defence of Hobbes' and Bentham's theory of law and sovereignty. Stephen holds that Hobbes' reliance on religion was his strength and Bentham's weakness. The weakness is a lack of provision for obligation to the moral and legal norms of utilitarianism. According to Stephen, the truth of utility and the promise of aggregate happiness are hypothetical truths which no single individual and certainly no historically-shaped nation state would be motivated to accept on their own terms. Unless the truths of utility are incorporated into the 'ways of life' of individuals and the historically transmitted values of nations, those truths will always be subordinated to other ends. Stephen's criticism repeats Locke's lament in the *Reasonableness of Christianity*:

Those measures of right and wrong, which necessity had anywhere introduced, and civil laws prescribed, or philosophy recommended, stood on their true foundations...But where was it that their obligation was thoroughly known and allowed and they received as precepts of law....That could not be, without a clear knowledge and acknowledgement of the law maker, and the great rewards and punishments for those that would or would not obey him.<sup>39</sup>

Stephen's solution, like Locke's, goes straight back to the second half of *Leviathan*: obligation to law requires a belief in an historical and punishing God. Indeed, adds Stephen, the 'truths' proclaimed by experience and sanctioned by reason are themselves the result of Reformation biblical theology and remain dependent upon those beliefs. For utility and reason to prevail, the state must proclaim and teach this religion.

Lest James Fitzjames Stephen's proposed solution appear wholly bizarre (or, in the case of his brother, embarrassing) in the mid-19th century, one should recall that Maine and Austin share his concern, if not his solution. Both fear that a legal order based on individual interest would never receive the assent of democratic politics; both recommend the retention of traditional institutions. Rule by the few - especially if they are properly instructed in political science - is the only way of allying political power to legal truth.<sup>40</sup>

John Stuart Mill has his own doubts about political democracy and popular opinion and often for the same reasons. His revisions of utilitarianism, however, do not consist merely of adding political or religious makeweights to the felt deficiencies of its legal theory, but of seeking to revise the entire structure of its teachings. Mill begins by questioning the central psychological postulates of Bentham and, by extension, the entire framework of natural history explanations of legal and political change. For Mill, self-interest is always mediated through opinions. Opinions are determined by the prevailing system of ideas in any age. Thus he concludes, against natural history explanation, that change is caused not by 'the practical life of the period', but 'from the previous state of belief and thought'. The connecting links in man's progress are spiritual, not material: 'The state of speculative faculties, the character of the propositions assented to by the intellect, essentially determines the moral and political state of the community'. The content of this knowledge is historical, consisting of beliefs about mankind's past and future. The earliest forms within which authoritative ideas are discovered and conveyed are religious, symbolized by the shift from polytheism, to Judaism, to Christianity and finally to Protestantism. Changes in the immediate past, he continues, are caused by the development of a critical philosophy originating in Protestantism.<sup>41</sup>

Mill's periodization of history in these terms not only recalls the periodization in the sacred histories of Hobbes and Locke, but points to the relationship between political obligation, justification for criminal sanctions and authoritative ideas. And, as each man's personal history is believed to be an integral part of a larger religious story, these ideas constitute powerful checks on self-interest. The rise of critical philosophy, however, signals a crisis of authority in the contemporary period, reflected in utilitarianism. This purely negative philosophy, says Mill, destroys the past beliefs, but fails to give us 'any new fact by which to guide ourselves....'<sup>42</sup> Without the guidance of new ideals - and a new history - ordinary self-interest may reign, but it can never rule.

Within this explanatory framework, Mill's evaluation of Bentham both explains and denigrates his achievements. The 'times were ripe' for Bentham because of the shift in leading ideas, but these same ideas produce a society which is fragile, mediocre and morally stagnant. The weakness of Bentham's system results from its ties to critical philosophy - its rejection of history - and must be revised to accommodate new and obligatory ideals. Mill's critique of Bentham has a paradoxical effect on analytic jurisprudence: it undermines its intellectual foundations even as it seeks to anchor its truths within a new form of history and a new system of religious beliefs. This effect is most evident when comparing their respective writings on religion.

In stark contrast to Bentham, Mill's *Utility of Religion* is both a critique of religion and an apology. To be sure, past religions always justify injustice and exploitation, but for a few men, religion provides a means of freeing them intellectually from the historical limits of

prevailing regimes. A 'craving for higher things' and a 'cultivation of a high conception of what [the world] may be made' moreover, also frees these men from 'enslavement' to their 'personal hopes and fears'.<sup>43</sup> This, too, is necessary for mental freedom, because self-interest inevitably ties one to the prevailing order of rewards and punishments. When men of intellect and genius no longer hold religious beliefs, other men no longer have the guidance of innovative prophets, no longer heed 'cultivated minds', and therefore, become enslaved to individual desires and interests. In the contemporary situation, human behaviour does confirm the theory of human nature postulated in analytic jurisprudence, but this is precisely the limit on its truth value. Wedded to critical philosophy, the principle of utility as articulated by Bentham destroys inherited injustices but, in itself, motivates no higher ends. Mill's essay ends by calling for a new form of history - a new religion of humanity - to insure moral progress in the future.

Bentham's reforms destroy the past. Mill's religion of humanity, in contrast, is designed 'to preserve the stores and to guard the treasures.... and thus to bind the present with the past; to perfect and add to the same, and thus to connect the present with the future'. Bentham's reforms require an appeal to self-interest. Mill requires that general happiness become a part of everyman's view of *his own good*. Moral progress in the future must replicate moral progress in the past; both forms require that 'our purposes....become independent of the [natural] feelings of pain or pleasure from which they originally took their rise'. 'Enlightening the selfish feelings' is fundamentally mistaken and doomed to failure. Only 'those who are themselves impelled by nobler principles of action' should be entrusted with such doctrines,<sup>44</sup> for only they can hold self-interest to its proper historical role.

One cannot explore here Mill's controversial suggestions regarding the creators and sustainers of this new combination of a religion of humanity, social science and philosophy.<sup>45</sup> His major point, however, is clear: as his vision of a just society is indebted to past prophets, so the realization of legal justice and political equality will require new ones. Whether he knew it or not, Bentham himself was a kind of prophet who inherited a philosophical perspective which was incomplete, but nevertheless helped to shape man's future. But for all of the reasons suggested above, in the pantheon of prophets, Mill would place Bentham in the second rank:

To see the futurity of the species has always been the privilege of the intellectual elite or of those who have learnt from them; to have the feeling of that futurity has been the distinction, and usually the martyrdom, of a still rare elite.<sup>46</sup>

#### IV. Conclusion

The critics of Bentham suggest to us that the lessons Bentham learned from his liberal predecessors are incomplete. This incompleteness means that his system of thought neither addresses nor answers the central question Mill asks of any complete theory of law:

What is its sanction?, what are the motives to obey it?.... what is the source of its obligation?, whence does it derive its binding force? It is a necessary part of moral philosophy to answer this question.<sup>47</sup>

Bentham's vision culminates in rational self-interest codified in civil law, but predicts at best a bleak and timeless future - as bleak, indeed, as his prison. Mill sought to prevent this future by reintroducing a real history - a history of ideas encompassing all of man's spiritual life. A complete moral philosophy cannot supplant religion and history, but must incorporate and transmit a history of authoritative ideas which has always had a religious basis.

This formulation of Mill's revisions of utilitarianism does not fully answer the question regarding the status of law and legal rights. Mill grants that Bentham's legal theory was prophetic: Bentham, like Hobbes before him, saw clearly that in the modern age 'the law is all the reason we have'. But for Mill, to preserve this reason requires that higher, historical, reason be discovered and shaped within a history of ideas. Mill's discussion of the place of law and justice in *Utilitarianism* confirms this dual view. No less than Bentham, Mill values contractual promises guaranteeing 'security of expectation' as the 'very groundwork of our existence'.

All other earthly benefits are needed by one person [but] not needed by another; and many of them can, if necessary, be cheerfully forgone....; but [on security of expectations] we depend for all our immunity from evil, and for the whole value of all and every good beyond the passing moment.<sup>48</sup>

For Bentham, the creation and enforcement of contractual promises defines the entire realm of liberty and justice. Mill, in contrast, gives only partial assent to their primacy. Mill withholds full assent because of the unsolved problems of criminal law, vengeance and political obligation. Behind the justice and reason of law lies natural vengeance - in Mill's words, 'a peculiar instinct', or an 'animal desire to repel or retaliate a hurt or damage to oneself or to those with whom one sympathizes'. In contrast to Bentham's prisons and related reforms, however, Mill calls upon shared moral ideals to transform collective vengeance into common political and moral sympathies. Because the natural sentiment for justice, 'in itself, has nothing moral in it', this passion must be subordinated 'to the social sympathies, so as to wait on and obey their call'.<sup>49</sup> This subordination re-establishes the historic subordination of law to politics. Informed by an historically grounded religion of humanity, this modern subordination will, in turn, reintegrate legal rationality with political obligation. A corollary to this relationship is the permanent subordination of legal liberty and self-interest to the ends of political and personal freedom. For Mill, the necessities of natural history expressed in critical philosophy and codified in Bentham's jurisprudence must yield to the mental and political freedoms embedded in a history of ideas and codified in a prophetic religion of humanity.

Even today, utilitarian theories of law remain suspended between these two historical visions, one postulated by natural history and the other by a history of ideas. Each vision promises liberty, but of radically different kinds. Bentham's jurisprudence promises what is now termed 'negative liberty', where politics is subordinated to civil law. Mill grants a limited value to this liberty and even seeks to preserve the logic of law which flows from these assumptions. But in calling upon spiritual history as the repository of higher forms of freedom and higher ideals of happiness, he relegates both the truth of this jurisprudence and the values of negative liberty to second place. In current

terminology, Mill's use of history constitutes the claim that 'positive liberty' - the capacity to think and act outside the bounds of self-interest and civil law - is not only the more noble liberty, but is absolutely required to protect the sphere of negative liberty.<sup>50</sup> But does not Hobbes, the first prophet of the new jurisprudence, tell us at the start that this is to be the case? The prophecy contained in the first half of *Leviathan* ends on the vain hope that a young and uncorrupted sovereign will perchance read *Leviathan*, recognize its truth and institute its laws. Mill's critique of Bentham contains the implicit message to explore the teachings of the second half of *Leviathan*. There one will discover history and prophecy at the very origins of a timeless vision of law. And there, too, one will find the reasons why the problem of history has ever since haunted the jurisprudence of Bentham.

Students of Bentham are given the choice of approaching his jurisprudence from either half of the *Leviathan*. The first half urges us to test his theory by unaided and critical reason, in order to discover its timeless truths. The second half urges us to explore his theory in the manner of Mill, by placing it in the larger context of history and the history of ideas. The Bentham Project represents Mill's choice. Preserving the stores of Bentham's past is not proof that we are free to take or leave his various ideas according to prevailing canons of truth, but rather testament to an obligation to remember his genius and vision as proof of our own mental and political freedom.

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#### NOTES

1. J. Bentham, *Book of Fallacies*, Bowring, ii, 401; H.S. Maine, *Lectures on the Early History of Institutions* (London, 1875), 396; L. Stephen, *The English Utilitarians* (London, 1900), I, 317 and see III, 373; J. Plamenatz, *The English Utilitarians* (Oxford, 1949), 157; and see E. Halévy, *The Growth of Philosophic Radicalism*, trans. by M. Morris (Boston, 1955), 273.
2. Bentham, *op.cit.*, Bowring, ii, 401.
3. J. Locke, *Second Treatise*, *Two Treatises of Government* (New York, 1965), §101; D. Hume, *A Treatise of Human Nature* (London, 1974), Book III, Part II, §§2-6; A. Ferguson, *An Essay on the History of Civil Society*, sixth edition (London, 1973), 204.
4. Ferguson, *op.cit.*, 204; and see Locke, *op.cit.*, §§ 31-6, 76, 94, 106, 197 and 111.
5. Bentham, *op.cit.*, Bowring, ii, 400; J. Locke, *Reasonableness of Christianity* (Chicago, 1965) §241.
6. Locke, *Second Treatise*, §226. A fuller discussion of these themes is found in E. Eisenach, 'Crime, Death and Loyalty in English Liberalism', *Political Theory* (May, 1978), 213-25.
7. J. Bentham, *Theory of Legislation*, trans. from the French edition of E. Dumont by R. Hildreth (New York, 1931), 310, 470; *idem*, *A General View of A Complete Code of Laws*, Bowring, iii, 161; *idem*, *Of Laws in General* (C.W., ed. Hart), 230.
8. Locke, *Second Treatise*, §§8-13 and 18, introduced this distinction in terms of two forms of 'executive power' in the state of nature.
9. Bentham, *Theory of Legislation*, 55.
10. *Idem*, *Of Laws in General* (C.W., ed. Hart), 231; and see *idem*, *Complete Code of Laws*, Bowring, iii, 160.
11. *Idem*, *Of Laws in General* (C.W., ed. Hart), 217 and 227.
12. *Idem*, *Theory of Legislation*, 467.

13. *Ibid.*, 416, 417; on rules of evidence, G.W. Keeton and D.R. Marshall, 'Bentham's Influence on the Law of Evidence', *Jeremy Bentham and the Law*, ed. by G.W. Keeton and G. Schwarzenberger (Westport, Connecticut, 1970); and W.L. Twining and P.E. Twining, 'Bentham on Torture', *Bentham and Legal Theory*, ed. by M.H. James (Belfast, 1974).
14. Quoted from M. Mack, *Jeremy Bentham, An Odyssey of Ideas* (New York, 1963), 292.
15. Bentham, *Of Laws in General* (C.W., ed. Hart), 211; and see *idem*, *Complete Code of Laws*, Bowring, iii, 160.
16. *Idem*, *Theory of Legislation*, 322-58.
17. J. Mill, *Encyclopaedia Britannica*, seventh edition, 577-8; and see G. Himmelfarb, 'The Haunted House of Jeremy Bentham', *Victorian Minks* (New York, 1968), and *idem*, 'Bentham's Utopia: The National Charity Company', *Journal of British Studies*, X (1970).
18. J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, third edition (London, 1869), 413-6, 426-7, 774-6, and 871.
19. *Ibid.*, 771-2.
20. Bentham, *Anarchical Fallacies*, Bowring, ii, 501-2; and for Bentham's early views see D.G. Long, *Bentham on Liberty* (Toronto, 1977), 45-115.
21. E.L. Keyser, *The Grand Social Enterprise* (New York, 1967), 37-64; Mack, *op.cit.*, 432-42 and 448-66.
22. Quoted from Keyser, *op.cit.*, 51.
23. Compare T. Hobbes, *Leviathan* (London, 1950), Part III, to Locke, *Reasonableness of Christianity*, on the use of Protestant theology against church history. On Hobbes' biblical history, see J. Pocock, *Politics, Language and Time* (New York, 1973), 148-201; on Locke's, see J. Dunn, *The Political Thought of John Locke* (Cambridge, 1969), 203-41; on Locke's view of biblical religion and despotism, see Locke, *Reasonableness*, §§241-3; and compare Gamaliel Smith [J. Bentham], *Not Paul, But Jesus* (London, 1823), for a parallel argument.
24. D. Hume, *Dialogues Concerning Natural Religion*, ed. by N. Pike (Indianapolis, 1979), 114-5; *idem*, *Natural History of Religion*, ed. by H.E. Root (London, 1956), 71-2, and see 49.
25. Philip Beauchamp [J. Bentham], *An Analysis of the Influence of Natural Religion on the Temporal Happiness of Mankind* (London, 1822), iv, v and vi; Stephen, *op.cit.*, II, 340; Hume, *Natural Religion*, 8-11 and see summary, 65-6.
26. Hume, *Natural Religion*, vii and 121-39.
27. Hobbes, *op.cit.*, III, 38, p.387.
28. *Ibid.*, I, 15, pp.118-25.
29. *Ibid.*, I, 12, p.97.
30. J. Locke, *Essay Concerning Human Understanding*, Introduction and IV, III, §6; and see R. Ashcraft, 'Faith and Knowledge in Locke's Philosophy', *John Locke: Problems and Perspectives*, ed. J. Yolton (Cambridge, 1969), 194-223.
31. J.S. Mill, 'Austin on Jurisprudence', *Dissertations and Discussions* (New York, 1874), IV, 160-8; on Austin's changing reputation in relation to Bentham, see A.D.E. Lewis, 'John Austin (1790-1859): Pupil of Bentham', *The Bentham News Letter*, II (1979), 18-29.
32. Maine, *op.cit.*, 396-7.
33. Stephen, *op.cit.*, i, 304, and 310 and 317 on sociology as history.
34. Locke, *Second Treatise*, §139.
35. Mill, *op.cit.*, IV, 180-2; J.S. Mill, 'Bentham', *Dissertations and Discussions*, I, 402.
36. Maine, *op.cit.*, 393.
37. H.S. Maine, *Ancient Law* (London, 1861), 224-33 *passim*.

