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Past numbers of The Bentham Newsletter have been recently reprinted and are now available at £5.00 per copy.

EDITORIAL

In both its articles and reviews this issue reflects the diversity of current Bentham scholarship and the multitude of subjects that Bentham himself considered during his long life. It also contains news of progress of the two major editorial sub-projects now located at the Bentham Project. The newest of these is based on a three-year grant from the ESRC to edit two volumes containing Bentham's writings on constitutional law and government prior to his beginning the main text of the Constitutional Code. The first volume will contain two hitherto unpublished essays, written in 1822, entitled 'Economy as applied to Office' and 'Supreme Operative', and the second, his writings for Greece and Tripoli which were composed in 1822-3. Both volumes will be edited by Dr. T.P. Schofield. The Correspondence sub-project continues to gather momentum and Correspondence, volume 7, ed. J.R. Dinwiddy and volume 8, ed. S.R. Conway, will go to the press in 1986 with publication to follow in approximately one year. These volumes will bring the Correspondence to the end of 1816. In addition, Essays on French and British Political Reform 1788-95, ed. M. James, which contains, besides Political Tactics, Bentham's writings for France during the period of the French Revolution, will also go to the press this year. Together with Economy as applied to Office, four new volumes will soon be added to the Collected Works.

Membership forms for the International Bentham Society are enclosed in this issue of the Newsletter and all readers are encouraged to join. Although it will be possible to continue to subscribe to the Newsletter without joining the Society, the advantages of joining will be considerable. The Society will sponsor conferences and other events and also offer volumes in the Collected Works at substantial discount. The special offers which have previously been made available to individual subscribers to The Bentham Newsletter will now only be open to members of the International Bentham Society. It is now planned, for example, to offer all volumes in the Collected Works at a 25% discount to members of the Society.

THE INTERNATIONAL BENTHAM SOCIETY

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The International Bentham Society, which will be launched formally on 9 June 1986, has been founded with the following aims:

- a) To foster Bentham scholarship and to be a focal point for utilitarian studies;
- b) To further the work of the Bentham Project in editing the manuscripts of Jeremy Bentham.

It is also intended that the Society will organize conferences, seminars and other such events.

The Society hopes to be able to further the work of the Bentham Project both by fund-raising and by bringing it to the attention of a wider audience.

The annual subscription for membership of IBS is £10 and covers the period 1 July 1986 to 30 June 1987. Members will receive a copy of the current Bentham Newsletter, discounts on volumes of the Collected Works and past issues of the Bentham Newsletter, and invitations to a Bentham conference at University College London in July 1987.

The officers of IBS invite all Newsletter readers who have not already become members to join by sending a cheque or money order payable to the International Bentham Society to the Honorary Secretary, Bentham House, Endsleigh Gardens, London WC1H 0EG. Subscriptions for this year should be sent by 30 September at the latest.

Claire H.G. Gobbi
Honorary Secretary

BENTHAM'S DEMOCRATIC THEORY AT THE TIME OF THE FRENCH REVOLUTION

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I

The earlier, and by far the briefer, of the two democratic phases of Bentham's thought lasted from late 1788 to 1792. During this time Bentham was, like many of his compatriots, intensely interested in the French Revolution; this led him to compose a number of manuscripts with which he hoped to influence events across the Channel. Among these manuscripts were some which purported to derive a fully democratic constitution from utilitarian principles. A few manuscript sheets were circulated among a group of anglophile French reformers acquainted with Bentham's patron, Lord Lansdowne; but they had little effect in a country which was already awash with home-grown pamphlets on constitutional matters. When in 1792 the National Assembly did recognise Bentham's efforts by making him an honorary French citizen, Bentham was well on the way to being completely disillusioned with the course of the Revolution and, apparently, with the entire notion of democratic reform.

The historical interest in this phase of Bentham's thought lies very largely in the fact that he temporarily advocated radical reform for Britain as well as for France. This was not, it seems, his original intention. In an open letter to the Comte de Mirabeau, composed towards the end of 1788, Bentham claimed that the British constitution did not need reforming, but the French constitution was so degenerate that only radical democratic treatment could bring it up to British standards.¹ Bentham went on to compose 'Représentation', in which he offered answers to the detailed constitutional questions which Jacques Necker, the French Director of Finances, had put to the second assembly of the Notables in November and December 1788. This work was prefaced by an attempt to derive equal and near-universal suffrage from the principle of utility. In 1789 Bentham composed 'French Constitution Plan'; this was a complete plan of a democratic constitution, drawn up on similar lines to the constitutional documents which the National Assembly was commissioning and discussing at this time. Around 1790, however, he composed both 'British Parliamentary Reform', which advocated similar reforms for Britain, and 'False Principle Division of Power', which proposed the idea of 'dependence' (dependence, that is, of government on the governed) as a source of constitutional security. A question which has intrigued Bentham scholars is whether Bentham was sincere when, in the early and mid-1790s, he ostensibly returned to his erstwhile constitutional conservatism. For if he was not, then his resumption of work on radical reform in 1809 indicated not so much a conversion to that cause as a tactical decision to publicise views which he had held for nearly twenty years.

This paper, however, does not address that question.² Rather, it is concerned with the contribution of these early manuscripts to our understanding of Bentham's democratic theory. That theory was expounded for the most part in the voluminous writings on radical reform which

Bentham began in 1809 and which culminated in Constitutional Code. What the manuscripts of the earlier period have to offer above all is an attempt to derive reform proposals from first (utilitarian) principles. This attempt reflects the fact that Bentham was both sympathetic to the democratic direction of French reform and critical of its inspiration by the (for him) discredited philosophy of natural rights. Bentham was thus concerned not only with the constitutional details of radical reform but also with the consistency of such reform with his established moral and legal philosophies. The actual reforms which Bentham advocated at this time and in later years were scarcely original; the secret ballot, equal electoral districts, an extensive suffrage and short parliaments were all common currency among the reform movements which appeared in Britain in the mid-eighteenth century. Bentham's main achievements in this earlier period were, first, to develop a doctrine of 'dependence', which sought to strengthen responsible government by creating a harmony of interests between government and governed, and, secondly, to derive near-universal and equal suffrage from a utilitarian rather than a natural-rights conception of equality. This second exercise is especially interesting in that it throws fresh light on the formal egalitarian dimension built into utilitarianism, as usually expressed in the dictum 'everybody to count for one, nobody for more than one'. These two exercises are here examined in turn. Finally, a response is offered to Elie Halévy's comment on the discussion of equality to the effect that we should beware of attaching 'an exaggerated importance to this logical exercise'.³

II

Bentham elaborated his theory of constitutional dependence by way of an attack on the traditional doctrine of the separation of powers, a doctrine which he introduced as a 'false principle' because its supporters' claim that it was a source of constitutional liberty could be easily refuted. It was, meanwhile, open to a number of further objections. In the first place, the doctrine did not enjoy a settled formulation; sometimes the judicial power was separated from the executive, sometimes it was included in it.⁴ Secondly, it was morally objectionable, since it facilitated minority rule by allowing any one branch to veto proposals supported by the other two.⁵ Thirdly, it was incoherent in that it systematically denied its own premise: either the various powers could not agree, in which case government was impossible; or they could agree, in which case the theoretical separation between them was redundant.⁶

Bentham did not, however, attempt a complete refutation of the general idea of the separation of powers. Although his command theory of law suggests the idea of an absolute, unitary sovereign, Bentham had, in Of Laws in General, modified this idea in several ways. It was possible, he wrote, for the habit of obedience to be divided between different sovereigns for different purposes; in this way he was able to accommodate his legal philosophy to the fact that many actual governments were federal rather than unitary.⁷ And, as we shall see, Bentham's democratic theory itself involved a division of power between a plurality of supreme authorities. But the relationship between these authorities was quite distinct from that included in the traditional doctrine.

Bentham began 'False Principle Division of Power' thus:

The true efficient cause and measure of constitutional liberty or rather security is the dependence of the possessors of efficient power on the originative power of the body of the people.⁸

Note that Bentham here distanced himself from liberalism by preferring the term 'security' to 'liberty'. The phrase 'constitutional liberty' was uncomfortably close to the doctrine of natural rights and the belief that the individual's protection from oppression consisted of limits on the power of the state. Bentham's objection to this belief was not the logical one that legal limits on the state were inconceivable, since he had already stipulated, in Of Laws in General, that sovereignty could be limited, either by laws addressed by the sovereign power to itself or by the absence of a disposition among subjects to obey certain kinds of law (in Bentham's example, 'the Jews would have done everything else for Antiochus, but they would not eat his pork').⁹ Rather, Bentham argued that the individual's protection from oppression could consist only of positive laws which prohibited other individuals from harming him; and such laws necessarily limited the liberty of those individuals. The term 'security' was preferable to 'liberty' because it more clearly connoted the idea of positive legal protection; and of course security, as the most important single source of happiness, was the first priority of government. But constitutional security involved more than this: it required that the individual should be secure against the potentially oppressive power of the government itself.