38. Maine, *Early History of Institutions*, 396-7.
39. Austin, *op.cit.*, note 'u', 288-9 and 298; J.F. Stephen, *Liberty Equality, Fraternity* (London, 1874), xlvii, 108, 212, 242, 249, 285, 339; Locke, *Reasonableness*, §§243.
40. J. Austin, 'A Plea for the Constitution', *Fraser's Magazine* (April 1859); H.S. Maine, *Popular Government*, second edition (London, 1886).
41. Mill, *Logic of the Moral Sciences* (Indianapolis, 1965), 117-8, and see *idem*, *Auguste Comte and Positivism*, Ann Arbor, Michigan, 1961), 84-9, 101-2, and *idem*, 'Spirit of the Age', *Essays on Politics and Culture*, ed. G. Himmelfarb (New York, 1962), 45.
42. J.S. Mill, 'Utility of Religion', *Essential Works*, ed. by M. Lerner (New York, 1961), 404 and see 402 and 417.
43. *Ibid.*, 416-7, 421; and see *idem*, 'Spirit of the Age', *Essays on Politics and Culture*, 19.
44. *Idem*, 'Coleridge', *Dissertations and Discussions*, II, 51; *idem*, *Logic of the Moral Sciences*, 17; *idem*, 'Autobiography', *John Stuart Mill, A Selection of his Works*, ed. J.M. Robson (New York, 1966), 270.
45. See, for example, M. Cowling, *Mill and Liberalism* (Cambridge, 1973), and Mill's discussion of a science of society in *Logic of the Moral Sciences*, 37, 51, 81, 103, 118 and 136-7.
46. J.S. Mill, *The Subjection of Women* (London, 1906), 71-2; & see *idem*, *Logic of the Moral Sciences*, 130-1.
47. *Idem*, 'Utilitarianism', *John Stuart Mill, A Selection of his Works*, 182.
48. Hobbes, *op.cit.*, II, 31, 315; Mill, 'Utilitarianism', *John Stuart Mill, A Selection of his Works*, 216.
49. Mill, 'Utilitarianism', *John Stuart Mill, A Selection of his Works*, 213-4.
50. *Ibid.*, 212-28; *idem*, 'Utility of Religion', *Essential Works*, 428-31; *idem*, 'Theism' in *Essays on Politics and Culture*, 461-479. And see A. Ryan, 'Two Concepts of Politics and Democracy: James and John Stuart Mill', *Machiavelli and the Nature of Political Thought*, ed. by M. Fleisher (New York, 1972), 76-113; and I. Berlin, *Four Essays on Liberty* (New York, 1970), 118-72, for the distinction between negative and positive liberty.

## THE INFLUENCE OF BENTHAM ON THE TEACHING OF PENAL LAW IN CHILE

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### 1. Another line for the research work of the Committee

Twenty years ago the Bentham Committee was founded at University College London, which owns most of Bentham's manuscripts. Its major programme during that time has been the preparation of Bentham's works in 'definitive versions....based, wherever possible, on the original manuscripts' so as to offer scholars texts 'for the first time...in Bentham's authentic words',<sup>1</sup> and by this means define the true characteristics of Bentham's thought, often deformed by editors and translators. Six impressive volumes, three of correspondence, and three of works edited by Professor Burns and Professor Hart under the common epigraph of *Principles of legislation*, have already been published. The last of these volumes of works, the edition of the *Comment on the Commentaries*, which involved numerous difficulties of different kinds, is, as far as I can see, the best model of a critical edition which a scholar can seek. An extensive group of volumes, entrusted to able specialists, will soon increase the series that we know by its general title of *Collected Works*.<sup>2</sup>

The texts referring to Spain, Portugal and Latin America, are under the responsibility of Professor Pedro Schwartz of the University of Madrid, with the collaboration of Miss Claire Gobbi. Professor Schwartz's intelligent researches in the Iberian Peninsula and in the Latin American countries, besides fulfilling the specific task of preparing the edition of Bentham's pertinent writings which will enter the *Collected Works*, have shown a different line of study, which will no doubt interest the Committee: Bentham's influence in the countries speaking Spanish or Portuguese. Obviously this influence was exerted mainly through second-hand texts, the editions of Etienne Dumont and their Spanish translations, which did not, in some cases, express Bentham's authentic thought. However, these editions were the vehicle by which the name of Bentham acquired great notoriety, and his ideas gained credence in several fields. Our knowledge of these facts is currently far from satisfactory: it consists only of the certainty of Bentham's correspondence with several Spanish and Latin American statesmen and scholars, and of evidence about the presence of his writings and of their having been put to some use. An example: one of the important matters which should be carefully examined is the impact of Bentham's ideas on the shaping of Hispanic American jurists who practised codification during the 19th century. An outstanding case, assuredly the most important, is that of Andrés Bello, who was for a time heavily influenced by utilitarianism: he read and studied with extreme care Bentham's works, used the Englishman's explanations for his own teaching of law, and reached a high level of achievement in the codification of the civil part of the law. Of course we can presume that his thought went through a stage during which the influence of Bentham brought him to an intelligent legalist positivism, which left him receptive subsequently to the influence of the German Historical School, because the success of the Chilean Civil Code is based on its historicistic realism.<sup>3</sup> In order to explain these facts I have posed the question: What was Bentham's juridical philosophy? I have worked on this subject and hope to be able to offer a correct answer in the future; it will not be a philosopher's answer but that of the historian of law. For the time being this short essay will deal with the knowledge of Bentham's work in Chile and how Andrés Bello employed it for the teaching of penal law.



## 2. How Bentham became known in Chile

Copies of *Traité de législation*, published in 1802, soon reached Latin America: Blanco White wrote that a friend of his who, before the Napoleonic invasion of Spain, had been a magistrate in a Latin American country, started translating *Traité* into Spanish.<sup>4</sup> In spite of this I think that the chief cause of the wide knowledge of the juridical ideas of Bentham was *El Español*, the monthly periodical published by Blanco White, who was personally acquainted with Bentham and was a friend of Dumont, as well as an enthusiastic admirer of their work. *El Español*, whose forty-seven issues make eight thick volumes, was published in London from 1810 to 1814. It was forbidden in Spain but circulated extensively among the Spanish American literati. In September 1810,<sup>5</sup> Blanco White gave a brief account of the proceedings of the House of Commons as a model for the newly-established *Cortes* of Spain, and immediately afterwards published a review of a book by Bentham entitled *Tactique des assemblées politiques*, not published yet, but which Dumont had provided in manuscript for him; he praised its technique, which was especially useful for newly-established assemblies, remote from British tradition. Soon after, in January 1811,<sup>6</sup> he made known a project referring to the basis for establishing the freedom of the press which Bentham had given him in manuscript. In the issue of February 1814,<sup>7</sup> we read an extensive review of *Théorie des peines et des récompenses*. Blanco White emphasized the progress in the field of penal law which the ideas of Bentham showed compared with those of Montesquieu and Beccaria, and translated into Spanish several passages about punishment. Finally, in the last but one issue of his periodical, April 1814,<sup>8</sup> he gave his own translation of part of the second volume of *Principes politiques et économiques sur les colonies*.

*El Español* reached Chile with promptitude. Several collections of this journal are still available in libraries,<sup>9</sup> although from the end of 1814, when the patriots lost and Spanish rule was reimposed, this and other printed matter were destroyed and their owners prosecuted. This period, called the *Reconquista*, lasted till February 1817, when, after the battle of Chacabuco, O'Higgins was elected chief of the new state. During his government (1817-1823) we find the work of Bentham was well known: Camilo Henríquez, who had been appointed director of the National Library, compiled a list of urgently needed books, which included *Principles of legislation* by Jeremy Bentham, published by Dumont in French.<sup>10</sup> The same Henríquez was the editor of the first specialized cultural periodical there has been in Chile, called *El Mercurio de Chile*, which was published in 1822 and 1823. In the first issue, in a section of bibliographical news referring to 'useful books', he mentioned two by Bentham. He commended *Principles of legislation*, edited by M. Dumont in French. This 'matchless book is being translated into Spanish. Dr. Villanueva had already done so partly, including the plan of the Panopticon, and the Spanish *Cortes* have recommended his translation to the government, praising it very much'. Henríquez added that 'the project of Penal Code that the *Cortes* are studying is based on the principles of Bentham, as far as they seem suitable to the Spanish state of affairs'. He ended his comment by saying, 'Bentham is one of the most illustrious jurists of England; we owe him several other very celebrated works like the *Tactique des assemblées législatives*, published in French'. A review of this book was published in the second issue of the periodical; at the same time, in the notice about useful books he mentioned *Tactique* again, besides *Plan for a Parliamentary reform* and *Théorie des peines et des récompenses*. Apropos of these he commented, 'Nothing is more useful than Bentham's works in the century in which the representative system and the correction of old wrongs make prodigious progress all round the world'.

It has been said traditionally that Bentham wrote to O'Higgins offering to prepare a general code of law. We have not found this document so far: it may come to light sooner or later, or it may have been destroyed. Among Bentham's papers at University College there is a long rough draft of a letter addressed to O'Higgins by him, containing the said offer.<sup>11</sup> This letter must have been written in 1822. We know that in May of that year codification was discussed in Chile;<sup>12</sup> O'Higgins, in his message to the newly-established Assembly in July, suggested the adoption of the Napoleon codes.<sup>13</sup> Thus, if Bentham's letter reached him it must have been at the end of the year, since O'Higgins did not answer it, perhaps for lack of time: his government came to an abrupt end on January 28th 1823.<sup>14</sup>

During the following years, till 1828, we can find frequent references to Bentham in the press, both in periodicals and in abundant pamphlets. The Spanish translation of *Traité de législation* by Ramón Salas had been published, in eight small volumes, in Paris in 1823. We have written evidence that in January 1826 the library of the Instituto Nacional, the most important college in Santiago, owned those eight volumes.<sup>15</sup> The copies of Salas' translation are abundant in Chile: we find them in all the libraries of the 19th century;<sup>16</sup> for decades it was a bestseller, frequently imported by the merchants because it was certain to sell easily like the other books by Bentham in French or in Spanish translations.

At the end of the 1820s the presence in Chile of two men who had been personally acquainted with Bentham increased the influence of his ideas. In 1828 José Joaquín de Mora arrived. He had been a disciple, friend and correspondent of Bentham in Spain for a long time. The following year it was Andrés Bello who settled in Chile. He had had a curious relationship with Bentham who was an enthusiast of the South American revolution and a good friend of Francisco de Miranda: in 1810, before Miranda's departure to America, Bentham had started to write a project of a general code for the first independent government; Miranda handed the manuscripts to Bello, who lived with him at that time, so that he could edit and translate them into Spanish. The defeat of Miranda's revolution did not allow Bello to fulfil this task. It is possible on the other hand, that Bello never started it, because Bentham might have never written anything but the forty-one fragmentary sheets that Miranda had given him.<sup>17</sup> Bello used to reminisce, when he was very old, that his friend James Mill, with the intention of helping him in a period of hard poverty, perhaps towards 1815 or 1816, had entrusted him with the difficult task of transcribing some manuscripts by Bentham.<sup>18</sup> Bello had no other direct contact with Bentham himself, but was extremely familiar with his books,<sup>19</sup> and with those of the philosophical, economic, historical and political inspirers of utilitarianism.<sup>20</sup> It is important to remark that it was Bello, not Mora, who introduced Bentham's doctrines in Chile in the juridical field, in a very effective way: in the teaching of civil and penal law.

3. A textbook based on texts by Bentham was prepared by Bello for his course of law

The seven years from 1823 to 1830 in Chile were full of political arguments and all kinds of institutional endeavours. It is necessary to remember that, in the field of superior studies, the University had ceased to perform the function of teaching in 1819, which was transferred to the Instituto Nacional and to other private colleges. In 1828, José Joaquín de Mora opened the Liceo de Chile, under the patronage of the liberal government of the time. It was a civil and military school, both secondary and superior including law studies, which were inspired by jusnaturalism.

A rival institution, the Colegio de Santiago, was founded in 1829, with a group of French teachers, to enter into competition with the Liceo. Andrés Bello was appointed director of the Colegio in January 1830. The most important theoretical subject he established in the curriculum of legal studies was the course of 'Universal Legislation', for which he prepared a textbook, a manuscript of about a hundred and fifty pages, which was dictated to the pupils. Its contents were considered strictly theoretical, in the sense that it had nothing to do with existing Chilean law, but was intended to create a serious juridical mentality. The course was divided into three parts, following literally one of Bentham's classifications: civil law, penal law and constitutional law. The first two parts of the textbook consisted of extracts from *Traité de législation civile et pénale* by Bentham, selected by Bello, and the third consisted of extracts of the writings by Benjamin Constant.

José Victorino Lastarria, who later held the abovementioned chair and whose opinions regarding Bello were often critical, when commenting about the sections of civil and penal law of the course wrote: 'Fortunately for our education Mr. Bello was a utilitarian; and although the points of view of this school are not considered suitable today....when he started teaching the science of legislation in our country, he could have done nothing better than follow the theories of Bentham, whose school was then the one that had the most practical principles to guide the first steps in the science. This is the great merit of Bentham and his disciples'.<sup>21</sup>

When, in 1830, the political situation in Chile acquired a degree of stability, both rival colleges, which had been entrusted to the two most capable men to be found in the country, disappeared. Mora pursued his activities in Peru. A new curriculum for the studies of law, inspired by Bello, was brought into practice at the Instituto Nacional. The 'principles of universal legislation' were considered the most important course in the second year. The appointed professor was Jacobo Vial; he and his successors, Ventura Marín (1836-1837) and Felipe Herrera (1838),<sup>22</sup> used Bello's textbook in its entirety. José Victorino Lastarria did the same thing during the first years of his lessons, which lasted from 1839 to 1851. Later, the third part, referring to constitutional law, ceased to be employed because he published in 1846 his own book on this subject. At the same time he insisted that civil law should be taught together with natural law. As to penal law, strictly following Bentham, he gave it a wider importance. In 1847 he published the *Theory of penal law. An extract of the works by Bentham adapted to the requirements of the students of the Instituto Nacional*.<sup>23</sup> Unfortunately, I cannot give an opinion about the alterations Lastarria made to Bentham's extracts of the manuscript textbook edited by Bello, because I could not find a copy of Bello's work, but it is probable that the variations, if there were any, were not very important because Lastarria did not put his name in either of the two editions of the book. This was employed for the theoretical teaching of penal law in Chile at least until 1875. This was the year when the new Penal Code was enforced, which the authorities ordered to be used as the textbook of the course.<sup>24</sup> Evidence of the length of time the Bentham extracts lasted is the fact that a new edition without any variations appeared in 1864.<sup>25</sup> The book is divided into eight chapters, whose titles are: (I) Classification of the offences; (II) About the mischiefs of first and second degree produced by the offences; (III) Means of justification; (IV) About direct preventive measures and repressive measures; (V) About amendments in general; (VI) About punishments; (VII) Considerations about several types of punishments; and (VIII) Indirect preventive measures.

I will now give some short examples of the contents of the book. Bentham, supported by the principle of utility, defined crime by its effects; he stated 'crime is any act prohibited by a positive law, but according to the theory of legislation, any act that ought to be prohibited because of its evil results, could be called crime as well'; immediately he divided and subdivided the offences considering who is the victim of the mischief and its magnitude. He analysed the circumstances that lead to a mitigation of punishment and those that bring about its suppression. Public punishment tends 'to prevent the same offences being repeated, either because disposition is corrected by fear of punishment, or because the delinquent is disabled of his means of causing mischief'. Following the principle of utility no punishment must be imposed when it is groundless, inefficacious, superfluous or too costly. One of the subjects more extensively discussed is measures of penal prevention, called by Bentham 'indirect preventive measures'; it includes all kinds of possibilities which are explained in seventeen paragraphs.

The sources of the Chilean text are volumes IV and V of the Spanish translation by Salas of the *Traitées*, published in 1823. It is very short, less than fifty pages, which means that it was only intended to be a guide: the professor had to add his own commentaries and examples. It must not be inferred that during the curriculum of law studies only theoretical penal law was taught: until 1850 Chilean penal law was taught in the course of Spanish law and in the Forensic Practice Academy. An independent chair of penal law was created in 1853 whose occupant taught legal theory according to Bentham, followed by the law in force. From then and till 1874 several eminent jurists held the chair: Santiago Prado, José Bernardo Lira and Diego Armstrong. In 1868, during Armstrong's period, two theses on penal law were submitted to the Faculty.<sup>26</sup> Both asked that the studies be modernized, and criticized the textbook based on extracts from Bentham's as insufficient and inadequate: this was the moment when the study of law was oriented almost exclusively towards professionalism. The first professor who used the Penal Code of 1875 as a textbook was invested the same year: he was Alejandro Reyes, a member of the Faculty of Law, who had been the president of the Commission for the codification of penal law. It is worth mentioning that during the first meetings of the Commission, Reyes<sup>27</sup> proposed to use the Spanish Code of 1822 as a model: this was accepted. It is well known that Bentham's ideas and personal suggestions had a large influence in that Spanish Code.

#### NOTES

1. The quotations belong to the 'General Preface' by Professor Burns to the *CW*.
2. J.R. Dinwiddy, 'The Bentham Project', *The Bentham Newsletter*, I (1978), 31-3.
3. Alamiro de Avila Martel, 'Bello y el derecho romano', in *Estudios sobre la vida y obra de Andrés Bello* (Santiago, 1973), 79-97.
4. *El Español*, VIII, 34, footnote.
5. *El Español*, I, 411-37.
6. *El Español*, II, 329-34.
7. *El Español*, VIII, 23-37.
8. *Ibid.*, 109-46.
9. The success of *El Español* was so remarkable that Blanco White had to reprint the first volume in 1813, copies of which are conserved in Chile.
10. The list accompanies a letter of Henríquez to Manuel de Salas, of February 1st 1822, published by Raúl Silva Castro, 'Los primeros años

- de la Biblioteca Nacional de Chile (1813-1824)', in *Revista de historia de América*, XLII (Mexico, 1956), 394-7. The title that Henríquez mentioned should certainly correspond to *Traité de législation*, which first volume comprises a reduced edition of Bentham's *An introduction to the principles of morals and legislation*, published in 1789.
11. UC, lx, 66-7; *Bowring*, x, 500-13. A reference to the letter is in Elie Halévy, *La formation du radicalisme philosophique. II. L'évolution de la doctrine utilitaire de 1789 à 1815* (Paris, 1901), 277. A Spanish translation of the draft, from the manuscript at University College, has been published by Patricio Estellé in *Historia*, XII (Santiago, 1875), 375-81.
  12. *El Mercurio de Chile*, 1.
  13. *Sesiones de los cuerpos legislativos de la República de Chile*, VI (Santiago, 1899), 28.
  14. No answer has been found among Bentham's papers.
  15. An inventory of the books belonging then to the Instituto is published by Domingo Amunátegui Solar, *Los primeros años del Instituto Nacional (1813-1835)* (Santiago, 1889), 689-91.
  16. For instance, in the library of the jurists Juan and Mariano de Egaña, which was the most abundant private library in Santiago during the first half of the 19th century, we find two copies of Salas' translation and one of the second edition of the *Traité* (Paris, 1820). Besides there are seven other books by Bentham (*Catálogo alfabético i por materias de las obras que contiene la Biblioteca Nacional Egaña de Santiago de Chile*, Santiago, 1860).
  17. In 1862 Bello gave the manuscript as a present to Diego Barros Arana, in whose collection it is kept (Biblioteca Nacional of Santiago, Biblioteca Americana Diego Barros Arana, piso 2°, estante 25, vol.17, forty-one sheets). As was Bentham's practice, the subjects are written, rewritten and corrected several times. I believe, as I say in the text, that the project was written to be offered to Miranda and entrusted by Miranda to Bello, because of the sequence of the dates of the events: (1) at the end of June 1810 the establishment of the Suprema Junta of Caracas was known in London; (2) Bentham wrote the manuscript during August and September (the dates he put in almost every sheet went from August 2 to September 16, 1810); (3) Miranda left England on October 10, 1810.
  18. Miguel Luis Amunátegui, *Vida de don Andrés Bello* (Santiago, 1882), 144-5. We do not know which manuscripts were those entrusted to Bello: the examination made up to now in Bentham's papers, in search of samples of Bello's writing, have been unsuccessful.
  19. Bello owned the second edition, Paris, 1820, of *Traité*, as well as Salas' Spanish translation, and six other works by Bentham (*Catálogo manuscrito de la biblioteca de don Andrés Bello*, Biblioteca Central de la Universidad de Chile. Colección de Manuscritos. I. Papeles de don Andrés Bello, no. 129).
  20. Among the books he owned we find the works of Locke, Helvetius, David Hume, Adam Smith (*Catálogo, op.cit.*).
  21. 'Recuerdos del maestro', in *Suscripción de la Academia de Bellas Letras a la estatua de don Andrés Bello* (Santiago, 1874), 79.
  22. Domingo Amunátegui Solar, *El Instituto Nacional bajo los rectorados de don Manuel Montt, don Francisco Puente i don Antonio Varas* (Santiago, 1891), 49-50.
  23. *Teoría del derecho penal. Extracto de las obras de Bentham adaptado a la enseñanza de los alumnos del Instituto Nacional* (Santiago, Imp. Chilena, 1847, 51 + one p.). Lastarria explicitly declared he published this text: 'Comenamos entonces a arreglar para nuestros cursos

*dos textos separados, el uno de derecho constitucional y el otro de la teoría del derecho penal....cuya primera parte apareció ya impresa en 1846. Al año siguiente publicamos también la Teoría del derecho penal, que es un extracto de las obras de Bentham' (Recuerdos literarios, Santiago, 1878, 242).*

24. By decree of 22 December 1874, the chair of 'Penal Law' was suppressed and, in its place, that of 'Penal Code' was created, which textbook would be the legal body that would be put in force on January 1st of the following year.
25. Santiago, Imp. Nacional, 1864, 47 + one p.
26. Both are published in *Anales de la Universidad de Chile*, XXX (Santiago, 1868).
27. *Actas de las sesiones de la comisión redactora del código penal chileno* (Santiago, 1873), 3-4.

## BENTHAMISM IN SANTANDER'S COLOMBIA

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During the last years of the wars of independence and the period which followed, roughly the 1820s and the 1830s, the English reformer and legal philosopher Jeremy Bentham was a favourite author among the liberals of Latin America, and nowhere was this more evident than in the present Colombia, known also as Cundinamarca and New Granada during its early history. Bentham had a particular interest in 'Gran Colombia', the republic which temporarily united Venezuela, New Granada and Ecuador under Simón Bolívar's leadership, because of his acquaintance with Francisco de Miranda and with Bolívar himself, and he maintained intermittent contact with this nation through English acquaintances who journeyed to Colombia and Colombians who sought him out in London. Yet these personal relationships were of no more than secondary importance in initiating the Bentham vogue, as the writer has argued elsewhere.<sup>1</sup>

It is the thesis of this study that the liberal leaders who were really effective in promoting an interest in Bentham among the Colombian elite, that is, Francisco de Paula Santander and his collaborators, were introduced to his works because they were popular among liberal Spaniards and Spanish expatriates, and accepted and esteemed them for reasons related to their own revolutionary experience and political needs.

Bentham's thought met the ideological requirements of the Colombian liberals although Bentham himself, it seems clear, should not be considered a liberal, and was politically conservative during the period before the French Revolution. The *Traité de Législation civile et pénale*, which established his reputation in the republic and was used in its schools, was a<sub>2</sub> collection of his early treatises written, almost entirely, before 1789,<sup>2</sup> when Bentham had been indifferent to forms of government. Etienne Dumont, who edited these manuscripts and published them in 1802, wrote of Bentham in his introduction to the work:

He thinks that happiness is the only *end*, the only thing with an intrinsic value, and that political liberty is only a *relative* good, one of the means of arriving at this end. He thinks that a people which has good laws can arrive at a high degree<sub>3</sub> of happiness even without having any political power....

and Bentham did not feel that his thought had been betrayed by these expressions.<sup>4</sup>

He dismissed the theory of natural rights and the several versions of the social contract as mythical and misleading. Those who really believed that natural rights existed were apt to judge laws 'only for their conformity to a supposed natural right'. Since all were free to define the natural rights as they wished the concept, in Bentham's opinion, was an open invitation to anarchy.<sup>5</sup> He considered declarations and bills of rights which pretended to limit the powers of lawmakers both futile and dangerous,<sup>6</sup> and taught that 'there was nothing government<sup>7</sup> might not do if it could show that the public interest demanded it'.

At the same time, Bentham was always a champion of freedom of the press, liberty of conscience, a rational and humane reform of penal law, and other innovations favoured by the liberals. And he was unquestionably well qualified to instruct the Colombian legislators if, as Jaime Jaramillo Uribe has suggested, the revolutionary generation hoped to solve the nation's problems by replacing the political and juridical institutions of

the colony with a new structure based upon simple rational principles.<sup>8</sup> Rejecting the natural law, the moral sense, and standards of justice or injustice as so many innate ideas whose falsity Locke had exposed,<sup>9</sup> Bentham reasoned that laws could be validly based only upon the principle that human pleasure ought to be increased and pain reduced, since the greatest happiness of the greatest number was the proper end of government.

This study will relate the vogue of Benthamism to the career of General Santander, who was vice-president charged with the government of Cundinamarca from 1819 to 1821, vice-president of Colombia from 1821 to 1828 - acting as chief executive in Bolívar's absence during most of that time - and New Granada's first president from 1832 to 1837. Although the Bentham vogue is said to have persisted, while waning at certain periods, until about 1870,<sup>10</sup> the narrative will not go beyond May 1840 when Santander died.

Bentham achieved his earliest popularity outside England, and in Spain more than in any other country.<sup>11</sup> During the time of the Bonapartist occupation, from 1808 to 1814, Bentham's works were known 'among the studious', according to Joseph Blanco White,<sup>12</sup> who left Spain in 1810 to settle in England, and there is evidence that Bentham had admirers both among the reform-minded *afrancesados* who collaborated with the invaders and the liberal patriots who resisted them.

It was undoubtedly Blanco White, who had been one of the latter group, who introduced the Colombian elite to the writings of Jeremy Bentham in the pages of *El Español*, the journal which he founded in London in 1810. Material by Bentham began to appear in *El Español* in the fall of that year, and in 1811 Antonio Nariño published a Bentham article on freedom of the press, reprinted from Blanco's journal in *La Bagatela*, a paper which he was editing in Santa Fe de Bogotá.<sup>13</sup> This is the earliest known citation of Bentham in New Granada, as Angel and Rufino J. Cuervo noted years ago.<sup>14</sup>

The first reference to Bentham in Santander's correspondence is in a letter from Francisco Antonio Zea, a *granadino* who had lived in Spain from the 1790s until the end of the French occupation, and had attained a certain prominence among the *afrancesados*.<sup>15</sup> Zea wrote to his countryman, citing the 'illustrious Bentham', and paraphrasing a passage from the *Traité de Législation* on June 22, 1819,<sup>16</sup> the very day when Bolívar's liberating army, with Santander commanding the advance guard, began the audacious campaign which would end Spanish rule in New Granada.

Shortly after the republican victory at Boyacá in August, Santander was appointed vice-president and remained at Bogotá to administer the liberated territory while he mobilized its resources in support of the war. Two letters written by Santander during this time of the provisional government seem to illustrate the reasons which disposed the Colombians to appreciate and utilize Bentham's writings a few years later. *Granadinos* of that time had been deeply impressed by the disasters of the period 1810-1816, when they had made their first faltering attempts at self-government, and tended to place the blame on an excess of theorizing and constitution-making. Santander and the other leaders were now determined to be 'realistic and not naive', as Bolívar said the new republic would be.<sup>17</sup>

In August 1820, Santander wrote to Jose Maria Castillo on the subject of the future constituent congress:

Would you believe that I feel an aversion to this meeting? On recalling the realities of our former congress, its willingness to capitulate, its withdrawal in time of danger, I become angry and would like to forget that we need a representative system.<sup>18</sup>



In September he wrote to the same correspondent:

Experience....has taught me that in our revolution without resources, without a well decided opinion.... it is necessary that a very unlimited power preside among our peoples, and this power should make itself more feared than loved. Without this, believe me, we would not have a fatherland, nor will we have it unless the government understands the maxim 'the welfare of the people is the supreme law'.<sup>19</sup>

The difficulty of Colombia's liberal leaders seems clear: because of the ongoing state of warfare and the absence of a 'well decided opinion' they could not seriously follow out the implications of popular sovereignty and other ideals of the English, Anglo-American, and French Revolutions. Many, including Bolívar, doubted that peace would really change this situation: would not illiteracy, religious 'fanaticism', the vast cultural differences separating the races, *caudillismo*, local separatist movements, and other evils destroy stable and progressive government if the people were really allowed to exercise their sovereignty, to make and break social contracts as they pleased?

It is understandable that the liberators learned to value Bentham's principles when they read in the *Traité de Législation*:

The true political bond is in the immense interest of men in maintaining a government; because without government there is no family, no property, no industry.... By comparing the government with its object, one can reason solidly about its rights and obligations, without having to refer to supposed contracts which only serve to produce interminable disputes.<sup>20</sup>

Santander had not been in office six months when the Riego Revolt of 1820 erupted in Spain. Spanish influences must have contributed substantially to the ideology and style of the Colombian reformers even before 1820, but this revolution, which inaugurated three years of constitutional government, greatly enlarged the prestige of Spanish liberalism and gave it an unprecedented influence during Colombia's formative years.

The admiration of the Spaniards for certain works in law and politics was communicated to Colombia during this time, and among these was the Bentham-Dumont work on legislation, which became available in a Spanish translation published by Ramón Salas, with an extensive commentary, in Madrid during 1821 and 1822. And Bentham attempted personally, through publications and correspondence, to play an active role as adviser to the Spanish liberals. Reports of his activities were published from time to time in the Colombian press, adding something more to his reputation.<sup>21</sup>

The documents show that the Colombian revolutionaries began to make their own modest use of Bentham's works in 1821 at the Congress of Cúcuta, the assembly which established the Republic of Colombia upon a solid constitutional basis. The *Boletín del Gobierno*, a small paper printed on a press set up in the provincial town where the congress was meeting, announced on May 17 that the body had adopted a set of rules which were 'nothing more than a set of the wise regulations which long experience has taught the British Parliament'. 'We believe it opportune', continued the editor, 'to include...the principal rules proposed by Mr. Jeremy Bentham. Bentham has been the first to reduce to formal principles the art (as he calls it) of managing a gathering of men....' There followed a brief series of extracts from *El Español* of September 30, 1810, citing the Bentham-Dumont manuscript later published as *Tactique des Assemblées législatives*.<sup>22</sup>

According to Alejandro Osorio, a fellow-delegate, Vicente Azuero was the sole author of this number of the *Boletín*.<sup>23</sup> Azuero, a lawyer, journalist and public servant who would be called Colombia's 'earliest and most enthusiastic partisan of the doctrines of Jeremy Bentham',<sup>24</sup> was, by all accounts, one of the most important of Santander's collaborators from the beginning of his administration.<sup>25</sup>

It is possible to document Azuero's attention to the work of the Spanish liberals, as well as his interest in Bentham. He was the principal draftsman of the Constitution of Cúcuta,<sup>26</sup> and the indebtedness of that document to the Spanish Constitution of 1812 is obvious. In 1823 he adapted for use in Colombia a code of penal law enacted by the Spanish liberals in 1822,<sup>27</sup> and in 1827 recommended that the Colombian Congress adopt or 'take as models' certain provisions of a military code approved by the liberal Spanish *Cortes*.<sup>28</sup>

During 1822 two newspapers edited by Azuero, and the government's official *Gaceta*, began to use material taken directly from the *Traitées de Législation civile et pénale*.<sup>29</sup> At about the same time, Azuero, writing in *La Indicación*, began to propose the principle of utility as a solution for the dilemma of sovereignty. The newspaper offered this counsel in August 1822, when 'Gran Colombia' had not completed a year of constitutional existence:

There is a superior authority, resting on the nature of man itself, which is superior to that omnipotent will of the people: it is the public utility. It is this which in the primitive forests united families, which established government....Let us not exalt, then, more than is just the wisdom and virtues of the peoples:....let us attend solely to the common utility in the legislative concurrences, and let us not forget that the universal clamour of all centuries and all people for the institutions of government proves that men prefer to give up part of their liberty and of their rights in exchange for order and tranquillity.<sup>30</sup>

Azuero's analysis, with its overtones of Hobbes, seems to reflect Bentham's explanation of the 'true political bond', quoted above, and to be related to his discussion of security as the principal object of the laws, also included in the *Traitées de Législation*:

This inestimable good, distinctive index of civilization, is entirely the work of the laws....To estimate the value of this great benefaction of the law, it is enough to consider the state of the savages.<sup>31</sup>

He had ridiculed, in the same work, Rousseau's 'great discovery' that the law is the expression of the general will;<sup>32</sup> elsewhere he had called this proposition the 'sponge which wipes away all governments'.<sup>33</sup>

Later in the year, Bolívar wrote to Santander, in the midst of alarmed speculation that the Colombian congress might wish to revise the Constitution of 1821:

The sovereignty of the people is not unlimited, because justice is its base and perfect utility sets limits to it. This is the doctrine of the constitutional apostle of the day. From where do the representatives of the people believe themselves authorized to constantly change the social organization? What, then, will be the foundation of the rights, of the property, of the life of the citizens?<sup>34</sup>

Bolívar was undoubtedly citing Benjamin Constant, whose work 'De la souveraineté du peuple' contains this passage:

The sovereignty of the people is not unlimited: it is circumscribed within the limits which justice and individual rights trace for it.<sup>35</sup>

But he altered the statement, employing the principles of utility in a way which Constant had rejected as inconvenient and dangerous.<sup>36</sup> It is more than likely that Bolívar was following Bentham here, or one of his interpreters - Vicente Azuero, perhaps, writing in the Bogotá press.