The idea of 'dependence', on which constitutional security was based, was the simple one that the possessors of political power should be vulnerable to periodic electoral dismissal at the hands of the 'body of the people'. The specifically utilitarian bearing of this idea is revealed in Bentham's interpretation of the orthodox eighteenth-century conception of government as a trust. In An Introduction to the Principles of Morals and Legislation, Bentham had asserted that sovereign power, 'upon the principle of utility', could 'never be other than fiduciary'.¹⁰ The sovereign power could not possess its powers as of right; rather, it exercised those powers on behalf of the community, and so was obliged to use them to promote the greatest happiness of the community. Bentham arrived at the notion of dependence by supplementing this moral obligation with a legal one: by rendering governments liable to suffer the punishment of dismissal should they govern in an unacceptable fashion. This amounted to no more than an application by Bentham of his principle of the union of duty and interest. In this instance, the principle ensured a harmony of interest between government and governed.

But although the doctrine of dependence was advanced by Bentham as a corrective to the 'false principle' of the separation of powers, it did itself posit a separation between the 'efficient power' exercised by the elected governors and the 'originative power' of the people who elected them. Bentham did discuss the nature of this separation. In contrast with the purely verbal distinctions posited by the traditional doctrine, dependence was grounded in what he called the 'more material distinction ...between subordinate power and supreme'. The 'subordination' referred to here was of 'the persons invested with power' to 'the body of the people'.¹¹ Here, the originative power was 'supreme' and the efficient

power 'subordinate'. In the traditional doctrine, all the separate branches of power were assumed to be independent of one another.

Yet Bentham's use here of the supreme-subordinate distinction was a little confusing, since in 'French Constitution Plan' he had used those terms to describe a quite different kind of separation: that between the 'supreme' power of the National Assembly and the 'subordinate' powers of the provincial and the sub-provincial assemblies. This distinction arose in Bentham's account of the powers which could be delegated to local government. It was alleged by some that provincial assemblies could exercise only administrative power and not legislative. Bentham rejected this argument, which he said was based on the erroneous belief that legislative power was equivalent to supreme power. In reality, all types of efficient power - legislative, executive and judicial - could be delegated to subordinate authorities.¹² This argument, once again, was entirely consistent with Bentham's legal philosophy. In Of Laws in General Bentham had shown that the sovereign power could legislate either by 'conception', as when it drew up and promulgated laws on its own behalf, or by 'adoption', as when it validated the laws of previous sovereigns, the orders of subordinate power-holders such as local governments, and the contracts agreed to by private citizens.¹³ In 'French Constitution Plan', then, Bentham understood 'supreme power' to mean 'sovereignty' in the sense of the highest law-making authority. But, in 'False Principle Division of Power', as we have seen, the law-making power was taken to be 'subordinate' to the 'originative power' of the people.

The clearest expression that Bentham gave to the necessary separation between efficient and originative power, and which formed the basis of his elaboration of the subject much later in Constitutional Code, is to be found among a collection of fragmentary manuscripts on constitutional law composed around 1790. Bentham here distinguished between 'the power of carrying on the business of government', which should be exercised by a small number of trained legislators, and 'the power of determining who should carry it on', which could and should be shared by the entire community.¹⁴ In a sheet of marginalia he wrote:

The Sovereign constituent and disconstituent power ought to be in the body of the people. The Sovereign efficient power is an assembly of the delegates of the people.¹⁵

A little later, he referred to a third sovereign power, the judicial. In Constitutional Code, this terminology was amended so that 'sovereignty' referred finally and unambiguously to the constitutive authority alone, and conveyed Bentham's stipulation that this authority was supreme in relation to every other authority.¹⁶ Meanwhile the legislature was to be 'omnicompetent'.¹⁷ In this work Bentham's treatment of the dependence of the latter authority on the former completed his transformation of the older idea of responsible government into the nineteenth-century idea of representative government.

III

The second main theoretical achievement of Bentham's earlier democratic

phase occurs in the manuscript 'Représentation', in which Bentham worked out in some detail the democratic institutions by means of which the dependence of the legislature was to be established. In an introductory section of that work, Bentham proposed a utilitarian justification for equal and near-universal suffrage. As noted above, this exercise clarified the utilitarian dictum, which J.S. Mill attributed to Bentham, 'everybody to count for one, nobody for more than one'.

According to Mill's editors,¹⁸ the source of this dictum lies in a section of the 'Introduction' to Bentham's Plan of Parliamentary Reform, first published in 1818. Bentham was here trying to establish a background presumption in favour of universal and equal suffrage as the natural standpoint from which to argue for certain exceptions, such as minors and the insane. Everyone experienced pleasure and pain; everyone pursued the former and tried to avoid the latter; everyone was morally obliged to do so. Bentham went on:

The happiness and unhappiness of any one member of the community - high or low, rich or poor - what greater or less part is it of the universal happiness and unhappiness, than that of any other?¹⁹

We should note that Bentham was not here using equality as one of the four subordinate ends of government - not, that is, as a distributive principle guiding legislation towards utility-maximizing allocations. Rather, he was using it as a weighting principle, which required that, in calculations of the effects of policies, the happiness of each individual was to count on an equal basis with the happiness of every other. Equal universal suffrage was the obvious result of applying that principle in the political sphere. So, even if individuals fared unequally under utility-maximizing legislation, they should have equal voices in determining that legislation.

In 'Représentation' we find what I believe is Bentham's most extended attempt to justify equality of suffrage. Bentham was at this time, we recall, concerned to offer a utilitarian as opposed to a natural-rights basis for the impending political reforms in France. On this reasoning there could be no prior right to the vote. Rather, any extension of the suffrage would have to involve purely legal rights justified on utilitarian grounds. Specifically, Bentham had to justify equality of suffrage. Making governments fully dependent on the governed would certainly require an extended suffrage; but such an extension could take any of several forms, including plural votes for some citizens. The case for equal voting rights would have to be made with a distinct set of arguments.

Bentham approached the subject in a series of axioms on equality. The first one reflects the delicacy with which Bentham treated the natural-rights sensitivities of his proposed readership. He wrote:

Chacun a un droit égal à tout le bonheur dont sa nature est susceptible.²⁰

But he at once qualified this statement with a footnote designed, as he put it, 'pour éviter l'obscurité qui s'attache à l'idée de droit', and

which contains a kind of 'impartial spectator' conception of utilitarian equality:

Donné une assemblage quelconque d'hommes un être supérieur quelconque qui auroit assez de bonté pour s'intéresser à leur sort, pour trouver du plaisir dans l'idée de leur bien-être sans avoir aucun intérêt personnel qui le porteroit à préférer quelqu'un d'entr'eux à un autre, trouveroit naturellement un plaisir égal à contribuer au bonheur d'un quelconque entr'eux que d'un autre: le bonheur d'un quelconque entr'eux ne vaudroit pas mieux à ses yeux que le bonheur égal d'un autre quelconque: cependant un bonheur quelconque plus grand à recueillir par un quelconque entr'eux vaudroit plus, à proportion de sa grandeur qu'un bonheur moins grand à recueillir par un autre quelconque.²¹

The equality that ultimately matters here, and which gives the passage its specifically utilitarian bearing, is not the equality of treatment between different individuals, but the equality of value of equal amounts of pleasure, whether these are experienced by the 'superior being' himself or by the individuals under his care. Bentham's task was, therefore, to show that the different individuals in a community did in fact represent equal amounts of utility, and in a way which justified distributing the suffrage equally.

The succeeding axioms were designed to establish a general equality in what Bentham described in later works as 'appropriate moral aptitude', or the willingness to promote the universal interest, and in 'appropriate intellectual aptitude', or the ability to make sound judgements about what the universal interest required. Bentham discussed two qualities associated with moral aptitude: the ability to experience happiness, and the desire for happiness. He argued, not that these qualities were equally distributed, but that inequalities in their distribution could not be measured. Of the susceptibility to experience happiness he wrote:

Faute de pouvoir déterminer le degré relatif de bonheur dont différens individus sont susceptibles il faut partir de la supposition que ce degré est le même pour tous. Cette supposition [si elle]²² n'est pas exactement vraie, approchera au moins autant de la vérité que toute autre supposition générale qu'on pourroit mettre à sa place.²³

Similarly with the desire for happiness, of which he wrote:

Chacun a un désir égal du bonheur: ou bien qu'il se trouve à cet égard quelques différences ces différences n'étant susceptibles d'aucune preuve ou mesure, ne sauroient se mettre en ligne de compte: et en tout cas cette proposition générale se trouvera plus approchante de la vérité qu'aucune autre que l'on pourroit mettre à sa place.²⁴

In the case of intellectual aptitude, however, some exceptions were legitimate. On this topic he wrote:

Différens individus ont des degrés très différens de capacité pour

juger de ce qui s'accorde avec le bonheur: mais ces différences ne peuvent être comptées pour rien, à moins que pour les constater on ne puisse trouver quelque signe quelque épreuve dont la qualité probatoire à cet égard soit claire et manifeste: comme de celles que l'on exige dans la procédure judiciaire.²⁵