Bentham's views on a variety of topics appeared more and more widely in the newspapers of the capital as time went on, and his opinions were quoted in the Colombian congresses. Most of the references were to the *Traité de Législation*, but in 1823 and 1824 two minor works, *Letters to Count Toreno on the Proposed Penal Code* and the *Codification Proposal*, both published in 1822, were cited by Azuero and by Vice-President Santander, who was also an editor and journalist, publishing anonymously.<sup>37</sup> Bentham had forwarded at least one, and probably both, of these works to Colombia in the care of personal acquaintances.<sup>38</sup> In time additional works became known as translations were published in Europe, and these were cited occasionally in the press, or were advertised for sale. Yet they never approached the popularity of 'el Bentham' - the *Traité de Législation*.

In 1825 the Colombian leaders showed their esteem for this work in a remarkable way: by his decree of November 8th Santander ordered that it be used throughout the republic to teach the principles of legislation in a class required of all law students.<sup>39</sup>

José Manuel Groot, who was one of the vice-president's secretaries at the time, wrote later:

Wasn't this author being taught at San Bartolomé much before the decree was issued? From that time Santander studied legislation from Bentham without letting the book out of his hand.<sup>40</sup>

This is probably another indication of Vicente Azuero's pioneering work, since he had been appointed professor of *dercho público*, the class mentioned in the decree, at the Bogotá *colegio* the previous June.<sup>41</sup>

Santander's decree was provisional and limited in scope, but on March 18, 1826 congress passed a comprehensive 'Law Concerning the Organization and Regulation of Public Instruction' and authorized the government to prepare a detailed 'plan of studies'. This took the form of an executive decree issued on October 3, 1816 outlining the curricula, procedures to be followed, and authors whose works would be studied in the nation's *colegios* and universities.<sup>42</sup>

A comparison of these Colombia enactments with the *Reglamento general de instrucción pública* approved by the Spanish *cortes* in 1821 and the plan of studies contained in the *Real orden* of September 20, 1820<sup>43</sup> makes it abundantly clear that the Colombian liberals were using these Spanish precedents as models in their reform of education. The inclusion of the Bentham text is one of the few points on which the American plan of studies differs from the Spanish plan, but 'principles of universal legislation', which the Colombians established as the first class for the course of studies in law, was also the first class named in the Spanish decree. The Colombian plan of studies described it in this way:

In this *cátedra*....the students will be made familiar with the natural laws which regulate the obligations and rights of men....The *tratados de legislación civil y penal* by Bentham should serve for now for the lessons which are to be taught in this *cátedra*....<sup>44</sup>

There is an obvious inconsistency in this article, which proposes both the natural law and Bentham's utilitarianism as a theoretical base for the study of legislation. Moreover, the law concerning public instruction had made a class in 'morality and the natural law' a prerequisite for the course of studies in law or theology, following the Spanish *reglamento* in this regard.<sup>45</sup> And the contradiction reflects a real ambiguity in the position of the Santander government, which deliberately retained both studies in subsequent directives.

The Colombian plan assigned a number of writers considered unorthodox by church authorities because of their regalist or anti-papal position on ecclesiastical questions. But the Colombians who opposed the plan of studies for religious reasons directed their protests almost exclusively against the study of Bentham and the French sensationalist Destutt de Tracy, denouncing both as materialists and decrying Bentham's rejection of divine revelation, the natural law, and all that had been considered the basis of the moral order.<sup>46</sup>

The government had foreseen that the public would object to the incorporation of the Bentham text in the plan of studies and, according to Vicente Azuero, who was a member of the commission appointed to draft the document,<sup>47</sup> had provided article 229 to resolve the question.<sup>48</sup> This frequently cited article ordered instructors to omit from their lessons any 'doctrine contrary to religion, morality, and the public tranquillity' which might be found in the texts assigned.<sup>49</sup>

Unconvinced by this gesture, the conservative José Manuel Groot wrote in his history of New Granada that the plan of studies, and more concretely the article which imposed the Bentham treatises, had been part of a careful plan aimed at destroying the Catholic religion in Colombia.<sup>50</sup>

There is something to be said for this view. The Santander government, continually denouncing fanaticism and ultramontanism, felt itself joined in a life-and-death struggle to establish the sovereignty of the nation and to curb the power and autonomy of the Catholic Church. The administration leaders must have understood the implications of Bentham's materialism as well as his anticlericalism; perhaps this gave his works an additional value for them since, at the very least, a measure of scepticism might be a useful antidote to the religious excesses which they claimed to see all about them.

But Groot's charge is surely excessive. In 1826 a group of Venezuelans commented that the educational reforms constituted a plan 'exact and appropriate for forming in a brief time men who will be useful to the state',<sup>51</sup> and this analysis seems more fundamental. Diego Fernando Gómez and Vicente Azuero wrote later:

Our programme in jurisprudence should not only prepare lawyers and jurists of integrity, but also statesmen, capable diplomats and financiers, enlightened legislators, and intelligent public servants, because it cannot be denied that this profession enjoys great influence among us, and that candidates to fill the most important public offices are sought principally in its ranks.<sup>52</sup>

The men who governed Gran Colombia often spoke of the dearth of enlightened candidates for public office as a serious administrative problem. Santander had once declared himself unfit to govern a people in revolution because he lacked technical preparation - 'economic, political, and the rest'.<sup>53</sup> Now he and his associates were seeking an educational design that would meet the needs of the state that was struggling to be born.

Additional sections of the plan of study for jurisprudence reinforce this conclusion. The class known as *derecho público político* was to be based upon the 'elemental work' of Benjamin Constant, followed by a study of the constitution of the republic; these stipulations followed the model of the Spanish plan.<sup>54</sup> And another class in 'administrative science', which is not found in the Spanish legislation, was to treat the laws of Colombia, the functions and obligations of its administrative officials, and the elements of 'commerce, agriculture, and industry, the theory of revenues and taxation, the statistics of the republic, the annual budgets, and the discussions which they have occasioned in the congress'.<sup>55</sup>

Bentham's treatises must have seemed perfectly appropriate for such a plan, since they would challenge the young nation to create new laws and institutions after a cautious weighing of all relevant factors - factors from the real world, not the principles of Catholic dogma or of any tradition-bound system of thought. And Bentham's reputation gave his works a special attractiveness, since he was known as the mentor of the advanced reform party in England, the most advanced of nations, and had advised the Spanish liberals.

The critics of Bentham and Tracy, clergymen and a substantial and growing number of the lay public, had made their opposition heard from the time of Santander's first provisional decree.<sup>56</sup> Early in 1826 a priest who was well-known and liked in Bogotá preached against Benthamism and the plan of studies and was formally denounced by Vicente Azuero since, Azuero claimed, 'among us preaching is a function of the government'.<sup>57</sup> A small-size anti-Bentham newspaper was published during the controversy which followed, and its clerical editor insisted that any Colombian's right to criticize and protest should be respected.<sup>58</sup> Other commentators argued that the government's decision to implant utilitarianism in the schools contradicted the popular will, and one surviving statement points out that the *Traité de Législation* conformed in its doctrine neither to the Catholic religion 'nor to the political principles of New Granada'.<sup>59</sup> It should be recorded that Santander's government apparently allowed such criticism to circulate freely, as Bentham himself would have advised, although the priest who had angered Azuero was subjected to a temporary suspension of priestly faculties, imposed, at least in name, by the ecclesiastical authorities.<sup>60</sup>

The question of the Bentham studies was shortly resolved, not by Santander but by Bolívar, who resumed his presidential functions in 1827. His opposition to the plan of studies and other innovations of greater material importance was the result of his conviction that the constitution and laws of Colombia were excessively liberal, and were bringing about its dissolution.

Bolívar forbade the teaching of the Bentham treatises on legislation in March 1828,<sup>61</sup> acting upon the recommendation of the venerable José Félix Restrepo,<sup>62</sup> whom Santander had appointed *director-general* of studies. This was only one among the acts of his government which showed a reactionary direction, and in August 1828 he signed the Organic Act of the Dictatorship, declaring the executive and legislative powers united in his

person. Not many days later came the momentous news that a group of youthful conspirators, in association with some members of the military and two persons of French origin, had broken into the presidential palace and made an attempt on the life of the Liberator.

Certain university students and young instructors had been principals in the conspiracy, including two professors of legislation and a philosophy teacher.<sup>63</sup> Bolívar's government responded to this circumstance with an official circular which announced on October 20 that the Liberator President, after meditating upon the plan of studies, believed that the immorality of the young had its origin

in the political science in which the students have been instructed at the beginning of their career in higher studies....The evil also has increased beyond measure through the authors which were chosen for the study of principles of legislation, like Bentham and the others....

This directive ordered, among other changes in the plan of studies, that 'principles of universal legislation' and other classes in the law curriculum be suppressed entirely, to be replaced by the study of the Roman Catholic religion.<sup>64</sup>

It is difficult to imagine what justification the conspirators could have found in Benthamism for their impractical attempt to restore constitutional government by assassinating Bolívar. What does seem evident is that the presence of several intelligent young idealists among this group was a serious blow to the Liberator's glory, and that his government thought it best to fasten the blame upon the heterodox authors the liberals had set them to studying.

Santander's exile and three-year sojourn in Europe and the United States were among the results of the assassination attempt. He visited Bentham twice in London and the records of their interviews are intact.<sup>65</sup>

In 1832 Santander returned to New Granada as president-elect of the new state, still an admirer of Jeremy Bentham. In a letter written shortly after his arrival he reaffirmed his faith in the principle of utility as a guide for one who governed,<sup>66</sup> and during the following year refused to commute a death sentence after reflecting, he wrote, on Bentham's theory of punishments.<sup>67</sup>

Congress restored the Colombian plan of studies in 1835,<sup>68</sup> and at about the same time the senate received the first of many petitions which would be directed to the government of New Granada against the study of the *Traité de Législation*. They came from various sources - from the church hierarchy and other groups in Bogotá, the provincial legislatures of Buenaventura in the southwest, Veraguas on the Isthmus of Panama, and Cartagena, and the towns and cities of Cali, Chaparral, Paipa, Sogomosa, Popayán, and Honda.<sup>69</sup> By May of the following year an anonymous pamphleteer estimated that thousands of persons had signed anti-Bentham memorials.<sup>70</sup> The issue was widely discussed by anxious residents of the capital, according to José Manuel Restrepo's history of the period,<sup>71</sup> and was aired in pamphlets, broadsides, and a new anti-Bentham paper, *La Cáscara Amarga*.<sup>72</sup>

The government remained firm, but Santander did respond to a petition from the *Director-general de estudios* that the government cease to impose the study of Bentham's doctrines 'which the public rejects for solid reasons'.<sup>73</sup> The opposition to Bentham and his commentator Salas, wrote the chief executive, was very likely due to a misunderstanding of their

principles, but the reform and generalizing of education must proceed, always conducting the republic 'in harmony with the present state of civilization, and with the liberty which has been proclaimed for thought'. The president believed that the study of Bentham's work, well executed, would 'cause the bases of the legislation of a free people to be sought in reason and nature, the only sources of that which is just and sure, and not in the spirit of emulation and routine'. But he urged those who taught legislation to observe rigidly article 229 of the plan of studies, explaining the propositions of Jeremy Bentham 'in such a way that they may not take precedence over the laws which prescribe the teaching of morality and the natural law'.<sup>74</sup>

In his message to the Congress of 1836 the president declared that he would not recede a line from the position which the government had taken, being convinced that the struggle for independence had not been limited to throwing off the rule of Spain while preserving the colonial system of education.<sup>75</sup>

He apparently discussed the issue in his correspondence with Joaquín Mosquera, his former vice-president, who was at the time publishing a series of anonymous articles critical of the Bentham text in *El Constitucional de Popayán*.<sup>76</sup> Mosquera's letter of March 22, 1826 contains this significant passage:

You tell me that you are a utilitarian without denying the fundamental principle of that which has been called the natural law. This is the way Benjamin Constant and all the friends of liberty think, and so do I....I hope you will be persuaded that the principle of utility which you profess is not Bentham's and never can be.<sup>77</sup>

The point is so essential that one is inclined to agree that Santander should not be called a Benthamite. The order which he had recently given to the professors of legislation had shown the same inconsistency, and in two documents written between 1828 and 1830, when he was familiar with the *Traité de Législation*, he had justified his arguments with appeals to the natural law and the concept of natural rights.<sup>78</sup>

During the congressional session of 1836 two bills to ban the utilitarian textbook were introduced in the upper house, but Bentham was reputedly more popular in the lower house, where the members tended to be younger. According to one senator, the majority of them had studied the Bentham treatises, 'and there is no doubt that they esteem that author very much'.<sup>79</sup> This *cámara* did reject the anti-Bentham bills, but substituted another which would have given each *catedrático* the right to select his own texts, and the senate approved this house bill.<sup>80</sup>

Joaquín Mosquera urged Santander to sign the measure into law, for this, he wrote, 'would be conformable to the practice of the universities of France, England, and the United States....The most liberal statesmen, partisans of free discussion, are of the same opinion, consistent with the principle of not using force with the thought of another. In Europe,<sup>81</sup> only the partisans of the past subject instruction to determined authors'.

But Santander did not sign the proposed law, explaining to congress that public education was too important to the nation to warrant leaving the designation of texts to the arbitrary choice of each professor. If the bill became law, he wrote, article 229 of the plan of studies would remain in force as the only guideline. Because of its provisions

the professors of canon law, for example, will not teach doctrines contrary to the religion we profess....but they

will be able to teach the infallibility of the Pope, his supremacy in temporal matters, and all the doctrines of ultramontanism, as alarming as they are discredited. Young men imbued with these ideas leave the university halls to occupy the benches of congress or fill public offices, or to begin to take some other part and to influence the affairs of the nation: could they be counted on for support in favour of the liberal institutions to the full enjoyment of which we aspire, and which are still, we may say, in embryo form?

He continued:

I am not aware that there is a country in the civilized world in which a disposition analogous to the one I am returning exists....In all parts there are established rules for the designation and variation [of textbooks]....<sup>82</sup>

This document demonstrates once again the central importance which Santander assigned to the struggle against untramontanism, as well as his indifference to the opinions of so many representatives of the articulate public, and his insistence that education must be officially directed. When he referred to the educational reforms as contributing to 'the liberty which has been proclaimed for thought' *liberty* can have meant only freedom from the past, and from the powerful control of the church.

During the year 1837 the Santander regime was replaced by a more moderate government which seemed ready to give a more conservative direction to education. When that occurred, the *santanderistas* changed their position on public instruction and declared that teaching should be free from government interference. By that time the general himself would be too ill to take part in the debate, and his opinion is not on record.

Some time after taking office the new president, José Ignacio Mañquez, responding to a new group of petitioners, ordered that the nation's three universities submit opinions on the question of the controversial texts.<sup>83</sup> The University of the Cauca declared itself opposed to Bentham and Tracy, but the governing body of the University of Magdalena and the Isthmus responded that it saw 'no reason to vary the authors indicated'.<sup>84</sup> The report of the Central University is interesting because of the eminence of the man who composed it, Dr. Rufino Cuervo, the new rector. He wrote that the Bentham work 'sparkled' with sublime principles and new ideas, but believed that it was **extremely dangerous if not well understood**. With Salas' commentary it would deprave the hearts of youth. He recommended that university professors receive a full-time salary so that they could devote themselves exclusively to teaching and the advancement of their sciences, preparing their daily lectures from the best authors available.<sup>85</sup>

New legislation on the textbook issue was introduced in the Congresses of 1839 and 1840.<sup>86</sup> In April 1840 the *Diario de las sesiones* reported a debate in the *cámara de representantes* on a bill leaving the selection of texts to the professors' judgment, but requiring them to submit their class syllabi for official approbation. Although he was an elected member of the house, Santander was absent because of an attack of a chronic ailment which he had suffered two weeks earlier.

Ezequiel Rojas, long a prominent associate of Santander, objected to prior censorship of class materials, which might be an obstacle to progress. Would not each *catedrático* be a more competent judge in these matters than the officially-appointed subdirector of studies? Vicente Azuero spoke in favour of an amendment limiting the scope of the govern-



ment's control to the prohibition of specific doctrines. Liberty of teaching had been guaranteed by article 195 of the constitution, he said, and the dispositions imposing certain authors should have been considered null since the day on which New Granada's constitution took effect.<sup>87</sup> Florentino González, another leading *santanderista*, who had taught legislation in the 1820s and published a newspaper with Santander in the 1830s,<sup>88</sup> agreed that discussion and education should be free in every sense, because out of such a situation the truth was likely to emerge. He asserted that the evil of the plan in force lay not in the works of Bentham and Tracy, but in the fact that the government had invested them with its authority and had excluded other texts.<sup>89</sup>

The new law, somewhat modified to permit greater academic liberty, received the president's signature on May 14.<sup>90</sup> Santander had died a week earlier, 'as a Christian', in the arms of the archbishop.<sup>91</sup> An inventory drawn up shortly after his death reveals that his library contained nine<sup>92</sup> titles by Bentham, as well as the eight bound volumes of *El Español*.

Benthamism had seemed a promising political philosophy to Santander and his associates, who had laboured to build a modern and enlightened state during their years in power. They must have done what they thought was necessary to serve this aim and to govern well; if justification were needed they could find it in the principle of utility, but they could also cite the more familiar liberal doctrines.

While the merits of utilitarianism were clear to these leaders, it was never likely to arouse great popular enthusiasm. It could not compete with the attractiveness of the libertarian principles of the great revolutions, or the appeal of the older religious faith, and critics attacked it from both positions. By 1840, nevertheless, Jeremy Bentham had won new followers among the younger members of the governing elite. The government's commitment to his writings had increased the pain of the nation's religious controversies, and had damaged the popularity of Santander and his party. Yet his treatises had furnished a system of thought which the liberals endorsed in the expectation that it would produce, on balance, a 'greater good': a generation of leaders formed to continue the modernizing work they had begun.

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#### NOTES

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3. Quoted and translated, *ibid.*, p.143. This passage by Dumont was included in the Spanish version of the *Traité de Législation* which circulated in Colombia.
4. *Ibid.*
5. Jeremy Bentham, *Tratados de legislación civil y penal*, Obra extractada de los manuscritos del Señor Jeremías Bentham...Traducida al Castellano, con Comentarios, Por Ramón Salas...Con arreglo a la segunda edición... (5 vols., Madrid, 1821-22), I, 178-9.
6. Jeremy Bentham, *Tratado de los sofismas anárquicos*, in *Tratado de los sofismas políticos*...Nueva edición aumentada con el tratado de los sofismas anárquicos... (Madrid, 1838), 317-18.

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8. 'Bentham y los utilitaristas colombianos del siglo XIX', *Ideas y Valores: Revista de la Facultad de Filosofía y Letras de la Universidad Nacional* (Bogotá), IV (1962), 11.
9. Etienne Dumont (ed.), *Tratados de legislación*, I, 203.
10. Jaramillo, 'Bentham', 13.
11. Halévy, *op.cit.*, 296-7.
12. *El Español* (London), Jan.-Feb., 1814, 34.
13. 'Artículo extractado de los manuscritos ingleses de Bentham y publicado por el Sr. Blanco en su "Español",' *La Bagatela*, Dec.1, 1811.
14. *Vida de Rufino Cuervo y noticias de su época* (2 vols., 2nd ed., Bogotá, 1946), I, 16.
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16. *Correspondencia dirigida al General Francisco de Paula Santander*, comp. Roberto Cortazar (14 vols., Bogotá, 1964-70), IX, 164.
17. Robert Gilmore, 'Federalism in Colombia, 1810-1835', Dissertation, University of California, Berkeley, 1949, 1-2, 4, 9, 21, 24, 36.
18. Letter of Aug.19, 1820, in *Cartas y mensajes del Gral. Francisco de Paula Santander*, comp. Roberto Cortázar (10 vols., Bogotá, 1953-56), II, 258.
19. Letter of Sept.29, 1820, *ibid.*, II, 312.
20. *Ibid.*, I, 166.
21. *Correo del Orinoco* (Angostura), Sept.2, 1820; *Gaceta de Colombia* (Villa del Rosario de Cúcuta), Sept.9, 1821; *Correo de Bogotá*, April 9, 1824.
22. *Boletín del Gobierno*, Número 2<sup>o</sup>, preserved in the Biblioteca Nacional (Bogotá), Fondo Pineda, #883. The Fondo Pineda will hereinafter be cited as F.P.
23. Letter to Santander, May 21, 1821, *Correspondencia*, IX, 463.
24. Fabio Lozano y Lozano, 'Apuntes para le biografía del Doctor Vicente Azuero', in *Documentos sobre el doctor Vicente Azuero*, ed. Guillermo Hernández de Alba y Fabio Lozano y Lozano (Bogotá, 1944), xlvii.
25. David Bushnell, *The Santander Regime in Gran Colombia*, University of Delaware Monograph Series, No.5 (Newark, Delaware, 1954), 11; Eduardo Acevedo Latorre, *Colaboradores de Santander en la organización de la república* (Bogotá, 1944), 45.
26. Azuero to Santander, June 6, 1821, *Correspondencia*, I, 304; José Manuel Restrepo, *Biografía de José Manuel Restrepo, Escrita por el mismo* (Bogotá, 1957), 34.
27. *Proyecto de Código Penal Para Colombia: Tomado, con las variaciones necesarias, del que se presentó a las Cortes españoles por una comisión en el año de 1821* (Bogotá, 1823), F.P., #205; Secretary of the Interior to Azuero, Feb.25, 1823, in *Documentos sobre Azuero*, 84.
28. This recommendation appeared in a newspaper which Azuero was writing and editing and may be presumed to be his. See *El Conductor* (Bogotá), April 13, 1827.
29. *La Indicación* (Bogotá), Sept.21, 1822, Sept.28, 1822, Dec.28, 1822; *Gaceta de Colombia* (Bogotá), 24 Nov. 1822. Cf. Bentham, *Tratados de legislación*, I, 288; III, 274-6; II, 102-3; I, 280. The material in Azuero's *Correo de la Ciudad de Bogotá*, June 20, 1822, was said to be the contribution of an unnamed correspondent, summarizing certain views expressed by Bentham 'en su tratado de legislación civil y penal'.
30. Issue of Aug.24, 1822.

31. I, 247.
32. *Ibid.*, 160.
33. *Sofismas anárquicos*, 351.
34. Letter of Dec.31, 1822, *Correspondencia*, II, 350.
35. *Cours de politique constitutionnelle, ou Collection des ouvrages publiés sur le gouvernement représentatif* (2 vols., 2nd ed., Paris, 1872), I, 15.
36. *Ibid.*, 347.
37. *Correo de Bogotá*, April 9, 1824, cf. Bentham, *Letters to Count Toreno on the Proposed Penal Code...*, *Bowring*, viii, 538; *El Patriota* (Bogotá), July 6, 1823, cf. Bentham, *Codificational Proposal*, *Bowring*, iv, 578.
38. McKennan, 'Colombian Liberators', *op.cit.*, 470-2.
39. *Gaceta de Colombia*, Nov.27, 1825.
40. *Historia eclesiástica y civil de la Nueva Granada* (5 vols., 2nd ed., Bogotá, 1889-93), V,63.
41. *Gaceta de Colombia*, June 26, 1825.
42. Law of March 18, 1826, *Codificación nacional de todas las leyes de Colombia desde el año de 1821* (Bogotá, 1924-), VII, 226-40; Decree of March 18, 1826, *ibid.*, 241; Decree of Oct.3, 1826, *ibid.*, 401-51.
43. Decree of June 29, 1821, *Colección de los decretos y órdenes que han expedido las cortes generales y extraordinarias* (10 vols., Madrid, 1820-23), VII, 362-81; Royal Order of Sept.20, 1820, Archivo Histórico Nacional (Madrid), Sección de Universidades, Leg.575, 2.
44. Decree of Oct.3, 1826, 437.
45. Law of March 18, 1826, 236; Decree of June 29, 1821, 369.
46. Thomas P. Neill has described Bentham's departure from traditional moral teaching in this way and it is a good summary of the complaints of the Colombian Catholics. See his *The Rise and Decline of Liberalism* (Milwaukee, Wisconsin, 1953), 56.
47. *Acuerdos del Consejo de Gobierno de la República de Colombia, 1821-27* (2 vols., Bogotá, 1940-42), II, 68-70.
48. Report of Vicente Azuero and Estanislao Vergara to the Vice-President, Aug.9, 1827, *Gaceta de Colombia*, Sept.9, 1827.
49. Decree of Oct.3, 1826, 450.
50. IV, 201, 227-8; V, 61, 128.
51. 'Acta de la Asamblea Reunida en Valencia', June 29, 1826, in *Archivo Santander*, ed. Ernesto Tirado et al., (24 vols., Bogotá, 1913-32), XV, 20.
52. *El Constitucional de Cundinamarca* (Bogotá), May 25, 1834.
53. Letter to José Manuel Restrepo, Dec.7, 1819, *Cartas y mensajes*, I, 355.
54. Cf. Decree of Oct.3, 1826, 437; Royal Order of Sept.20, 1820; Decree of June 29, 1821, 366-7, 369.
55. Decree of Oct.3, 1826, 437.
56. *Gaceta de Colombia*, Nov. 27, 1825; *El Constitucional* (Bogotá), Dec.1, 1825
57. 'Representación dirigida al Supremo Poder Ejecutivo contra el presbítero doctor Francisco Margallo - 1826', in *Documentos sobre Azuero*, 282.
58. *Cartas Críticas de Un Patriota Retirado* (Bogotá), May 22, 1826. An anti-Bentham paper of the 1830s declared that the author of this publication had been Rosillo, presumably Dr. Andrés María Rosillo, dean of the cathedral chapter of Bogotá. See *La Cáscara Amarga* (Bogotá), Oct.16, 1835.

59. *El Constitucional de Popayán*, Dec. 1, 1835. The author was undoubtedly Joaquín Mosquera.
60. Auto of Fernando Caicedo y Flórez, July 26, 1826, in *Gaceta de Colombia*, Aug. 20, 1826.
61. Decree of March 12, 1828, *Gaceta de Colombia*, May 23, 1828.
62. Report of Dr. Félix Restrepo, March 6, 1828, Archivo Histórico Nacional, Bogotá, Instrucción Pública (Sección de la República), CXXXIV, 838-89. Hereinafter cited as A.N. All of the volumes to be cited are from the Sección de la República, Instrucción Pública.
63. Florentino González and Ezequiel Rojas were professors of civil and penal legislation at the Universities of Bogotá and Boyacá, respectively, and Pedro Celestino Azuero taught philosophy at the *colegio* of San Bartolomé.
64. Public Instruction Circular, Oct. 20, 1828, *Gaceta de Colombia*, Oct. 30, 1828.
65. Francisco de Paula Santander, *Diario del General Francisco de Paula Santander en Europa y los EE. UU., 1829-1832*, ed. Rafael Martínez Briceño (Bogotá, 1963) 173, 335-6. See also Santander's letters to Bentham dated July 1, 3, 9 and 10, British Library, Add. MS 33546, fos. 436, 438, 442, 444.
66. Letter to Gen. Manuel Valdés, Dec. 16, 1832, *Cartas y mensajes*, VIII, 237.
67. 'Apuntamientos para las Memorias sobre Colombia y la Nueva Granada', in *Archivo Santander*, I, 78.
68. Law of May 30, 1835, *Codificación*, V, 486-90.
69. For petitions received during the Santander administration see *Representación al Senado*, Bogotá, May 18, 1825, F.P.#275; A.N., CXII, 496; Archivo del Congreso (Bogotá), Cámara de Representantes, 1836, Tomo XVI, Vol. 75, sheets 164, 166-7, 170-1, 178, 180-3, 187, 189-90, 193. Hereinafter cited as A.C. All material to be cited is from the archive of the Cámara de Representantes. See also *Prohibición de la Enseñanza por Bentham*, Bogotá, April, 1836, F.P.#470, which cites the petitions from Cartagena and Honda, not seen by the writer, and *Gaceta de la Nueva Granada* (Bogotá), Sept. 11, 1836, which also cites the Cartagena petition. For those of the Márquez administration see A.N., CXII, 488; A.C., 1839, T. IX, Vol. 119, sheet 219, Vol. 211, sheet 119.
70. *Aviso al Público*, Número 3, F.P.#198. This paper, of admittedly intemperate style, gives the total as 253,000.
71. *Historia de la Nueva Granada* (2 vols., Bogotá, 1952-63), I, 81.
72. Juan Francisco Ortiz was the writer; see his *Reminiscencias* (Bogotá, 1907), 102. José Manuel Groot briefly edited another such paper, *Los Tardes de Tinjuelo* (Bogotá), in 1839.
73. *Informe de la Dirección general de instrucción pública sobre la enseñanza de Bentham...*, Sept. 23, 1835, F.P.#469. The report is signed by José Manuel Restrepo, who was director of studies.
74. 'Enseñanza por Bentham', *Gaceta de la Nueva Granada*, Oct. 18, 1835.
75. Message of March 1, 1836, *Cartas y mensajes*, IX, 345.
76. These articles appeared from December 1835 until April 1836, challenging a more extensive series of articles published in *El Constitucional de Cundinamarca*.
77. *Correspondencia*, VIII, 373.
78. 'Apuntes de Santander sobre el atentado del 25 de setiembre', *Archivo Santander*, XVIII, 53; Exposition to the Representatives of the Colombian people, July 4, 1830, *Cartas y mensajes*, VIII, 67, 75.

79. The speaker was Senator Valencia of the Cauca. See *Diario de Debates* (Bogotá), Senado, March 28, 1836, 240. During the congressional session of 1839 Groot asserted that the 'disciples of Bentham' formed almost a majority in the lower house. See *Tardes de Tunjuelo*, June 2, 1839.
80. *Aviso al Público*, Número 3, F.P.#198.
81. Letter of June 28, 1836, *Correspondencia*, VIII, 379.
82. Message to the President of the Senate, Feb.6 [1837], *Cartas y mensajes*, IX, 337-9.
83. A.N., CXII, 488.
84. *Ibid.*, sheets 494-7, 498.
85. *Ibid.*, sheets 489-92.
86. A.C., 1839, T. IX, Vol.119, sheet 209; José Rafael Mosquera and Francisco Javier Zaldúa, *Informe de la comisión de Instrucción Pública a la Cámara de Representantes*, Bogotá, April 6, 1840, F.P.#470.
87. This article, as translated by William Marion Gibson, reads: 'No kind of work, trade, or commerce which is not contrary to good morals shall be forbidden to the Granadines, and all shall be able to employ themselves as they will, except in such occupations as may be necessary for the support of the state; consequently, they shall not be able to establish any body or corporation of trade, art, or business which may be an obstacle to the freedom of invention, instruction or industry'. See his *The Constitutions of Colombia* (Durham, North Carolina, 1948), 147.
88. Santander, González and Lorenzo María Lleras founded *La Bandera Nacional* in Bogotá in 1837.
89. *Diario de las Sesiones*, Cámara de Representantes, 1840, session of April 24.
90. *Codificación*, VIII, 566-69.
91. Restrepo, *Nueva Granada*, I, 167-8.
92. Quoted in Guillermo Hernández de Alba and Rafael Martínez Briceño, 'Santander íntimo', work in preparation.

JEREMY BENTHAM AND LEGAL EDUCATION IN THE UNIVERSITY OF SALAMANCA DURING  
THE NINETEENTH CENTURY

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1. The Historical Background to the Introduction of Bentham's  
Philosophy in Salamanca

The University of Salamanca has been considered as one of the most important academic centres in Spain. Its great prestige, already well established in the Middle Ages when, together with the Universities of Paris, Bologna and Oxford, it was one of the chief centres of European culture, did not disappear altogether even in the years of its initial decline in the late 18th and early 19th centuries.

There are several reasons for the crisis within the University. There was a progressive estrangement between the universities and Spanish society in the 18th century, the former remaining bound to their traditional ways while the latter, under the influence of Encyclopedism, was reappraising the role of the humanities and their application to the problems of the day. Similarly, the universities experienced a progressive increase in state control, gradually losing their autonomy. Besides this, the Napoleonic invasion disrupted all spheres of Spanish life. The resulting war tore students and teachers alike from their studies, and created a climate hostile to academic and cultural disputes.

On the other hand, the War of Independence reawakened two ancient strands of thought, traditionalism and liberalism, which were profoundly antipathetic and which produced distinct effects on Spanish society.

These events struck especially hard at the University of Salamanca, which had suffered particularly from the corruption which had afflicted the universities.<sup>1</sup> Nevertheless, the University came to be considered as the undisputed centre for the initiation of successive university reforms. It was in Salamanca too that the first attempts were made by the University staff to restructure the didactic methods; this was to have special emphasis in the field of legal studies.