This axiom permitted the exclusion from the suffrage of minors and the insane, since in their cases incapacity of judgement could be established beyond reasonable doubt. Bentham considered the several arguments which were popular at the time for excluding women from the vote, arguments like, for example, their dependence on men and their alleged ignorance about the world resulting from their domestic preoccupations. But he rejected all of them, claiming that they were invalidated by the devices of the literacy test and the secret ballot which he advocated at this time and in his later works on parliamentary reform.²⁶

It was in the manuscript 'French Constitution Plan', written in late 1789, that Bentham justified the literacy test as a safeguard for intellectual aptitude. Of literacy he wrote:

After the circumstances of infancy and insanity it is the only circumstance which can serve to draw a distinct line between the condition of those who may reasonably be deemed to have it in their power to exercise the right in question to the advantage of the community and those who can not.²⁷

In addition, the literacy test was not in principle a derogation from equality of suffrage, since it was an 'exclusion which every man has it in his power to free himself from whenever he thinks proper'.²⁸

For a time, Bentham advocated one further qualification to ensure intellectual aptitude. In 'Représentation' he proposed a low property qualification for the suffrage, designed to exclude the poorest individuals. The purpose of this was to remove the danger of what later came to be called the 'tyranny of the majority', under which the worse-off majority would combine against the better-off minority and strip them of their property, to the ultimate detriment of all. A low property qualification would combat this possibility by encouraging a political alliance in favour of property between the rich minority and the middle classes. It would also effectively undermine the aristocratic argument that the suffrage should be distributed unequally in accordance with the amount of property owned.²⁹ Bentham could have added that, like literacy, it was a qualification to which all could aspire. However, after 'Représentation' Bentham made no further reference to a property qualification. In both 'French Constitution Plan' and 'British Parliamentary Reform' he advocated equality of suffrage, with only minors, the insane and the illiterate excluded.

Finally, Bentham argued for the secret ballot as a safeguard for appropriate aptitude, and primarily moral aptitude. The suffrage was not a natural right but was, like all political offices, a trust; and the voter, as a trustee, was obliged to cast his vote so as to promote the universal interest rather than any sectional interest of his own. The open system of voting made this almost impossible by exposing the voter to

bribery and intimidation, so that he could hardly fail to vote in accordance with the will of someone else rather than his own will. The secret ballot would remove the threat of corruptive influence on the voter and guide him towards the fulfilment of his trust. Bentham expressed the psychology of this process thus:

Three principles, the selfish, the dissocial and the social, share the dominion of man's conduct. Where the two first are out of the way, the latter will carry every thing before it. No matter how weak it is, it will shape completely the course of every man's conduct, while it acts alone. What should induce him to vote for any other candidate than for him whom he really deems the fittest, when there is no advantage to be got by it?³⁰

The secret ballot enhanced moral aptitude by neutralising the motives which might lead the voter to sacrifice the universal interest to his own, so creating a union between his duty and his interest. This account of the operation of the secret ballot resembles the accounts in Bentham's later writings on the subject, with the exception that, following Mackintosh's hostile review of Plan of Parliamentary Reform in The Edinburgh Review, Bentham came to depend less on the voter's altruistic attachment to the universal interest as such, and more on his self-regarding attachment to his personal share of the universal interest.³¹

To summarise: Bentham grounded equality of suffrage in a presumed equality of ability to experience happiness, to desire happiness, and to make judgements about happiness. Only the most obvious and uncontroversial circumstances - those of infancy and insanity - justified exceptions to this equality. Intellectual aptitude was to be further safeguarded with the literacy test, and moral aptitude with the secret ballot. Equal and near-universal suffrage would not only be extensive enough to ensure the dependence of government on the governed; it would also satisfy the requirements of the formal weighting rule contained within the principle of utility.

IV

Finally, what should we make of Halévy's warning that we should not attach 'an exaggerated importance' to Bentham's arguments for political equality? Halévy was sceptical about this exercise because Bentham, who was normally so hostile to natural-rights theory, suppressed this hostility in 'Représentation' in his attempt to produce the equivalent 'utilitarian formula' for equal political rights. The suggestion is that 'Représentation' was something of a propaganda exercise, and that Bentham was obliged to produce ad hoc arguments to which he was not really committed, but which might succeed in easing the French away from their attachment to natural-rights theory. Now there certainly is something of an ad hoc, provisional feel about some of the axioms on equality in 'Représentation'. Equality was, so Bentham argued, based on our inability to measure interpersonal differences in the ability to experience, to desire, and to make judgements about happiness. But if it ever did become possible to measure such differences, would it not then be right to depart from strict political equality and to distribute the suffrage unequally?

In an earlier treatment of interpersonal differences in the capacity to experience happiness, Bentham did state that legislators and magistrates should as far as possible take them into account. In chapter VI of An Introduction to the Principles of Morals and Legislation, entitled 'Of Circumstances influencing Sensibility', Bentham listed the physical and mental attributes and other circumstantial and environmental factors which determined the individual's disposition to pleasure and pain. This he called 'the bias of his sensibility'.³² Legislators were obliged to take these factors into account to the extent that they could be ascertained and measured. Thus, while the legislator should certainly weigh the pleasures and pains of each individual affected by policy, the result might be that each individual counted not for one, but for more or less than one in so far as the relative biases of their sensibilities could be ascertained.

However, in more extended treatments of this subject Bentham clearly committed himself to the view that the limits on the measurement of interpersonal differences in sensibility were not practical and provisional, but were grounded in the limits of human understanding. In a manuscript from the 1770s on the measurement of subjective states, Bentham wrote:

When the effect of a portion of wealth upon happiness is spoken of, it is always without reference to the sensibility of the particular individual, and the exterior circumstances in which he might be placed. Difference of character is inscrutable; and there are no two individuals whose circumstances are alike. If these two considerations were not laid on one side, it would be impossible to form a single general proposition: but though each of these propositions may be found false or inexact in each particular case, it will neither militate against their speculative correctness, nor their practical utility.³³

Bentham made the same point in his 'Projet Matière' manuscripts from the 1780s, where, in a section entitled 'Propositions de pathologie et de dynamique sur lesquelles se fonde le bien de l'Egalité', he wrote of the 'idiopathie' of each individual as being 'inscrutable'.³⁴ The term 'idiopathie' (in English 'idiopathy') refers to certain experiences which are so subjective that they cannot be detected or communicated, and so cannot be measured or compared with the corresponding experiences of other individuals. For Bentham, then, the phenomenon of idiopathy precluded absolute interpersonal comparisons, leaving equality as the only plausible basis on which to ground any further comparisons.

The axioms on equality in 'Représentation' thus seem to be based, as Halévy himself observed, on the most fundamental propositions of Bentham's mental pathology. That is true of the axioms on moral aptitude, at any rate. The axiom on intellectual aptitude, however, is less securely grounded in those propositions; not only did Bentham admit clear exceptions to the presumption of equality, he also prescribed an intellectual qualification in the form of the literacy test. There seems to be nothing in the propositions of mental pathology which would rule out further qualifications along the lines of J.S. Mill's scheme to give

additional votes to the educated. So while the exceptions to equality were based on the relatively easily established differences in intellectual aptitude, the presumption of equality itself was based on the impossibility of establishing differences in moral aptitude, that is, the capacities to experience and to desire pleasure.

If there is anything of substance in Halévy's downgrading of Bentham's arguments for political equality in 'Représentation', this would, I believe, have to do with the fact that these arguments do not by themselves establish the case for democracy. All they establish is the basis for an equal distribution (exceptions excepted) of any extension of political rights. Whether or not political rights should be so extended is a separate argument. We have seen that Bentham's case for such an extension was based on the need to secure the dependence of government on the governed, for providing government with an interest in fulfilling its duty. In 1792 Bentham ostensibly repudiated this argument, and returned to it sixteen years later. But this could not affect the logic of the case for political equality. I have shown that Bentham's arguments against the traditional doctrine of the separation of powers, and his case for establishing dependence, were consistent with his established moral and legal philosophies. Similarly, the arguments in 'Représentation' for political equality explicitly drew upon the propositions on mental pathology established in earlier works. To the extent that Bentham's later writings on parliamentary reform do not make this connection clear, these arguments contribute significantly to our understanding of Bentham's theory of representative democracy.

NOTES

¹ UC clxx. 3.

² For various views on that subject, see J.H. Burns, 'Bentham and the French Revolution', Transactions of the Royal Historical Society, 5th series, XVI (1966), 110-14; M.P. Mack, Jeremy Bentham. An Odyssey of Ideas, London, 1963, pp.440-3; E. Halévy, The Growth of Philosophic Radicalism, London, 1934, pp.147-8; J.R. Dinwiddy, 'Bentham's Transition to Political Radicalism', Journal of the History of Ideas, XXXVI (1975), 683; and H.L.A. Hart, Essays on Bentham, Oxford, 1982, pp.67-71.

³ Halévy, The Growth of Philosophic Radicalism, p.148.

⁴ UC cxxvii. 4.

⁵ UC cxxvi. 8.

⁶ UC cxxvi. 9.

⁷ Of Laws in General, ed. H.L.A. Hart, London, 1970 (CW), [hereafter OLG], p.18n.

⁸ UC cxxvi. 8.