The central role which the University played in the educational reforms of this epoch was due to the fact that in spite of the crisis which afflicted it, and perhaps in reaction to that crisis, a vital intellectual nucleus was formed there in the final years of the eighteenth century which, because of its political affinities, its common desire for cultural broadmindedness, and its ties of milieu and friendship, was aptly named the 'Escuela Iluminista Salamantina'.<sup>2</sup>

The members of this school were men of letters, philosophers and jurists, as expressed in the words of Manuel José Quintana, one of its most distinguished exponents: 'Then began to form that school of literature, philosophy and good taste that abruptly rooted out the unpleasant characteristics of that tormented, Gothic grasp of Scholasticism and opened the door to the light then shining throughout Europe... All this stemmed from that school which has produced, from that day to this, such distinguished jurists, philosophers and humanists'.<sup>3</sup>

This atmosphere of intellectual reform on a juristic plane was also encouraged by the interest awakened through the study of Natural Law which started in the 'Reales Estudios de San Isidro' in 1771, and

which was subsequently taught in the Universities of Valencia, Granada and Zaragoza. In Salamanca a special chair for this branch of Law was not created, but it was taught in the other courses.<sup>4</sup> In that period, as Ramón de Salas tells us: 'To know Heinecius or Burlamachi was to know something'.<sup>5</sup> In the course of the study of Natural Law, Grocio, Puffendorf, Wolff, Montesquieu and Rousseau were read in addition to the two mentioned earlier, all of which led to a veritable reformation. That was how, according to Salas' own testimony: 'A few brave and independent masters dared to promulgate some truths new to them, truths whose importance and evidence piqued their curiosity, moving them to look for and read a few good books, at all costs'.<sup>6</sup>

This group of professors saw in the rationalism of Natural Law the mark of a new and more perfect justice, one capable of assuring equality and liberty amongst men. Firmly convinced of the value and necessity of a law for social reform and for the achievement of happiness amongst its members, these Salamancan intellectuals made an enthusiastic demand for an ambitious programme of change and transformation in the legal and political institutions of Spain.

It was in this atmosphere that Jeremy Bentham appeared on the intellectual horizon in Salamanca. Bentham, the philosopher-legislator, was completely at one with the spirit of legal and political reform which was breathed in the extremely restless circles in Salamanca at the beginning of the nineteenth century. His utilitarian method gave rise to a new way of laying the foundations for an *a priori* legal and political code of ethics, in view of the painful or pleasurable results of human actions and of their favourable or harmful repercussions on the social plane. Hence, the fact that the intellectual minority which, in the University of Salamanca, was hoping for a thorough reappraisal of the prevailing didactic system, chose Bentham's philosophy as the one most suited to their purposes.

## 2. The Diffusion of Bentham's Method of Legal Education in the University of Salamanca

When did the scholars in Salamanca first become aware of Bentham? Who were the men who contributed most directly to the furthering of his philosophy? How was it possible for his teachings to be assimilated? These are the questions which are raised by the study of the diffusion of Bentham's doctrines in Salamanca at the beginning of the nineteenth century.

a) The story of Bentham's rise to fame in Spain is almost anecdotal. Toribio Nuñez, who was later to become Bentham's best exponent in Spain, confessed in a letter to the English jurist and philosopher that, 'When the French army passed through Salamanca on its way to Portugal in 1807, I bought, among other books they had on sale, your *Principles of Civil and Penal Legislation*'.<sup>7</sup> It seems that it was by means of Dumont's French edition that Bentham's work gained popularity with Salamancan scholars. From then on, interest in Bentham's beliefs grew by leaps and bounds and numerous translations of his books were printed, so much so that it was correctly affirmed that: 'No other foreign author exercised as much influence on Spain as Bentham did from 1820-1845'.<sup>8</sup>

b) A brief survey of these translations will illustrate this point. The first work in Spanish which discussed Bentham's philosophy was *Aplicación de la panóptica de Jeremías Bentham a las cárceles y casas de corrección de España* written by Jacobo Villanova y Jordán. This was a report which was published in 1834, but which had been written

in 1819, as indicated in the Prologue.<sup>9</sup> In 1823 Joaquín Escriche published a compendium called *Tratado de legislación civil y penal*.<sup>10</sup> The *Principios de legislación y codificación* were taken from the Dumont edition in 1834 by Joaquín Ferrer y Valls.<sup>11</sup> One year later, José Gomez de Castro published *Tratado de las pruebas judiciales*.<sup>12</sup> Diego Bravo Destonet's edition of this work appeared in 1847.<sup>13</sup> Baltasar Anduaga y Espinosa then translated Dumont's complete edition in fourteen volumes and thus published between 1841 and 1843 the most extensive collection of Bentham's works in Spanish.<sup>14</sup> But by far the most important editions published in Spain were those undertaken by two men who were very closely bound to the University of Salamanca: the University Professor Ramón de Salas, and the librarian Toribio Nuñez.

Ramón de Salas y Cortes, Vice-Rector in 1776 and Rector in 1778 of the University of Salamanca, was a scholar committed to the political problems of his time. His critical attitude caused him to be put on trial before the Inquisition on the charge of being the author of an anonymous article entitled *Oración apologética y exhortación al pueblo español dirigida a moverle para que vindique sus derechos contra el abuso de la potestad real*, and also of the translation of Voltaire's *Diálogos del ABC*.<sup>15</sup> Salas was host to gatherings of scholarly men in his home and he was noted for his efforts to establish a chair of Political Economy in the University of Salamanca. Political changes led him in the era of liberal prevalence to a position in the *Cortes*, but during the absolutist reaction he was dispossessed of his chair.<sup>16</sup>

Ramón de Salas made a definite contribution to the propagation of Bentham's beliefs in Salamanca, thanks to his translation from Dumont's French edition of *Tratados de legislación civil y penal* in 1821.<sup>17</sup> There are also echoes of Bentham's thought in his *Lecciones de derecho público constitucional*.<sup>18</sup> Nevertheless, it should be stressed that Ramón de Salas was an independent thinker, not a pure Benthamite. Benthamism was only one of the strands in the thought of Salas, who was an admirer of Rousseau and a student of political economy many years before he first read Bentham.<sup>19</sup>

Toribio Nuñez y Sessé was undoubtedly the best exponent of Bentham's philosophy in Salamanca. He was a pupil of Melendez Valdés and obtained a chair which was arbitrarily taken away from him by Godoy, Charles IV's favourite. He was later nominated librarian of the University of Salamanca in 1812, but because of his liberal ideas he was subsequently stripped of this office during the absolutist reaction of Fernando VII. He was reinstated during the liberal triumph in 1820, and in 1822 he was made representative for Salamanca in the *Cortes*. True to the political ideals he professed, Nuñez followed the exodus of the *Cortes* to Sevilla and Cadiz in 1823, fleeing the 'Cien mil hijos de San Luis,' who overran the peninsula to restore the absolutist regime. From then on, he lived in Sevilla, dispossessed of all official posts and dedicated to study and to the instruction and formation of a select group of pupils.<sup>20</sup>

Testimony of Bentham's influence on Nuñez appears in a leaflet bearing the title of *Informe de la Universidad de Salamanca sobre el plan de estudios*.<sup>21</sup> The above-mentioned work, although it appeared in print in 1820, was edited between 1813 and 1814 by Tomás Gonzalez and Toribio Nuñez, the latter being the chief contributor.



The first book in which Nunez confronted Bentham's philosophy directly was one which bore the title *Espíritu de Bentham*, which was published in 1820 and in which he tried to pinpoint the essentials of Bentham's utilitarian doctrine. The book, which was dedicated to the Spanish *Cortes*, began with these telling words: 'A spirit of friendship, gratitude and patriotism impels me to offer this bouquet to social science on the altar of this country'.<sup>22</sup> Nuñez affirmed that the chief aim of his work was to make known to scholarly Spaniards the new order which Bentham had bestowed upon the social sciences, by endowing them with an exactitude in their principles which they had previously lacked. He pointed out also that he had made a synthesis of several of Bentham's works in which were found 'the most luminous principles so far seen concerning legislation, jurisprudence, public law, natural law, international law, economy, statistics, moral education, religion and the other matters of what we call moral and political sciences'.<sup>23</sup>

A year later he published *Principios de la ciencia social o de las ciencias morales y políticas*. This work, according to Nuñez himself, contained: 'The principles, arithmetic, logic, anatomy, physiology, pathology, gnosology and therapeutic benefits of social science'.<sup>24</sup> It was an all-embracing view of utilitarian doctrine and it was dedicated to the young students so that they might have a clear grasp of its cause in Spain. In 1835 this work was re-edited by order of the Spanish government with a preface by Eugenio Tapia and Joaquín Francisco Pacheco, members of the Commission of civil legislation, who wrote: 'Toribio Nuñez, who had a deeper understanding of Bentham's spirit than Dumont, and managed, through exhaustive study, to realize Dumont's projects, recasting them to form a body of doctrine'.<sup>25</sup>

It is well known that the books responsible for Bentham's widespread renown were not written by Bentham himself. In the intellectual world, Bentham's name is invariably linked with those of Dumont, John Stuart Mill and John Bowring; and in Spain, in particular, with those of Salas, Anduaga and Nuñez himself. But these authors did not merely translate Bentham's works; they were also his editors in effect. Seen in this light, Nuñez's great achievement was to have compiled a well-organized compendium of the principles contained in Bentham's numerous studies and unpublished manuscripts which Bentham had not bothered to unify: 'Other expositors did not accomplish this, since they limited themselves to expounding Bentham's ideas, without organizing them'.<sup>26</sup> This great task was acknowledged by Bentham himself who recognized in Nuñez in a letter to him in 1821 a 'worthy and eminently well beloved disciple'. In that same letter, he spoke of the great impression made upon him by Nuñez's *Espíritu de Bentham*: 'Such as thou has made me to thyself, such, to please thee, I make myself to thee. That work of thine, of which a work of mine forms the subject, has at length reached me. Yes: thy mind is the very child of mine: thy talent, of my talent....'<sup>27</sup>

Bentham's appreciation of the value of Nuñez's work is very significant, considering that Bentham occasionally expressed dissatisfaction with Dumont's editing. His effort was rewarded by the praise of Bentham himself who considered Nuñez to be the one who had best been able to capture the true nature of his teachings. It should be noted that Bentham was always reluctant to give his approval to the works of his various exponents, and many times refused to accept any responsibility, but he broke with his custom to praise Nuñez in the highest degree.<sup>28</sup> Within the boundaries of Spain, Nuñez's exposition towers

above the rest, including that of Salas, which has been judged 'anodyne'<sup>29</sup> and even misrepresentative of Bentham's thought.<sup>30</sup> We can therefore only agree with Sánchez-Rivera, a descendent of Núñez, when he pleads fervently: 'It should be known that the most brilliant and authentic expositor of Bentham's doctrines was a distinguished, and unjustly forgotten Spaniard, D. Toribio Núñez y Sessé'.<sup>31</sup>

Bentham's philosophy also influenced other professors and intellectuals connected with the University of Salamanca. Thus we find echoes of Benthamic methods in the *Elementos de verdadera lógica*, written by Juan Justo García, Professor of the Department of Mathematics and Member of the liberal *Cortes* in 1820.<sup>32</sup> Utilitarian influence on the moral plane is more marked in the *Elementos de filosofía moral*, by Miguel Martel, Professor of Ethics in Salamanca and Member of the same legislative body as García, and in the *Sistema de moral* by Prudencio María Pascual.<sup>33</sup> However, there was a certain amount of compromise between utilitarian and other principles in the work of the last three. Greater affinity with Bentham's thought is to be found in the *Descripción de los más célebres establecimientos penales* by the lawyer, Marcial López; the influence of Beccaria can also be felt and a proposal is advanced whereby the prisoner would receive mental and technical assistance in order to facilitate his rehabilitation.<sup>34</sup> Unmistakable Benthamic characteristics are also to be noted in the academic and political attitudes of Diego Muñoz Torrero, Rector of the University of Salamanca and President for a month in the *Cortes* in Cádiz,<sup>35</sup> and in the monk, José Marchena, a disciple of Ramón de Salas, in whom a clear example of bourgeois utilitarian philosophy in Spain has been identified.<sup>36</sup>

c) This brief account is sufficient to indicate the influence that Bentham's doctrine exercised upon the University of Salamanca. If this essay is not to remain incomplete, we must now examine the means by which the diffusion of his doctrine was made possible, with special reference to whatever it may have to do with the teaching of law. In this respect, the different aspects dealt with in Bentham's approach may be synthesized by three principal characteristics. It should be noted that this attitude was representative of Bentham's disciples of Salamanca, not of pure Benthamite doctrine.

#### 1. Methodological pluralism

The first revolutionary factor to be noted in the Benthamic approach to law, and one which played a decisive role in its application, hinged upon Bentham's intention to fuse together the study of law and the other cultural and scientific branches. Núñez was the one who put these words into Bentham's mouth: 'I have found means for inventions or models not in books on jurisprudence, but in works of metaphysics, natural history and medicine. In reading some modern treatises, especially those in medicine, my attention was particularly drawn to the classification of illnesses and remedies. Could not that same ordering be transferred to legislation? Could not the body politic for example, have its own anatomy, physiology, pathology, gnosology and therapy? What I have found in Tribonio, Conceis, Blakston, Watel, Poitier, and Domat has been almost useless, whereas Hume, Linnaeus, Bergman and Cullen have been much more useful'.<sup>37</sup>

The whole of Núñez's exposition of Bentham's work in this *Principios de la ciencia social* conformed, as has been seen, to his intention of projecting those methodological principles into the field of jurisprudence. Núñez himself deliberately justified the merit of this

pluralist methodological posture, thanks to which Bentham had recovered the Socratic idea of falling back upon: 'Arithmetic and geometry to sum up portions of good and evil and measure their extent, by which means he reached an exact measure'.<sup>38</sup> In Núñez's opinion, this method would help to impart a firmer base to legal studies, by imbuing its conceptual system with a theoretical code which was abreast of the advances of other cultural and scientific disciplines. Any method which steered clear of further complicating legal studies was bound to contribute to better training for law students, which would in turn lead to further advances in competent legislation and the pursuit of justice. In Núñez's own words: 'Don't think that having given more accuracy' to moral sciences will make your studies more trying; on the contrary, you will advance with greater ease, in a more pleasing way, and with much surer progress'.<sup>39</sup>

However, many of Núñez's contemporaries openly displayed their hostility to this new method of legal education. We should recall, for instance, the open criticism of the law historian, Franciso Martinez Marina, who played such a decisive role in the formulation of the Spanish constitutional and legislative system. In his opinion, Bentham's methodological stand originated only in a desire to be original, which led him to employ 'exotic and almost incomprehensible language and presumptuous vocabulary belonging to no known language'.<sup>40</sup> Martinez Marina reproached Bentham for having scorned the specifically legal method by combining it with principles borrowed from the physical, natural and medical sciences, 'achieving with this, and his vain divisions, subdivisions and classifications fame as an original writer, not so much for the novelty of his ideas as for his method, nomenclature and terminology'.<sup>41</sup>

From a present-day perspective, methodological pluralism proves to be clearly advantageous within the framework of legal studies in the nineteenth century. This attitude was responsible for the introduction and acceptance of Positivism<sup>42</sup> and Krausism.<sup>43</sup> Within the bounds of legal studies in Salamanca, Bentham's own branch of methodological pluralism signified undeniable advances; it broke the barriers which separated the study of law from the other humane and scientific disciplines, and it lifted it out of the purely abstract and idealistic plane of speculation to unite it with problems of practice.

## 2. Anti-dogmatism

Closely bound to this methodological pluralism is the overall anti-dogmatic attitude which dominated the methodological orientation of Bentham's disciples in Salamanca.

His contempt for any kind of dogma is amply demonstrated in his work. He examined this in particular by considering the notions of sympathy and antipathy and by pointing out their necessarily arbitrary nature. He went on to say that one's pride tries to make one's own sentiments triumph without ever bringing them face to face with the sentiments of other people. The result of this is personal dissatisfaction on the one hand and hurt to one's companions on the other. The dogmatic person will, if he has a bilious temperament to boot, attack all who do not think as he does, and he may even go to the extreme of becoming one of those self-exalted bigots who commit no end of injury all the while thinking that they are being just, 'who malignly stir up the fires of fanaticism, seeing it as their duty, and who openly maltreat, with perverse words and bad faith, those who do not

share the opinions they hold to be irrefragable'.<sup>44</sup> Bentham laid special emphasis on combating political dogma. He stated: 'Dogmatists form a great many sects, most of them at war with one another. In politics, however, all of them are inspired types who believe, order others to believe and do not reason....they spout endless maxims, have universal means for governing, which they apply without considering Past or Present. Their impatience to act is proportionate to their impotence to doubt, and their intrepid vanity leads them into being as violent in their means as they are despotic in their opinions'.<sup>45</sup>

This viewpoint was amply backed up by Bentham's followers in Salamanca. Later, Núñez was to note a certain parallel between Bentham's anti-dogmatic attitude and Kant's criticism. He wrote in the Prologue to his *Principios de la ciencia social* that: 'All the archetypal ideas of moral science are intellectualized poetic schemes, according to Kant. This philosopher has supplied us with the means to reason and given evidence for these principles. Join Socrates and Bentham by way of Kant and you will not abandon this method'.<sup>46</sup>

Ramón de Salas proved to be a committed opponent of dogma. His critical commitment was so deep-rooted that even when referring to Bentham's own discipline, he warned that it should never be accepted as a dogma; he went on to say, however, that such a danger would seem to be quite remote, seeing that one of the fundamental principles of Bentham's discipline was that: 'Reason is preferable to any authority, and authority alone never constitutes good reasoning'.<sup>47</sup> Salas' opinion on this point is perhaps most clearly in the paragraph where he stated: 'However great one's respect for one's superiors, even greater should be one's respect for truth....how many ills humanity has suffered through its blind obedience to authority!'<sup>48</sup>

As far as the Salamancan professors and lecturers were concerned, the primary objective of university education could be no other than a system of education geared towards freedom in all aspects; the student was there to develop an open and critical mind. It is worth noting that although these Salamancan intellectuals thought the development of a critical mind the prime requisite in legal training; this held advantages for society as well, in that the beneficiaries of the legal norm would only accept its precepts when they were instructed without force or obligation as to its significance.

This didactic stand led to an important change in the intellectual universe of Salamancan jurists in the first half of the nineteenth century. In exchange for the dogmatic learning of standard texts and of the doctrines of authorities on the subject, a critical examination of contemporary juristic knowledge was offered. The jurist gained new acclaim thanks to these novel techniques which encouraged him to perform more freely and more effectively. And thus did the application of a strong and vigorous faculty of reasoning lead to new and enlightened consideration of Law, brimming with possibilities unknown until then.

### 3. Utilitarianism

Sometimes, in the works of philosophers, as in musical scores, there is a *leit-motiv* around which the performers of the ensemble thread their way. In Bentham's philosophy there was also a fundamental notion which was so pronounced that it has even been taken to represent his entire philosophy: his well-known utilitarian principle.

Bentham's disciples in Salamanca were extremely faithful to this utilitarian principle and they used it as basis for their reformation of legal education; their methodological pluralism and their critical attitude were completely in accordance with the utilitarianism which was their prime objective.

This principle of general public utility was the starting point for the whole of Bentham's theory. From that basis he was to formulate all the other propositions of the social sciences. This principle had already been tacitly proposed in Socrates' teachings and expressly stated in Francis Hutcheson's ethico-political maxim: 'The greatest happiness for the greatest numbers'.<sup>49</sup> The principle of utilitarianism was also echoed in the works of Helvetius and Hume although, in the case of all these aforementioned thinkers, it was still an abstract criterion, imprecise in its applications and purely qualitative. Under Bentham's influence, it became a quantitative ideology with which one was capable of establishing a scale of moral units by means of the consideration of the differential calculus of two factors: the feelings of pleasure and grief. The respective elements of good and evil, and the pleasures and pains that were born of human actions on ethical, political and legal planes could then be calculated by arithmetical process. The utilitarian method sought in human action 'what efficacy meant. It would calculate, in the economy of its motives, the possible value of the result, or performance - in sum, the pragmatic sense'.<sup>50</sup> On the legal plane, as far as Bentham was concerned, general public usefulness was also to be the guiding principle and ultimate goal of all norms and institutions.

The distribution of Bentham's utilitarian theses by his Salamancan followers has been judged by some as harmful because of the part it played in fomenting amongst the students of law an egoistic and relativistic conception of law incompatible with its axiological status.<sup>51</sup> In other cases, a supposed contradiction has been pointed out between Bentham's criticism of Natural Law, according to which the latter was nothing but: 'A figured expression representing Nature as an entity to which we attribute this or that disposition which we figuratively call a law';<sup>52</sup> and his acknowledgement that: 'The general ideas of vice and virtue, based on confused, vague ideas of good and evil, are uniform enough in the essentials. Legislators consulted these general, popular ideas and made the first laws, without which society could not have subsisted'.<sup>53</sup> A critical examination of this apparent contradiction was expounded by Martinez Marina, seeing that he tried first of all to demonstrate 'the logical impossibility of the existence of Natural Law and then terminates by recognizing the necessity of its existence'.<sup>54</sup>

It is easy to point out that there is no such contradiction in Bentham's theory: he was trying to demonstrate the logical inconsistency of Natural Law's *a priori* propositions, and he was striving to implement, in their place, empiric method. Núñez and Salas quote Bentham as saying: 'I can imagine a conciliatory peace treaty among the partisans of natural law. If Nature has made a particular law, those who cite it so confidently, and who modestly presume to interpret it, should remember that Nature must have had some reason to make such a law. Would it not be safer, more persuasive and shorter to go directly to these reasons, rather than to accept the will of some unknown legislator, acting as if he, and he alone, were sufficient authority?'<sup>55</sup> All of this led to the fact that Natural Law, instead of being challenged, received a new, more

practical and more exacting scientific status. We should not forget that, in the academic circles that adhered most closely to scholastic tradition, several hypotheses of Natural Law had been gradually losing the initial significance which, at the time, had conferred such distinction upon the theologians and jurists of the 'Escuela de Salamanca', and had assumed an abstract and dogmatic stature which was entirely out of touch with reality, thereby provoking necessarily negative repercussions on the same.

Subsequent historiographical examination has demonstrated the immense benefits proffered by this approach by Bentham's supporters in Salamanca. Several people have also noted in the principle of utilitarianism its propensity to expose the self-interest which is necessarily manifested in legal proceedings and which appeared so many times under the guise of supposedly religious, ethical or political ideals; this also favoured a more realistic legal training than the prevailing system provided in the syllabuses of the Faculties of Law.<sup>56</sup> Toribio Núñez collaborated directly with the University of Salamanca to reform legal training, and utilitarian principles were beginning to show themselves in the efforts of these men.<sup>57</sup> However, the political instability of that era, in which periods of liberal influence were so ephemeral compared with those of absolutist sway, prevented this good work from producing the results which might have been expected. Nevertheless, Bentham's legacy in Salamanca was to be gathered up by Krausism, so that, in the end, it was incorporated with the most influential reformist movement in Spanish academic life.

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#### NOTES

1. Cf., M. Peset and J.L. Peset, *La Universidad Española (Siglos XVIII y XIX). Despotismo ilustrado y Revolución liberal* (Madrid, 1974), 174-5.
2. J. Beneyto Pérez, *La Escuela iluminista salmantina* (Salamanca, 1950).
3. M.J. Quintana, *Noticia histórica y literaria de Meléndez Valdés* (Madrid, 1852), 110.
4. Cf., R. Herr, *España y la revolución del siglo XVIII* (Madrid, 1964), 144ff.; S. Rodríguez, *Renacimiento universitario salmantino a finales del siglo XVIII* (Salamanca, 1979), 19ff.
5. R. de Salas, *Lecciones de Derecho público constitucional* (Madrid, 1821), p.xii.
6. *Ibid.*, p.xii. See G.M. Addy, *The Enlightenment in the University of Salamanca* (Durham, North Carolina, 1966), 229; B. Clavero, 'La disputa del método en las postrimerías de una sociedad 1789-1808', *Anuario de Historia del Derecho Español* (1978), 307ff.
7. T. Nuñez, letter to J. Bentham dated 20th of December 1821 and reproduced in the *Apéndices* of the report by L. Silvela, 'Bentham: sus trabajos sobre asuntos españoles', in *Discursos de la Real Academia de Ciencias Morales Y Políticas* (Madrid, 1908), 82-3; and in *The Iberian Correspondence of Jeremy Bentham*, ed. P. Schwartz (2 vols., London-Madrid, 1979), I, 627-35.
8. L. Silvela, *op.cit.*, 48. See C. Kenny, 'A Spanish view of Bentham's Spanish influence', *Law Quarterly Review*, V (1895), 48-63; P. Schwartz, 'La influencia de Jeremías Bentham en España', *Información Económica Española* (1976), 37-57; A.E. Perez Luno, 'Jeremy Bentham y la educación jurídica en la Universidad de Salamanca durante el primer tercio del siglo XIX', in *L'educazione giuridica*, II, (Perugia, 1979).

9. J. Villanova y Jordán, *Aplicación de la panóptica de Jeremías Bentham a las cárceles y casas de corrección de España* (Madrid, 1834).
10. J. Escriche, *Tratado de legislación civil y penal* (Madrid, 1823).
11. J. Ferrer y Valls, *Principios de legislación y codificación extractados de las obras del filósofo inglés Jeremías Bentham* (Madrid, 1834).
12. J. Gómez de Castro, *Tratado de las pruebas judiciales* (Madrid, 1835).
13. D. Bravo Destonet, *Tratado de las pruebas judiciales* (Madrid, 1847).
14. B. Anduaga y Espinosa, *Obras Completas de Jeremías Bentham* (Madrid, 1841-1843).
15. Cf., R. Herr, *op.cit.*, 272-274; D. Mateo del Peral, 'Sobre Ramón de Salas y al incorporación de la *Economía civil* a la enseñanza universitaria', *Investigaciones económicas*, No.6 (1978), 167-90.
16. D. Matero del Peral, *op.cit.*
17. R. de Salas, *Tratados de legislación civil y penal* (Madrid, 1821).
18. R. de Salas, *Lecciones de Derecho público constitucional*, *op.cit.*
19. Cf., D. Mateo del Peral, *op.cit.*, 179-90; P. Schwartz, *op.cit.*, 42-3.
20. Cf., J. Sánchez Rivera de la Lastra, 'El Utilitarismo. Estudio de las doctrinas de Jeremías Bentham. Su expositor en España', *Revista General de Legislación y Jurisprudencia*, CXXXIX (1921), 522-6; C. Kenny, 'A Spanish Apostle of Benthamism', *Law Quarterly Review*, XI (1895), 175-84.
21. *Informe de la Universidad de Salamanca sobre el plan de estudios* (Salamanca, 1820).
22. T. Núñez, *Espíritu de Bentham. Sistema de la Ciencia Social* (Salamanca, 1820).
23. *Ibid.*, p.vi.
24. T. Núñez, *Principios de la ciencia social o de las ciencias morales y políticas* (Salamanca, 1821), 1.
25. E. Tapia and J.F. Pacheco, *Prólogo of the Ciencia social según los principios de Bentham* (Madrid, 1835).
26. J. Sánchez Rivera de la Lastra, *op.cit.*, 531.
27. J. Bentham, letter to T. Núñez (undated, but most probably written around the middle of 1821), reproduced in the *Apéndices* of the report by L. Silvela, *op.cit.*, 67; in *The Iberian Correspondence of Jeremy Bentham*, *op.cit.*, appears dated 9? May 1821, I, 514-8.
28. Cf., L. Silvela, *op.cit.*, 46.
29. Q. Saldaña, "Bentham en España", *Revista General de Legislación y Jurisprudencia*, CXXXIX (1921), 390.
30. M. Menéndez y Pelayo, *Historia de los heterodoxos españoles* (Madrid, 2nd ed., 1939), VII, 131-2.
31. J. Sánchez Rivera de la Lastra, *op.cit.*, 539.
32. J.J. García, *Elementos de verdadera lógica* (Madrid, 1821)
33. M. Martel, *Elementos de filosofía moral* (Madrid, 1843).
34. M.A. López, *Descripción de los más célebres establecimientos penales* (Valencia, 1832).
35. Cf., J. Beneyto Pérez, *op.cit.*, 10-17; J.N. Romero y Rizo, *Máñoz Torrero. Apuntes histórico-biográficos* (Cadiz, 1910), 27-31.
36. Cf., A. Elorza, *La ideología liberal en la ilustración española* (Madrid, 1970), 231-2.
37. T. Núñez, *Espíritu de Bentham*, *op.cit.*, 18.
38. T. Núñez, *Principios de la ciencia social*, *op.cit.*, p.ix.
39. *Ibid.*, pp.xi-xii.
40. F. Martínez Marina, *Principios naturales de la moral, de la política y de la legislación* (Madrid, 1933), 90.
41. *Ibid.*, 90-1.
42. Cf., D. Núñez Ruíz, *La mentalidad positiva en España* (Madrid, 1975), 62.
43. Cf., E. Tierno Galván, *Costa y el regeneracionismo* (Barcelona, 1961), 80.

44. T. Núñez, *Principios de la ciencia social, op.cit.*, I, 18.
45. R. de Salas, *Tratados de legislación civil y penal, op.cit.*, I, 12.
46. T. Núñez, *Principios de la ciencia social, op.cit.*, I, pp.xi-xii.
47. R. de Salas, *Tratados de legislación civil y penal, op.cit.*, I, p.xii.
48. *Ibid.*, p.xiv.
49. I am indebted to Professor D.D. Raphael for having supplied these data.
50. Q. Saldaña, *op.cit.*, 394.
51. This is the point of view maintained by M. Menéndez Pelayo in his *Historia de los heterodoxos españoles, op.cit.*, VII, 133-4.
52. R. de Salas, *Tratados de legislación civil y penal, op.cit.*, I, 176.
53. *Ibid.*, 45.
54. F. Martínez Marina, *op.cit.*, 146-9.
55. R. de Salas, *Tratados de legislación civil y penal, op.cit.*, I, 180.  
The same idea is expressed by T. Núñez in his *Principios de la ciencia social, op.cit.*, I, 559.
56. Cf., Q. Saldaña, *op.cit.*, 392.
57. Cf., P. Schwartz, *op.cit.*, 44-6.



## BENTHAM'S LETTERS AND MANUSCRIPTS IN GREECE<sup>1</sup>

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The object of this note is to report on a week's research in Athens (30th May-6th June 1980) in search of Bentham's letters and manuscripts and especially the early draft of the *Constitutional Code* sent to Greece in 1823. The most rewarding material was found in two collections: the archive of the London Greek Committee located in the National Library and a Leicester Stanhope archive in the General State Archives.<sup>2</sup> Neither of these collections have been explored to a great extent and both contain interesting Bentham material of which microfilms have been obtained.

The archive of the London Greek Committee, a rich collection of several thousand items, was presented by Victor Henry Bowring Hanbury, the grandson of John Bowring, the Committee's Secretary, to the Greek nation in 1924. The archive has been studied primarily for its Byron papers and for the collection of early Greek newspapers.<sup>3</sup> Among the newspapers are several Bentham items. In a brief "Prospectus" designed by Stanhope in January 1824, presumably for *Σλληνικα χρονικα*, a few paragraphs of a pamphlet on the liberty of the press were included in a Greek translation. This was most likely taken from Bentham's tract written originally for Spain, *On the Liberty of the Press and Public Discussion* (1821), several copies of which were sent with Stanhope to Greece in 1823.<sup>4</sup> In the 12 June 1824 number of *Telegrafo Greco*, which, like *Σλληνικα χρονικα*, was founded by Stanhope and edited by Dr. J.J. Meyer, may be found the first publication of Bentham's first letter to the Legislative Council of Greece.<sup>5</sup> In the same issue there also appears in print for the first time a letter to Alexander Mavrocordato, then Secretary to the Provisional Government and a leading figure in Greek politics.<sup>6</sup>

The London Greek Committee archive also contains a number of Bentham letters and copies of letters which Bentham supplied to Bowring for his use and which were retained in the archive. These will make possible a clearer definition of Bentham's relationship to the controversial activities of the Committee. In particular, the correspondence provides important insights into Bentham's involvement in the negotiations for the Greek loan which took place in March 1824. The correspondence is very complex and letters (and copies of letters) exchanged hands among the participants from hour to hour during this period.

Although the actual Bentham correspondence is of great importance, it forms a small part of the total archive, and there is much else of interest to the Bentham scholar. For example, the originals of many Stanhope letters which subsequently appeared in *Greece in 1823 and 1824* are here.<sup>7</sup> There is an extensive collection of letters from Edward Blaquière, Bentham's friend and disciple, sent both from Greece and from various cities in England where he attempted to organise support for the London Greek Committee. This must be the most extensive collection of Blaquière correspondence yet uncovered.

In ten of the eleven volumes (one volume deals with Bowring's later activities in the Far East) one finds a fascinating picture of English radical politics during this period. Correspondence from nearly every radical politician of the day appears here, and the archive will provide the raw material for a useful case study of this important pressure group.

The Leicester Stanhope Archive (K.121) was purchased at Sotheby's and presented to the Greek Government in 1969. Little is known as yet about this collection prior to 1969. At some stage it was in a fire and many letters have been damaged. There are ten Bentham items in the single-volume collection, and the most important is a portion of the early draft of the *Constitutional Code*.<sup>8</sup> This material covers eighteen sheets in a copyist's hand and was sent to Stanhope on 14th October 1823.<sup>9</sup> It consists of a revision of the section on the term of service of the Prime Minister (Ch.VIII, §5) and is sent with a request to Stanhope to substitute it for the earlier draft of this material Stanhope took with him to Greece on 26th September. In the new version, Bentham introduced the theme of non-relocability of the Prime Minister for a period (one or two years) after his initial one-year term of service. In a note, Bentham requests Stanhope to extend this principle to other offices including the legislature and sublegislatures. The section consists of five articles which establish the practice followed by a lengthy "Rationale".