- ⁹ OLG (CW), p.19n.
- ¹⁰ An Introduction to the Principles of Morals and Legislation, ed. J.H. Burns and H.L.A. Hart, London, 1970 (CW), [hereafter IPML], p.263.
- ¹¹ UC cxxvi. 15.
- ¹² UC clxx. 166.
- ¹³ OLG (CW), p.21.
- ¹⁴ UC cxxvii. 2.
- ¹⁵ UC clxx. 47.
- ¹⁶ Constitutional Code, vol. I, ed. F. Rosen and J.H. Burns, Oxford, 1983 (CW), p.29.
- ¹⁷ Ibid., p.41.
- ¹⁸ J.S. Mill, Essays on Ethics, Religion and Society, Toronto, 1969, p.257 (vol. x of Collected Works of John Stuart Mill, ed. J.M. Robson).
- ¹⁹ The Works of Jeremy Bentham, ed. J. Bowring, 11 vols., Edinburgh, 1838-43, iii. 459.
- ²⁰ UC clxx. 114.
- ²¹ Ibid.
- ²² MS: 's'il'.
- ²³ UC clxx. 114.
- ²⁴ UC clxx. 115.
- ²⁵ UC clxx. 114.
- ²⁶ UC clxx. 115.
- ²⁷ UC clxx. 146.
- ²⁸ Ibid.
- ²⁹ UC clxx. 120.
- ³⁰ UC cxxvii. 11.
- ³¹ See my 'Bentham on Voter Rationality', The Bentham Newsletter, VI (1982), 4-7.
- ³² IPML (CW), p.51.

³³ A. Goldworth, 'Bentham on the Measurement of Subjective States', The Bentham Newsletter, II (1979), 7.

³⁴ UC xxxii. 5.

JEREMY BENTHAM AND PRINCE POTESKIN

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The bare fact that Jeremy Bentham was involved in a correspondence with the favourite and chief minister of Catherine II of Russia, Prince Grigory Aleksandrovich Potemkin, is alluded to in a draft letter of his now in the University College collection, long ago printed by Sir John Bowring in the Works.¹ Fifteen years ago, little more could be added from the more complete editing of Bentham's papers undertaken with the benefit of the collection in the British Library.² Part of Bentham's side of this correspondence has now come to light among the papers of Potemkin in the Central State War History Archive in Moscow and has been made available by courtesy of the Principal Archive Office of the government of the U.S.S.R.³

The correspondence was occasioned by Samuel Bentham's mention to his brother of the fact that Potemkin had delegated to him the task of finding a director for a botanical garden which the Prince proposed to establish in the newly acquired territory of the Crimea. There was also to be a model dairy, for which a woman supervisor would be required. 'As the Prince leaves these things so much at my discretion', Samuel wrote, 'so must I leave them entirely at yours'. At the same time he hazarded his own guess, that it would greatly please the Prince, if a printing press suitable for printing the classics were established in the Crimea.⁴

During the second half of 1784 and the beginning of 1785 Bentham spent appreciable time and effort in dealing with these commissions. The loss of his letters to Samuel has hitherto largely obscured these activities, but this gap can now to some extent be filled.

Bentham wrote four letters to Potemkin on these subjects during February 1785, and subsequently in August a fifth written en route during his journey southward across France, on his way to Russia. The first two letters have not so far been unearthed, though they may well survive somewhere in the enormous collection of Potemkin's papers or in those of his secretary V.S. Popov. But their dates, 1 and 4 February, are recorded in the first sentence of the third letter, itself dated 11 February, which also gives some indication of their contents.⁵

Associated with this early part of the correspondence, and probably forwarded under cover of the letter of 4 February, is a dossier written by Bentham on Logan Henderson, whom he proposed to engage as director of the botanical garden. This substantial curriculum vitae dated 3 February runs to ten and a half pages, and concludes with a further page and a half of information about the ladies of Henderson's household, who seemed to Bentham admirably suited to take charge of the projected dairy.⁶ Although Henderson had no specific botanical experience, he appeared to be a man of a thoroughly scientific cast of mind who could turn his hand successfully to such an enterprise, and he had a background which could to some extent be checked: Bentham by no means took him entirely on trust. Early in life he had spent over three years as a young officer of marines.

Subsequently he had engaged for a short time in sugar planting in Dominica, and Bentham secured a testimonial about him from the then governor of the colony, which he forwarded with the dossier (now mislaid). After returning debilitated by tropical illnesses Henderson had for six years (1777-1783) been employed by Bolton and Watt on the installation of their steam engines, until a quarrel of some sort had terminated their association - and the dossier indicates that Bentham had made some sort of investigation among people with whom Henderson had had business dealings during this phase of his career, which suggested he was not to blame for the breach. Since 1783 Henderson had been engaged on his own account on the manufacture and sale of phosphorus matches. While involved with Bolton and Watt he had picked up some knowledge of mining and mineralogy, which Bentham on one occasion put to direct test by asking him to identify specimens in a mineral collection recently sent back to England by Samuel Bentham: Henderson vindicated his judgement by rising to Bentham's challenge using the blow-pipe technique to extract metal lead from a specimen he had identified as a lead ore. His womenfolk had also played a part in this game of one-upmanship. Bentham had recently completed and published an English translation of Torbern Bergman's little book on the usefulness of chemistry.⁷ On offering a copy to Henderson's housekeeper and assistant in the match business, he was flattered to find she had already purchased and read it. It is evident that Bentham took considerable pains to probe Henderson's character and attainments. The latter seem to have been undoubted within their limits; but events were to prove that he had been hoodwinked over Henderson's strength of character and devotion to duty.⁸

Two other documents in the group belong to the opening stage of this correspondence. They are curricula vitarum of an itinerant 'professor' of physical science called Dinwiddie⁹ and of James Tytler, the Edinburgh apothecary and printer.¹⁰ Neither of these dossiers has survived in complete form. Neither is dated; but it seems probable that they were sent to Potemkin under cover of one or other of the letters of 1 and 4 February. Bentham suggested that the first of these men would make a suitable assistant director of the botanical garden, and that the second might serve in the Crimea both as a doctor and as the manager of a printing press. Nothing further came of either proposal.

The next two letters to Potemkin, dated the one, 11 February, and the other, 25 February-1 March,¹¹ dealt with the question of getting Henderson and his womenfolk to the Crimea, assuming that their appointments were approved.

In the first place these letters reveal Bentham's determination to create as many opportunities as possible for Henderson to acquire information about botanical gardens and the botanical art before he arrived at his destination; and for this purpose to visit noted gardens in France and Italy. At this stage he had the botanical garden at Florence particularly in mind - 'objet qu'il seroit facheux d'abandonner, s'il est vrai comme je viens d'apprendre que ce magasin est riche au point de posseder par exemple plus de 200 especes de vignes'. Other centres as yet unknown to him might also be open to view:¹² indeed later the garden at Montpellier was to form part of the itinerary.¹³

To achieve his purpose it seemed to Bentham in February 1785, that the best course would be to buy or charter a vessel to convey Henderson with all his equipment to the Crimea by the Mediterranean route. To this end, early in the month, he posted off enquiries about rates of hire in Scotland, thinking they might be lower there; and with Henderson he explored the possibility of purchasing a yacht of 100 tons which Mr. Lister, an M.P., had put on the market. Either of these plans involved a sanction of extra expenditure by Potemkin, and there were other complications such as the right of the vessel to fly the Russian flag as a condition of its being in the Black Sea. As regards the first option Bentham sought to sweeten the pill by investigating with a London merchant the possibility of the vessel bringing a return cargo of tallow from south Russia, and in his letter of 25 February he included detailed estimates, indicating the possibility of a profit of over £4,000, to be shared between Potemkin and the British undertakers. If the second course were adopted, Potemkin would have a fairly new vessel at his disposal in the Black Sea, easily capable of conversion into either a packet boat or a privateer.¹⁴

In writing these long detailed letters and memoranda, Bentham had failed to heed his brother's advice about full discretion being delegated, subject to the strictest economy being observed. It was naive of him, to say the least, to expect that a great statesman beset with multifarious problems of imperial statecraft would concern himself with minutiae of this sort. To his disappointment, but very naturally, no reply of any kind came for many weeks; and when eventually one did, about the middle of May, it arrived in the form merely of an indirect message that the Prince was pleased, and (why? Bentham wondered) ordered that his letters be translated into Russian.¹⁵ The Prince's own formal approval of the appointment of Henderson arrived several weeks later: on the score of lack of time he declined to enter into any of the detailed points raised in Bentham's letters.¹⁶ By that time Bentham had sensibly discarded both the plans he had put to Potemkin and had adopted the more commonsense course of arranging Henderson's passage on a ship bound for Smyrna via the western Mediterranean ports. Henderson was first to go to Paris, where he was allowed about three weeks to visit the Royal Garden and other botanical centres in order to pick up information. Bentham arranged to meet him there early in August and then travel to Nice, where they would all join their ship, taking in any other likely botanical centres on their way. Bentham wrote his fifth and last letter on this subject to Potemkin on board the 'diligence d'eau', travelling down the Rhone from Lyon to Avignon, on 27 August, explaining these arrangements, mentioning that Henderson had introductions for the botanical garden at Montpellier, for which they were now bound, and alluding to the recent departure from England by the Baltic route of other British personnel who were going to Russia on Samuel's account.¹⁷

Samuel Bentham was by no means pleased at his brother's thus troubling Potemkin with matters of detail which he well knew the Prince would regard as beneath his attention. 'He desired me to find those persons', he wrote to Bentham, 'and he ordered me credit for furnishing the expense. He expected then to hear no more of it till the people made their appearance'.¹⁸ He was anxious that Potemkin should not blame him for what had happened, and in one of the four letters of his to the Prince which

have come to light in this collection of papers he hastened to exculpate himself. 'Je ne dis plus rien touchant les commissions dont Votre Altesse me fit l'honneur de me charger pour la Crimée', he wrote, 'parceque j'ai appris que mon frere a ecrit quatre lettres à Votre Altesse où je crains beaucoup que sa prolixité a ennuyé plus que son zele a pu plaire. C'est pourquoi je dois prier a croire ce n'etoit nullement pas mes instructions mais entierement a mon ennui que mon frere s'est adressé directement à Votre Altesse'.¹⁹

NOTES

- ¹ UC ix. 10-11; The Works of Jeremy Bentham, ed. J. Bowring, 11 vols., Edinburgh, 1838-43, x. 139-40.
- ² Correspondence (CW), ed. I.R. Christie, iii. 327-8, 330-1.
- ³ Tsentral'ny gosudarstvenny voenno-istorichesky arkhiv (Central State War-History Archive, henceforth CSWHA), fond no. 11, opis no. ED. KhR. 946. I gratefully acknowledge the kindness of the staff of the Principal Archive Office in making this material available on microfilm, and I thank Dr. L.A. Sitnikov of Novosibirsk for drawing my attention to it and providing addresses to approach.
- ⁴ Correspondence (CW), iii. 267, 269-71, 276.
- ⁵ CSWHA, 11/946, fos.188-189^v.
- ⁶ Ibid., fos.195-196^v, 193-194^v, 197-198^v.
- ⁷ Correspondence (CW), iii. 207n; B. Linder and W.A. Smeaton, 'Schwediaur, Bentham and Beddoes: Translators of Bergman and Scheele', Annals of Science, XXIV (1968), 259-73. Bentham's explanation of his part in this translation appears near the end of this dossier: 'Il y a un petit traité publié en Allemand par le celebre Bergman sur l'utilité et l'application de cette science. Pour le seul plaisir de le lire je fis convention l'autre jour avec un Allemand de traduire en Anglois l'espece de jargon où il le pouvoit mettre, moyennant quelques exemplaires dont j'ai fait présenté a mes amis. En ayant voulu faire de même a Mlle Kirtland, il n'en etoit plus tems: elle l'avoit acheté, et l'avoit lu'. CSWHA 11/946, fo.198.
- ⁸ Correspondence (CW), iii. 350n, 413n; E.I. Druzhinina, Severnoye Prichernomor'ye v 1775-1800 godakh, Moscow, 1959, p.136n.
- ⁹ CSWHA, 11/946, fos.190-191^v.
- ¹⁰ Ibid., fos.199-200^v.
- ¹¹ Respectively, *ibid.*, fos.188-189^v and 186-187^v, 192-192^v.
- ¹² Ibid., fo.188.

¹³ Bentham to Potemkin, 27 August 1785, *ibid.*, fo.141^v.

¹⁴ References as at note 11.

¹⁵ Correspondence (CW), iii. 327, 328. In fact, it would be understandable if Potemkin had ordered the dossiers to be translated for the benefit of any officials not fluent in French.

¹⁶ *Ibid.*, 330-1.

¹⁷ CSWHA, 11/946, fos.141-142^v.

¹⁸ Correspondence (CW), iii. 322.

¹⁹ Samuel Bentham to Potemkin, Critchoff, 24 June 1785, CSWHA, 11/946, fos.136^v-137.

BENTHAM AND 'BODIES FOR DISSECTION'

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The story of the Anatomy Act has never adequately been told. Death studies as a discipline is yet in its infancy in Britain, and other social historians of death since 1800 have so far overlooked the Act entirely.¹ References by social and economic historians to the Act's existence are rare.² Poor Law historians generally assume that popular beliefs concerning the mutilation or maltreatment of the workhouse dead have no basis in rationality or fact,³ while historians of medicine greet the Act with little comprehension of its social meaning beyond the material interests of the medical profession.⁴ Historians of government growth and administrative history barely mention the Act's existence, and where they do so, they seem entirely to have missed its significance.⁵ No one seems to have noticed that the Anatomy Act established what is probably the earliest centrally funded and administered national inspectorate of the Benthamite calendar of nineteenth-century administrative reform.⁶

I

In the early nineteenth century, all medical education was transacted on a private basis. Ever since Henry VIII's time, the only legal source of corpses for dissection had been the gallows. Bodies of murderers were handed over to the anatomists as a much-hated post-mortem punishment, one which the law itself described as 'a peculiar Mark of Infamy'. Dissection was a way of ensuring the body's destruction, and of denying it Christian burial. Superstitious beliefs were popularly current at this period which associated the fate of the body with that of the soul. Dissection was a profoundly unpopular punishment.⁷

Over the course of the eighteenth century a black market in corpses developed; promoted by increased interest in human anatomy and physiology, the increasing professionalisation of medicine, and a growing demand among the affluent for good doctoring. Anatomists offered money for corpses and were supplied: dismembered, they were sold to students at a profit. Every freshly buried corpse in the country was vulnerable to the predations of the bodysnatchers, most particularly in the metropolis and the larger towns and cities. Their activities were met with immense popular opposition.⁸

The bodysnatchers long bore the brunt of popular execration alone, but eventually in 1827-8, a change in case law led to the conviction of an anatomist. It was undoubtedly this event which prompted Parliamentary activity. The profession had long been demanding reform. For at least a century the inadequacy of the legal supply had been regarded as a major obstruction to medical knowledge, and had constituted a continuous threat to public order at gallows and in churchyards. The case appeared at Lancaster Assizes on 14 March 1828. Within forty days, Parliament, which had always thought it too hazardous a risk to do anything about the problem, had established a Committee to investigate. Before sentence in the Lancaster case had even been handed down, the Select Committee had all

but completed hearing evidence.⁹

II

Parliamentary recognition of the problem is commonly ascribed to the discovery of the Burke and Hare murders in Edinburgh. In fact, Burke and Hare were busily engaged in murdering poor street folk for dissection, and enjoying the proceeds thereof, whilst the Committee was sitting. The Select Committee's Report was published several months before the murders were discovered.¹⁰ The progress through the Commons of the first Anatomy Bill was certainly assisted by the discovery of their crimes. However, with the country in the midst of political turmoil over Parliamentary Reform, in June 1829 the Lords in their wisdom advised it should be withdrawn for reconsideration.

There the matter rested, until late in 1831 a new case of 'burking' was discovered in London. Almost immediately a new bill was introduced to Parliament, and passed with little opposition. It remains the basis of modern law on the subject. It recommended that instead of giving hanged murderers, the government should confiscate the bodies of paupers dying in workhouses and hospitals, too poor to pay for their own funerals.

The policy fitted admirably with the new concept of the deterrent workhouse, shortly to be enshrined in the New Poor Law. What for generations had been a feared and hated punishment for murder, would now become one for poverty.

III

Despite the speed with which evidence was collected, the Select Committee on Anatomy saw more witnesses on more occasions, and submitted a longer report with more pages of evidence than did the average Select Committee of 1828.¹¹ However, this assiduity was more apparent than real.

As a result of the fire at the Houses of Parliament in 1834, in which most Commons records were destroyed, all the Committee's administrative papers are lost. We have no record of Members' attendance, of their discussions, or even of when they met, other than for the taking of evidence. However, it is known that Henry Warburton, the 'avowed Benthamite'¹² Member for Bridport who had persuaded the Commons of the need for a Select Committee on Anatomy, wrote the Committee's Report himself.¹³ A close examination of the published Evidence leads to the conclusion that, like some other Parliamentary reports, 'it was based on speculative, anecdotal, and ultimately political judgments...on prejudice...[and] bias'.¹⁴

This is a serious contention. Yet similar allegations have been made by other historians concerning other measures of the same era, notably the 1833 Factory Inquiry, the 1834 Poor Law Report, the 1844-5 Commission on the Health of Towns, and the Report of the 1834-5 Commission on Municipal Corporations. The Webbs called the latter 'a bad case of a violent political pamphlet being, to serve Party ends, issued as a judicial report'.¹⁵ All the above enquiries were manipulated by Benthamites.¹⁶ Evidence of Benthamite influence on the drafting and passage of the Anatomy Act leads to the conclusion that the Select Committee on Anatomy

was another such.