The final version of the *Code* which Bentham published in 1830 contains substantially the same doctrine though it is set forth in a different form.<sup>10</sup> The term of service of the Prime Minister is extended to a proposed four years which may reflect Bentham's sympathy with the practice of the US Presidency.<sup>11</sup> Furthermore, in the 1830 *Code* the main discussion of temporary non-relocation is shifted to the earlier chapter on the Legislature (Ch.VI) where it is cast in an entirely different form.<sup>12</sup> In a note to this discussion, Bentham recalls how he had written against the principle he now adopts in the earlier *Three Tracts relative to Spanish and Portuguese Affairs* (1821).<sup>13</sup> At that time, he recalls, he had not discovered how to provide for the element of continuing experience in the legislature which he eventually does through the device of the Continuation Committee.<sup>14</sup> Although Bentham himself does not refer to Bowring's influence in the evolution of his thought, Bowring prints in his biography of Bentham a lengthy letter written to Bentham from Madrid in 1821 where he challenges Bentham's opposition to the non-reeligibility clause in the Spanish constitution and claims that he convinced Bentham of its desirability.<sup>15</sup> If Bowring is correct and since Bentham drafted the *Code* which he sent to Greece in the spring and summer of 1823, one wonders why he did not incorporate the principle of non-reeligibility in the original version of the chapters he had already sent to Greece with Stanhope. It is possible that he did in fact do so and the addition to the original section on the term of service of the Prime Minister is concerned more narrowly with devising the means of instituting the new principle rather than with the principle itself. The recovered manuscript might bear that interpretation as it contains no general justification of the non-reeligibility principle as found in Ch.VI of the later published *Code*. Further research should provide a fuller explanation, but it is worth emphasising the important role this early draft of the *Code* plays in our understanding of the evolution of Bentham's thought.

The other items in the Stanhope archive are concerned with Bentham's attempt to see his work accepted in Greece and with his involvement in the negotiations for the Greek loan of 1824. These letters and copies of letters complement the third source of Bentham correspondence in Greece which has been made available to the Bentham Project in recent years, the Louriotis archive located in the National Institute for Neo-Hellenic Research. Mrs. Loukia Droulia has been especially helpful in making these Bentham letters available, in providing the use of the Institute's library, and in directing me in further research during my visit.

Although the week's research was highly successful, much more remains to be done. The full early draft of the *Constitutional Code* has not yet been found. Other manuscripts which Bentham sent to Greece have not been located. These manuscripts and further correspondence may well exist either in private archives or in public collections which have not been catalogued or even researched. Attempts are now being made to organise and finance this further research.

#### NOTES

1. I am grateful to the University of London Research Fund for sponsoring this research and to Claire Gobbi of the Bentham Project for making prints and transcripts of the microfilms.
2. Mr. Nikolopoulos, Director of the Manuscript Department, National Library, and his Assistant, Miss Cordouli, and Mrs. Hairiti, Director of the General State Archives, were especially helpful in providing access to these collections and arranging for microfilms.
3. See E.S. De Beer and Walter Seton, 'Byroniana: The Archives of the London Greek Committee', *The Nineteenth Century*, September 1926, pp. 396-412.
4. See *Bowring*, ii, 275-97.
5. *Telegrafo Greco*, No.13, 12 June 1824. See *Bowring*, iv, 582, where the letter is included in the testimonials appended to the *Codification Proposal*.
6. Bentham's letter is poorly printed and this reflects the rudimentary state of the newspaper. The text is as follows: 'Jeremy Bentham to Prince Alexander Mavrocordato, Secretary of State to the Provisional Government of Greece χαίρειν. Little did my father think when six and Seventy years ago, he first folded me in his arms little did he think when seventy and more Years ago, he taught me to repeat Πάτερ ημών in its own language, that the object of these his fond labors was destined to receive, and at the same time, letters from the two most illustrious successors of those heroes, whose lives in the Pages of their fellow countryman, were numbered soon after, among the choicest of my amusements.

Not many years had elapsed when he put in to my hands a work on Ethics written (I have heard say) by an ancestor of Yours, and which at any rate bears your name.

Little did J dream of receiving, from a name from which J was then receiving lessons of morality any such missive as an invitation to address to that same name a work on Legislation.

This is an age of wonders, and not the least of them is, this same correspondence, a correspondence on such a subject, and between two such men, between one of the descendants of those handfuls of men, who in the Garden of Europe for so many ages, kept at bay the Despots of the East, with their ever armed yet still enslaved millions, between one of the most enlightened, of that first enlightened nation, and a fellow countryman of those naked barbarians, who were never deemed worth taming and but for a little tin, they had now and then picked up, would never have been worth visiting.

Continue in success as well as endeavours - continue as You have begun and Greece to her former ever tottering liberty, and that engrossed by the few will see substituted that only true liberty which is enjoyed alike by all - That liberty which is the matchless fruit of a Representative Democracy, with secrecy universality, equality, and annuality of suffrage.'

7. *Greece in 1823 and 1824; being a Series of Letters, and other Documents, on the Greek Revolution, written during a Visit to that Country* (London, 1824).
8. See nos. 18, 39, 50, 58, 63, 72, 73, 74, 153, 172. The *Code* material, which is not listed as a Bentham writing in the catalogue, is no.72.
9. See B.L. Add. Mss. 33563, The Colls Journal 1821-1825, fo.126.
10. *Constitutional Code; for the use of all nations and all governments professing Liberal opinions*, Vol.i (London, 1830), *Bowring*, ix, 146-333. For the term of service of the Prime Minister, see VIII. §5, *Bowring*, ix, 207-8.
11. See the numerous references to US practice in Ch.VIII: §1.A8-10, §2.Alln,A12, §3.A6n (*Bowring*, ix, 204-5, 205-6, 206).
12. See VI. §25, *Bowring*, ix, 172-80.
13. See *Bowring*, viii, 482-5. Bentham's note is at VI. §25.A53n (*Bowring*, ix, 180).
14. VI. §24, *Bowring*, ix, 170-2.
15. *Bowring*, x, 528-30.

Miriam Williford, *Jeremy Bentham on Spanish America: An Account of His Letters and Proposals to the New World*. Baton Rouge and London: Louisiana State University Press, 1980.

The object of the present study is given precisely in its title: it describes exactly what Bentham wrote and proposed on the subject of Spanish America, from the manuscript sources in University College and the British Library. The principal contribution of the book is that it identifies and brings together for the first time the laws, codes, plans and advice which Bentham offered to Spanish America, in an analytical description and with ample quotations. To this extent it is a valuable addition to the historical literature on Jeremy Bentham.

Dr. Williford begins with an expert account of the context and process of Bentham's growing interest in Spanish America and she draws the reader's attention to his view of colonies and liberation in general. 'Rid yourselves of Ultramarina', he advised Spain, and he reproached Spanish liberals for denying liberty to Spanish Americans, 'this sad inconsistency' as he called it. There is a new account of Bentham's attempt to promote his Code in Spanish America, particularly among leaders such as Miranda, Rivadavia, O'Higgins, Bolívar and del Valle. His republicanism emerges clearly, as does his distrust of personal dictatorship, and he advises Spanish Americans to adopt a form of government modelled on that of the United States, though without the federal system and with suffrage restricted by a literacy test. Further chapters cover Bentham's advocacy of liberty of the press, plans for an inter-oceanic canal, and his views on education, and the book concludes with a brief assessment of the merits and limitations of Bentham's thought. Thanks to Dr. Williford we now have a modern and comprehensive statement of Benthamite doctrine on Spanish America in the period of its independence, though the reader is given little guidance to its relevance for or impact on the Hispanic world.

Bentham, one has to admit, knew little about Spanish America. The words he used to describe - Ultramarina, Creolia - have a quasi-mythical character out of touch with reality. Even more disconcerting is the suspicion that he was not really anxious to know more: his real interest lay in promoting the greatest happiness principle, whatever the local environment might be. Nevertheless, he was one of the few reformist thinkers of the time to apply his ideas to colonies, to advocate independence as a general principle, and to expose the contradiction inherent in regimes which practised liberalism at home and imperialism abroad. Moreover, he was shrewd enough to put his finger on some of the basic weaknesses of Spain in America, whether Spain was constitutionalist or absolutist, and to point out that the ultimate solution available to Spain, military reconquest, was neither economic sense nor a popular cause in the peninsula. For these reasons Bentham's Spanish American thought is to be taken seriously. It may be true, as Dr. Williford points out, that Bentham offered a political solution only and ignored the real power groups in Spanish America, the military, the Church and the landowners. But he did more than merely provide encouragement and the prestige of his name to the cause of liberation. He offered a new philosophical framework in the aftermath of independence. Utilitarianism was one of the sources of liberalism in Spanish America and helped to give republicanism a moral legitimacy after the collapse of royal government. Seeking an alternative authority to absolutism and religion, liberals seized upon

utilitarianism as a modern philosophy capable of giving them the intellectual credibility they wanted. But utilitarianism was only one of the components of Spanish American liberalism, and the historian of ideas is obliged to assess its role in relation to other influences. This is where the limitations of Dr. Williford's work are to be seen.

To study Bentham and Spanish America it is necessary first to establish what he wrote and the context in which he wrote it; this the author has done. But there are further requirements. It is important to discuss the ways in which Bentham's thought was transmitted to the Americas and was received there. It is also necessary to try and answer the questions, what was the influence of Bentham in the formation of Spanish American liberalism and in the history of ideas in the sub-continent? On the modes of transmission, the author identifies the letters and the correspondents - Rivadavia, Bolívar and del Valle - but she does not locate these statesmen in their own political context, and they are left suspended in a kind of vacuum difficult to envisage and to understand. On the wider influence of Bentham she has nothing to say. No doubt, as she explains, this is another subject and a task for further research. But without it, the story is incomplete. Meanwhile her book will remain a valued point of departure.

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William Thomas, *The Philosophic Radicals: Nine Studies in Theory and Practice, 1817-1841*. Oxford: Clarendon Press, 1979.

William Thomas has written a number of detailed and often brilliant studies of an important group of radical thinkers and politicians in Great Britain who sought power and influence between 1817 and 1841. John Stuart Mill coined the phrase "philosophic radical" in 1832 in preference to the more sectarian "utilitarian" or the pejorative "Benthamite". But what provided coherence and continuity in this group was their general adherence to utilitarian doctrines. The book begins with the circle surrounding Jeremy Bentham at Ford Abbey in 1817 and with the publication of Bentham's *Plan of Parliamentary Reform* in the same year. In this work Bentham took a decisive public step on the side of radical reform, a step which represented the culmination of his return to a radical position following his early flirtation with and then abandonment of radical ideas at the time of the French Revolution. The book ends in 1841 when the radicals ceased to be a significant force in politics.

Mr. Thomas' aim is "to separate the Philosophic Radicals from philosophic radicalism and Benthamism, to discriminate what they did as individuals from what they are supposed to have thought as a group". The philosophic radicals appear in these studies as somewhat inept political actors and are placed in the context of Whig and Tory politics of the day. Mr. Thomas is a student of the meeting of character and political event, and he is most successful at this level. The biographical sketches of men like Francis Place, J.C. Hobhouse, J.A. Roebuck, Joseph Parkes and other subjects of his studies are carefully formed. Even the sketches of minor figures who pass quickly on the stage are written with care. He has mastered the important manuscript collections for these studies, especially the voluminous Place papers in the British Library, and uses the passing remark in correspondence or diary entry to develop telling points about character and politics. Mr. Thomas is a connoisseur of historical detail. The chapter on J.C. Hobhouse and radical Westminster is a brilliant study of the relationship between radicals and Whigs at the level of day-to-day politics. It reads as though written by an observer of the events. The study of Roebuck and the Bath constituency is of similar high quality and detail. Mr. Thomas also excels in his treatment of radical opinion. He has a solid grasp of the journals and newspapers of the period, and the account of the involvement of James and J.S. Mill in the *Westminster Review* and the *London* (later *London and Westminster*) *Review* surely breaks new ground in the history of radical opinion.

Mr. Thomas' book thus possesses considerable virtues, but in separating the philosophic radicals from philosophic radicalism, is not something of great importance lost? The weakness of Mr. Thomas' approach can best be seen in his chapters on the three important thinkers he considers, Bentham, James and J.S. Mill. The chapter on Bentham is especially weak. He relies too heavily on the Koe manuscripts which provide some useful insights into Bentham's life at Ford Abbey, but no basis for an interpretation of the work and intentions of the main figure of philosophic radicalism. Thus, in suggesting that it is Bentham's isolation from the world which leads to the odd and technical character of his language, Mr. Thomas neglects to consider that Bentham was attempting to construct a scientific language and utilise a scientific method to replace the vague and often equally cumbersome constructions of the English legal system. To suggest that "in the imaginary science-

fiction world of Bentham's 'ideal-republic', he was sole citizen and sole legislator" ignores the fact that Bentham was in close touch with constitutional developments throughout the world, well read in traditional texts, and modelled his own proposals on what he thought would be improvements in other systems. A perusal of Bentham's most important later work on political democracy, the *Constitutional Code* (to which Mr. Thomas does not refer) would reveal these characteristics. Furthermore, Mr. Thomas' account of Bentham, which emphasises his eccentricities and his isolation from the world, leads one to wonder why people gathered round him at all. The views of Bentham's political contemporaries are not entirely helpful, as they are often perplexed by the philosopher's ways. And J.S. Mill's reaction against Bentham may have formed so great a prejudice in our own minds that we cannot overcome his views, even though, as Mr. Thomas emphasises, Mill himself returned decisively to the doctrines of his father and Bentham. Nevertheless, in recent writings on Bentham's jurisprudence and ethics, especially those of H.L.A. Hart and David Lyons, and earlier in the work of David Baumgardt, many of the superficial views of Bentham which still appear in Mr. Thomas' book have been corrected. Bentham is an important philosopher, especially in political and legal philosophy, and no account of philosophic radicalism can neglect this dimension of his life. But Mr. Thomas ignores Bentham the philosopher and he finds Bentham the political writer clearly wanting. This leads him to prefer James Mill to Bentham. Bentham is remote from practice and a simplistic philosopher. James Mill is the skilful propagandist. But even James Mill is not regarded with great favour. After some positive remarks about Mill's *History of British India*, which should lead the student of utilitarian thought to give it more attention, Mr. Thomas argues that Mill's argument is "insular, morally intolerant, and implicitly authoritarian". As an historian, he finds Mill's work devoid of human interest, lacking in "imaginative sympathy" and "his commitment to utilitarian ethics seriously restricts the range of his understanding".

At times, Mr. Thomas can be somewhat crude in his observations. In commenting on Mill's treatment of rationality and calculation, he observes that "this is essentially the morality of a cautious, prudent, commercial civilization", and thus takes a view of man which is at the heart of British philosophy since Hobbes and ascribes it to the prevailing society of the time. His treatment of Mill as a Platonist and the Society for the Diffusion of Useful Knowledge as Platonic Guardians is equally crude. What is interesting about the utilitarians is that they were able to combine an advocacy of radical and democratic government with intellectual elitism and, in the process, avoid the authoritarianism of Plato's *Republic*. It was the Benthamite utilitarian George Grote (to whom Mr. Thomas devotes a chapter) who could first write of the ancient Sophists sympathetically and discuss Plato's authoritarianism critically. Both Grote's interest in the Sophists and his treatment of Plato are not accidental (as Karl Popper and especially W.K.C. Guthrie have pointed out). Philosophic radicalism owes little to Plato's *Republic*. But Mr. Thomas is not at home in these realms. He is better at placing Mill's radicalism between the extremism of Place and the moderation of Hobhouse. His treatment of Mill's more practical later essay on the ballot is more full of insights than his discussion of the more abstract and theoretical *Essay on Government*.

The chapter on J.S. Mill depends a good deal on the *Autobiography* and makes especially good use of the franker and more explicit early draft of that work. The chapter is less an account of the development of Mill's ideas generally and more one of the development of his political



radicalism. Here, as before, Mr. Thomas tries to use ideas to explain character and *vice versa*, but what makes for lively reading is not always clear and unambiguous. For example, in the account of the relationship between Mill and Carlyle we obtain numerous insights but no clear discussion of the similarities and differences between the two thinkers.

As for the relationship between theory and practice, Mr. Thomas is clearly on the side of practice. But philosophic radicalism is distinctive in its attempt to bring together theory and practice in a way (and this surely distinguishes it from Marxism) that does not ignore or misuse empirical data. By neglecting theory Mr. Thomas does not penetrate to the core of his subject. When he comments on the relationship between theory and practice in the philosophic radicals, it is usually to show disparagingly their similarities with Marxism or their ineptness in the face of practical politics. Although theory and practice will never merge in human affairs, there are many approaches to practice through theory, and one which remains of great importance is that found in philosophic radicalism. For this reason, the more philosophically sensitive *La Formation du radicalisme philosophique* by Elie Halévy will remain the standard work on the subject, although Mr. Thomas' book will make an important and valuable contribution to the history of radical politics and opinion.

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