This influence is all the more significant since the Anatomy Act established the first centrally financed and administered national inspectorate of the nineteenth-century 'revolution in government',¹⁷ pre-dating the Factory Inspectorate - which even historians of inspection date as the first - by a year.¹⁸

There certainly existed - primarily medical - voices in favour of anatomy reform which were not identifiably Benthamite. For example, in his Hunterian Oration of 1819 the surgeon John Abernethy had raised the idea of using paupers' bodies - seemingly the first occasion on which this expedient was mooted seriously in this country. There was a secret correspondence between anatomists and Robert Peel in 1824, via Peel's personal medical consultant, Astley Cooper, in which the feasibility of various alternative sources of corpses were discussed.¹⁹ Thomas Wakley's cogent running public critique in the Lancet was crucial, as was his publication of numerous suggestions for reform, which included a plea for government regulation of corpse supply and price control, by the anatomist George Dermott.²⁰

Nevertheless, the evidence is that the Anatomy Act was a Benthamite measure - and the association with Bentham himself could hardly be more clear. Bentham was known to be sympathetic towards dissection. A close connection can be perceived in manuscripts which survive in the Bentham Manuscripts at University College London. There are copies of an 1826 correspondence between Bentham and Peel, autograph draft letters, and - most significantly - Bentham's handwritten draft, dated November 1826, of a Parliamentary bill on the subject. Despite Bentham's bequest of his own corpse for dissection and curious preservation (which has certainly remained one of the most enduring facts of his biography)²¹ these manuscripts have not previously been published, and no discussion of their importance has so far been found.

The correspondence with Peel consists of a single exchange of letters, initiated by Bentham on 1 April 1826.²² Denying that he was asking Peel to act 'in contempt of Public Opinion and its tribunal', Bentham solicited Peel's attention to the 'distressed state of medical science', and offered 'an effectual cure...without wound to individual feelings'. His key recommendation was that by the act of applying for treatment, all hospital patients would be deemed to have given consent to the dissection of their corpses in the event of death. Bentham suggested the Christian burial of dissected remains, the use of hospital administrators in keeping dissection records (with copy certificates to survivors), as well as newspaper publication of the names of the deceased. Importantly, with reference 'to the feelings of relatives', Bentham drew a distinction between dissection and post-mortem, and suggested that dissection should perhaps be limited to corpses for whom no application for burial had been made. He did not find it necessary to define whom his suggestions would affect. All hospital patients at this date were by definition unable to pay for other medical treatment - so Bentham's chosen constituency for dissection material would be those who died in poverty with no relatives to bury them, and those whose relatives were too poor to do so.

Bentham went on to say that in 1825 he had seen similar regulations in operation in a Paris hospital, St Louis, and that English physicians there had told him that because of it, France was ahead of England in the 'art-and-science' of anatomy. The influence of the French precedent upon Bentham himself may have come by way of his medical friend Thomas Southwood Smith, whose influential article 'The Use of the Dead to the Living' had been published in the Benthamite Westminster Review in 1824. After mention of the French precedent, Bentham humbly mentioned the bequest of his own body,

so that my last moments have for their comfort the assurance that how little service soever it may have been in my power to render to mankind during my life time, I shall at least be not altogether useless after my death.

The letter ended with an indication that more research would be necessary before a final draft of a bill could be written up. Bentham added a postscript to the effect that he would 'with pleasure, do whatever is most agreeable to [Peel] in relation to this business, except the giving it up', adding:

If the design meets your approbation, the simplest course is for you to take it up as of yourself without my appearing in it. But if in that case you had rather it should appear called for ab extra, and that the call should appear in some Newspaper, so shall it be.... If I do not receive any commands from you within a week from the date of this letter, I shall conclude that you are not disposed to take up the matter yourself, and I shall in that case also send the letter to some Newspaper, for the chance of seeing it taken up by some one else.

The letter was marked 'Private'. Peel's reply²³ from Whitehall on 4 April 1826 was marked 'Private and confidential'. It read:

I have given much attention to the subject on which you have addressed me, and have had personal communication upon it with many eminent anatomists.

I think I may say with truth - that in consequence of the measures adopted by me - the difficulty of procuring Bodies for dissection in the Schools of the Metropolis, has been of late very materially diminished. I very much doubt however whether this be a fit subject for legislation, or even for public discussion - and whether there is not great danger that the attempt to legislate would throw new impediments in the way of anatomical Science.

Among those with whom I have conversed on this matter, are many Governors of Hospitals - and I am confident that an active opposition would be made by them to such a legislative enactment as that which you propose.

Perhaps on rigid inquiry it might be found - that without the existence of any legislative authority for it, a pretty free use is made of the bodies of those Patients who die in public Hospitals. I

should be sorry by any public Act to provoke too much inquiry into present practice.

There are other sources of supply open at present - not in contravention of Law - which I apprehend public discussion would effectually close.

I have entered into this detail in the hope of satisfying you - that if I do not adopt your suggestions - it is not because I am insensible to the importance of the subject - but because I fear the consequences to Science of too open an interference in a matter, in regard of which public feeling is naturally so easily excited.

I am, Sir,
Your obedient Servant,
Robert Peel.

Peel was usually parsimonious with his words, so the length of his reply to Bentham suggests that he took the correspondence very seriously. His polite rejection prompted two draft replies from Bentham - one dated 12 April 1826, and the other twelve days later. There is no evidence that either was ever sent. The first²⁴ referred to Bentham's conviction of the need for medical reform, as a result of newspaper coverage of medical reformers' arguments. Recognising Peel's 'personal apprehension' of 'odium', Bentham promised to observe his desire for secrecy. If he did not hear from Peel within a week, he would regard himself as having Peel's permission to show the correspondence to John Smith, MP, 'of the coincidence of whose sentiments with mine I am sufficiently assured'. The subject was still on Bentham's mind, however, for the second draft reply²⁵ again expressed his support for medical reform, and a promise of secrecy; but reveals that Bentham seems to have felt that by sharing his proposal with Peel, he had ceded the initiative. Much of this draft was concerned with reasserting control: he argued against Peel's contention that the subject would not benefit from legislation, expressed the fear that murder might occur unless change was effected, and offered a title for the projected bill: 'A Bill for the more effectual prevention of the violation of Burial Places'. Bentham offered to take responsibility for the engagement of 'some other MP to take it upon himself' to introduce the bill to Parliament. If he did not hear to the contrary within a week, he would conclude that Peel had 'no objection to the seeing the matter brought before the public in Parliament by some other hand'. The manuscripts are quiet on the subject until 6 November of that year (just before the start of the new Parliamentary session) when a draft bill - now headed 'Body Providing Bill' - appeared in Bentham's hand.²⁶ It contained all the elements Bentham had listed in his first letter to Peel, primarily the plan for legal recognition of an unspoken contract between patient and charity/hospital - in the event of death, in return for medical care the patient's corpse would be at the disposal of the hospital's dissectors. Should surviving relatives swear to their relationship within 24 hours of the death the body would be given up to them for burial without dissection, but in cases of 'extraordinary symptoms', the medical practitioner would have the right to make an 'aperture' to determine cause of death - and if then the body was not returned, a forfeit of £100 would become payable to the relatives. The proposed bill went on to direct

Christian burial for dissected remains, at the anatomist's cost; and repeal of the Act under which murderers were dissected.

The material from Bentham's proposed bill was almost certainly the basis of the first Anatomy Bill. The prevention of disinterment was primary in the first bill's title and text; and the supposed unspoken contract between patient and anatomist was implicit in its clauses. The two texts accord so closely in spirit, that it seems more than likely that Bentham did as he had suggested to Peel, and confided in John Smith, MP. The only John Smith to whom Bentham could have been referring, was John Smith of Dale Park - brother to Lord Carrington, MP for Midhurst since 1812, and one of the many Benthamites nominated to the Select Committee.²⁷ In fact, only three voices were recorded as having spoken during the Commons debate in April 1828 in which assent was granted for the establishment of the Select Committee: those of Warburton as proposer, Smith as seconder, and Peel, accepting their proposal on behalf of the government.²⁸

The choreography of relationships and views which resulted in the appointment of the Select Committee is not fully known. Yet contact ascertainably took place beforehand on the subject between Bentham and Peel, and probably between Bentham and Smith. Warburton was himself closely aligned with the Bentham/James Mill axis.²⁹

Between Bentham's draft and the submission of the first bill to Parliament in 1829, a great deal of research and added drafting had indeed been done - much of it apparently undertaken independently of the Select Committee's sessions. It had probably become evident that public notification of deaths in workhouses would have given undue publicity to high workhouse mortality, and could prove counter-productive. It was probably also appreciated that some other less interested form of control than hospital administrators would be necessary to oversee the Act's provisions.

Interestingly, Bentham did not himself address the need for an inspectorate. Nor did he appreciate the potential for conflict between the 'independent' private schools of anatomy, and the schools attached to hospitals, which yielded income to top surgeons. His followers did. The first bill spent a considerable amount of its bulk on the institution of seven 'Commissioners', the frequency and content of their meetings, their staff, their power to issue licences, to issue regulations for anatomy schools and to receive reports from paid peripatetic Visitors, penalties available to them for infringement of their powers, and other forms of administrative detail.³⁰ None of these innovations had been mentioned in the course of the evidence offered to the Select Committee, which supports the suspicion that it had served the role of a public relations exercise. As the Bentham-Peel correspondence reveals, a great deal of the real work behind the Report had probably already been done.

IV

The historian S.E. Finer's work on the transmission of Benthamite ideas has uncovered a network of committed devotees, 'clear in their convictions and filled with missionary zeal'. Finer points to the role of sympathetic MPs who would move for a Select Committee, and thereby gain the right to nominate a majority of its members. That Warburton used his position in

this way is evident from the weight of Benthamite representation on his Committee.³¹ The names of Hume, Baring, Graham, Spring Rice, Poulett Thompson and Hyde Villiers appear as 'first degree Benthamites' in Finer's analysis - all were on the Committee. The passage quoted above from the Bentham-Peel correspondence shows that John Smith belongs in the same category. Others, like Hobhouse, were keenly sympathetic (what Finer calls 'irradiated Benthamites') and in some cases, yet other connections may also have been operating - for example in 1833, Littleton, another member of the Committee, was nominated for the post of Speaker by Hume. Peel himself was also a member of the Select Committee, and although not a 'disciple' of Bentham, was by 1828 sympathetic to the expedient in mind. Yet another Committee member, Dawson, was Peel's brother-in-law, and Bransby Cooper, also on the Committee, was elder brother to Peel's consultant, Astley Cooper. Astley Cooper was himself a top surgeon/anatomist, and proved a key witness during the Committee's hearings.³²

The Select Committee on Anatomy conforms in other characteristics besides its 'packed' membership to Finer's analysis of other public enquiries manipulated by the Benthamites, for example, the 'pre-selection' of witnesses, and skilful use of the Parliamentary recess to stimulate favourable public opinion. It represents a prime example of the manipulated public enquiry which was a favourite instrument for achieving official status for Benthamite views.³³ It epitomises what Finer calls 'the use of the Select Committee as an offensive weapon'.³⁴

V

During its passage through Parliament, Warburton gained a reputation for late debates and thin houses - his Anatomy Bill was dubbed 'the Midnight Bill' - which he was eventually forced to defend in the Commons.³⁵ An attempt even seems to have been made to inhibit public as well as Parliamentary discussion of the bill - it was found that the Commons press gallery was unaccountably closed on at least one occasion during a debate on it.³⁶

Some draft notes which survive in the Bentham Manuscripts suggest that devious Parliamentary tactics utilised by Warburton and his colleagues may possibly have originated with Bentham. The notes were addressed to Brougham, and are unfortunately undated. They were probably written at an earlier period when Brougham was something of a favourite.³⁷ The notes are headed 'Suggestions for Modus Prociendi on Law Reform Motion', and offer advice on how to avoid unwelcome Parliamentary discussion of the topic in hand. Bentham's advice was to speak principally of the imperfections for which reform was sought; to avoid speaking of the remedies contemplated (to avoid provoking 'prejudices which will be played off against you'), and to defer debate by pleading that 'you think it will be too much for you to take upon yourself the task of developing them and defending them upon the present occasion', or that not enough information was available at the time. Warburton used all these tactics, and others besides, to keep Parliamentary opposition to a minimum.³⁸ Though he may not have been the object of Bentham's personal coaching, Warburton seems to have absorbed this aspect of the great man's influence. Brougham, incidentally, was Lord Chancellor during the passage of the Anatomy Act,

and gave more than one important speech in its support.³⁹

VI

This paper has argued that Bentham's, as well as Benthamite, presence was far from negligible in the Parliamentary consideration of the anatomy question. It hardly supports an argument that Benthamites were 'behind every hedge', as William Thomas's jibe at Finer's work would have it,⁴⁰ but shows that the Benthamites were capable of working in concert inside Parliament in the five years before the Reform Act, to enact a concrete programme of 'reform' in the area of anatomy. The manuscript material discussed here indicates Bentham's personal involvement in framing the anatomy legislation, his influence upon his followers' Parliamentary tactics, and his willingness strategically to adopt a low profile when a favourite project was in hand. William Thomas may like to note that prior to 1832 the person behind the hedge could be Bentham himself.

NOTES

Abbreviations:

Report/Evidence

Report and Evidence of the House of Commons Select Committee on Anatomy, 1828.

¹ See for example: J. Morley, Death, Heaven and the Victorians, London, 1971; J. Curl, The Victorian Celebration of Death, Newton Abbot, 1972; A Celebration of Death, London, 1980; G. Gorer, Death, Grief and Mourning, London, 1965; J. Whaley, Mirrors of Mortality, London, 1981.

² I have found brief references in the work of E. Thompson, 'Eighteenth-Century Society', Social History, (1978); G. Williams, preface to D. Thompson, The Early Chartists, London, 1971; and R.J. Morris, Cholera 1832, London, 1976, pp.101-2. Only two papers - one on a local riot - have been found which address the Act itself and its social implications as a topic worthy of independent historical inquiry: F.K. Donnelly, 'The Destruction of the Sheffield School of Anatomy in 1835', Transactions of Hunter Archaeological Society, X (1975); M.J. Durey, 'Bodysnatchers and Benthamites', London Journal, (1976).

³ See for example, M.A. Crowther, The Workhouse System, London, 1981, p.31. Several other instances are provided in Chapter 7 of my forthcoming book, Death, Dissection and the Destitute, to be published in 1987.

⁴ See for example, C. Newman, The Evolution of Medical Education, London, 1957; G. Wolstenholme & M. O'Connor, Ethics in Medical Progress, London, 1966. In his history The English Health Service, Cambridge, Mass., 1964, pp.24-5, Harry Eckstein refers to widespread anxiety concerning death insurance and Poor Law health provision, but seems completely ignorant of the relationship between the two. A footnote summarises the reactions of many such historians: 'nothing seemed to hold greater terror for the working-class than the prospect of a

"pauper's burial".'

⁵ See note 16 below.

⁶ See note 18 below.

⁷ See P. Linebaugh, 'The Tyburn Riot against the Surgeons', in D. Hay et al., Albion's Fatal Tree, Harmondsworth, 1977; and see Chapter 4, 'The Sanctity of the Grave Asserted', in my forthcoming book.

⁸ The number of bodies required per student was disputed. J.H. Green (Evidence, qq.280-3) thought that a minimum of three per student was necessary, while G.J. Guthrie (A Letter...containing Remarks on the Anatomy Bill now before Parliament, London, 1829, p.23) thought that dismembered parts adding up to one entire corpse dissected over a long period of time, would be quite adequate - 700 bodies a year would represent 'an ample supply' for London. Bodysnatchers supplied almost this amount - see Report Appendix 14. Contrary to all expectations, the Anatomy Act in fact supplied a smaller number.

⁹ Rex v Davies et al. (1828), Lancaster Assizes, 14 March 1828. Report Appendix 23. The Select Committee was elected on 22 April 1828. The Times reported sentencing on 19 May. Only one day's evidence was taken after this date - see the calendar on p.13 of the Report. The London Medical Gazette I (1827-8), 638, reported the launch of a subscription fund to help pay the costs of the case. The list of subscribers was headed by Sir Astley Cooper and Sir Henry Halford. See also London Medical Gazette I (1827-8), 744.

¹⁰ B.B. Cooper, The Life of Sir Astley Cooper, London, 1843, pp.407-8. The medical historian Charles Newman, for example, dates the Burke and Hare murders to 1827 and says that 'the addition of murder to the public nuisance and the professional scandal was at last enough to rouse the authorities. A Parliamentary Committee was set up in 1828 to investigate the teaching of anatomy and the provision of material, under the Chairmanship of Henry Warburton....' See C. Newman, op.cit., p.39. Burke's and Hare's first murder took place on 12 February, and they were discovered after their last, which took place on 31 October 1828. The Select Committee was appointed 22 April 1828, and its Report and Evidence was published just before the Parliamentary recess, on 22 July 1828.

¹¹ A total of 22 other Select Committees of 1828 have been analysed, with the following results:

[mean values]	other 1828 committees	Anatomy Committee
No. of witnesses	15.2	40
Length of report (with evidence and appendices)	8.2pp. 132.3pp.	10pp. 293pp.

- ¹² J.H. Burns, Jeremy Bentham and University College, London, 1962, p.3. James Mill was said to have been Warburton's 'chief political instructor': J. Hamburger, J.S. Mill and the Philosophic Radicals, London, 1965, p.14.
- ¹³ Place Papers, BL Add. MS 27828. Confirmed independently by Dr Betty Bostetter, see note 20 below.
- ¹⁴ Dr Brian Mawhinney, quoted in a report by Julia Langdon, which appeared in the Guardian newspaper, 20 July 1984, concerning the Select Committee on the Environment.
- ¹⁵ B. and S.J. Webb, English Poor Law History, London, 1929, p.72.
- ¹⁶ L. Brown, The Board of Trade and the Free Trade Movement 1830-42, Oxford, 1958; S.E. Finer, 'The Transmission of Benthamite Ideas', in G. Sutherland, ed., Studies in the Growth of Nineteenth-Century Government, London, 1972. Finer fails to mention the Anatomy Act as a Benthamite measure. See also: W.O. Aydelotte, 'Conservative and Radical Interpretations of Early English Social Legislation', Victorian Studies, IX (1967); V. Cromwell, 'Interpretations of Nineteenth-Century Administration', Victorian Studies, IX (1966); O. MacDonagh, 'The Nineteenth-Century Revolution in Government', Historical Journal, I (1958); O. MacDonagh, Early Victorian Government, London, 1977; The Inspector General, London, 1981; H.J. Parris, Constitutional Bureaucracy, London, 1969; D.F. Roberts, Victorian Origins of the British Welfare State, New Haven, Conn., 1960. A wise discussion of the entire debate is to be found in the final chapter of Oliver MacDonagh's superb book, The Inspector General.
- ¹⁷ The phrase is from the title of MacDonagh's 1958 paper.
- ¹⁸ The Anatomy Inspectorate was established when the Act became law on 1 August 1832. See 2 & 3 Gul IV c.75. T.K. Djang, Factory Inspection in Great Britain, London, 1940, whose focus is elsewhere, excusably does not mention anatomy inspection. J.S. Harris, British Government Inspection, London, 1955, makes no mention of the Anatomy Inspectorate, and dates the inception of government inspection to 1833, with the Factory Act, see pp.7-8: 'With the enactment of the Factory Act of 1833 central government inspection was adopted for the first time, and a major device for exercising central government supervision and control was created'. D. Roberts, op.cit., 1960, pp.92-5, perpetuates the misunderstanding by erroneously dating the Anatomy Inspectorate to 1839. Aydelotte follows Roberts ('Interpretations', op.cit., 226).
- ¹⁹ J. Abernethy, Hunterian Oration, London, 1819. I do not ascribe the idea as original to Abernethy himself - not only was he a rather conservative figure, but it seems unlikely that the expedient was not being discussed in medical circles at the time. His Oration, however, is the earliest published work I have so far found which recommends it. Durey seems to have missed this reference - see note 2 above. Peel Papers, BL Add. MS 40371.

- ²⁰ Thomas Wakley's specific influence on the Anatomy Act is dealt with in Dr Betty Bostetter's forthcoming biography of Wakley. His importance in the medical culture of his time can hardly be overestimated. In the Lancet of 31 October 1829, the anatomist Dermott accused the surgeon-anatomists Stanley and Mayo of deliberately raising the price of corpses to 20 guineas during the winter season. He begged for government interference in corpse supply, and the institution of some form of price control. Lancet, (1829-30), 179-80.
- ²¹ A forthcoming paper (by myself and Dr B.S. Hurwitz) deals with this subject in some detail. Visitors to University College will be familiar with Bentham's effigy in its showcase in the entrance hall.
- ²² UC xib. 180-3.
- ²³ UC xib. 184.
- ²⁴ UC xib. 189-92.
- ²⁵ UC xib. 193-5
- ²⁶ UC xib. 220-4. Bentham did not use the word 'unclaimed' as did the Select Committee, but his definition - 'those for whom no application has been made' - had an equally equivocal meaning. Bentham was in part exonerated by his desire to publicise the names of the dead - to give relatives and friends the chance to know of their kin's passing. The Paris morgue served an equivalent purpose - allowing public access to the unidentified dead. The Anatomy Act made no provision for informing next of kin.
- ²⁷ C.R. Dod, Dod's Parliamentary Companion, London, 1833.
- ²⁸ Hansard, 22 April 1828. One possible scenario could have been that Warburton and Smith were already at work on the subject as a result of Bentham's correspondence with Peel, when the crucial change in case law criminalising anatomists occurred. It is likely, given Peel's relationship with Astley Cooper, that discussion of the matter arose between them. With Peel's earlier objections to legislation undermined by the change in the law, he, Cooper and the Benthamites were in accord.
- ²⁹ See note 12 above. See also H. Grote, The Philosophical Radicals of 1832, London, 1866; A Brief Retrospect of the Political Events of 1831-2, London, 1878.
- ³⁰ Had provisions suggested in the first bill for the Act's administration been adopted, the Act would have been a far more efficient piece of legislation than it subsequently emerged.
- ³¹ A list of those appointed to the Select Committee appears in the Commons Journal, 22 April 1828, p.260. See also C.R. Dod, op.cit., 1833; L. Brown, op. cit., 1958, p.13; J.R. Dinwiddy, 'The early nineteenth-century campaign against flogging in the army', English

Historical Review, XCVII (1982), 308-331. E.P. Thompson, The Making of the English Working Class, Harmondsworth, 1963, p.564, discusses the packing and grooming of witnesses (by Francis Place and Joseph Hume) of the Select Committee on the Combination Acts.

³² G.P. Judd, Members of Parliament, 1734-1832, Yale, 1972, entry 1262.

³³ S.E. Finer, 'The Transmission of Benthamite Ideas'.

³⁴ S.E. Finer, *Ibid.*, p.21.

³⁵ Hansard, 17 January 1832.

³⁶ Hansard, 11 April 1832.

³⁷ UC xia. loose folio.

³⁸ The development of Warburton's tactics is discussed more fully in chapter 8 of my forthcoming book.

³⁹ For example, see his contribution to the anatomy debate in the Lords: Hansard, 24 January 1832.

⁴⁰ W. Thomas, 'The Philosophical Radicals', in P. Hollis, Pressure from Without, London, 1974, p.53n.

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BENTHAM'S WRITINGS ON EVIDENCE¹

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The modern reader who approaches Bentham's writings on Evidence is faced with a number of difficulties. First, there is a problem of classification. The subject of evidence falls, along with procedure and judicial organisation, under the general rubric of adjective law, that is to say that part of the law which has as its object the implementation of substantive law. The boundaries between evidence and procedure are not clearly defined.² There are many overlaps and borderline cases. The oath, forthcomingness of witnesses, cross-examination, are examples of subjects which do not belong clearly in one category rather than the other. It is also artificial to isolate Bentham's theory of evidence from the totality of his thought. Some important clues about his ideas on evidence are to be found in his writings on other subjects. Conversely, his writings on evidence, in particular the Rationale, contain some of his most important discussions of epistemology, logic, psychology and of a number of specific topics.

A few key works demand our attention. Those devoted exclusively or primarily to evidence are:-

- (a) An Introductory View of the Rationale of Evidence for the Use of Non-Lawyers as well as Lawyers, edited by James Mill in the period 1809-11, but first published after Bentham's death in the Bowring edition (1838-43).
- (b) Traité des Preuves Judiciaires, composed by Dumont from Bentham's manuscripts, and published in France in 1823. An English version by an unidentified translator was published in London as A Treatise on Judicial Evidence in 1825.
- (c) Rationale of Judicial Evidence Specially Applied to English Practice, edited by John Stuart Mill and published in London in 1827.
- (d) A mass of manuscripts on 'Evidence' or 'Evidence and Procedure', the greater part of which has never been published, although much of it represents early drafts, notes and outlines for the Rationale.

This gives a clue to some of the other difficulties of coming to terms with Bentham on evidence. One is the sheer extent of the relevant material. The Rationale alone contains over 3,000 pages; the English version of the Treatise - perhaps the most readable introduction to Bentham's theory - runs to 366 pages of large type. The extant relevant manuscript material on evidence, procedure and judicial organisation, is estimated to exceed 13,000 pages.³ There are also many cognate works.⁴

Another difficulty is indicated by the dates of the listed works. Bentham concentrated on evidence between 1802 and 1812 and the central works on the subject all belong to this period. There are, however, some

complicating factors. Bentham's interest in the reform of procedure and evidence covers almost the whole span of his long life. At the age of eleven, his interest was fired by the unhappy experiences of Teresa Constantia Phillips.⁵ In 1832, the year of his death, he was still ranting against Brougham, 'the Boa Constrictor', among other things for his cautious approach to the reform of adjective law. Bentham's views on evidence and procedure seem, by and large, to have been remarkably stable.⁶ But allowances should be made for their evolution over time and some changes of mind. A great deal of research has still to be done on the development of Bentham's ideas and it would be premature to try to come to firm conclusions about such matters as the relationship between changes in his political views and his ideas on evidence.

A further complication is the strange history of the editing and publication of his writings on evidence. It will suffice here merely to give a brief outline of a complicated story. All of Bentham's major works on evidence and procedure were edited by others; in some cases there was a substantial gap between writing and editing and between editing and publication. James Mill was the first to have access to the manuscripts on evidence. About 1809 or 1810 he edited what was to become An Introductory View. About a third of this (148 pages) was printed about 1812, but was not published. It has not yet been established whether this was because the printer or the bookseller took fright for fear of prosecution, or because of the potentially blasphemous chapter on oaths, or because of the virulent attacks on the legal profession and the judiciary, or because Bentham's recently published views on jury packing had earned him the reputation of being a dangerous radical or, more mundanely, as a sheet dated 1822 suggests, the printing was not finished 'owing to the disappearance of some papers which have since been recovered'.⁷ Whatever the reason, publication of An Introductory View was delayed for some 30 years.

Dumont was the next to try to tackle the material. James Mill had stuck very closely to Bentham's manuscript. Dumont had no such scruples. Bentham wrote as if his audience included English lawyers and metaphysicians; Dumont wished to make his ideas accessible to the general public on the Continent. Accordingly he omitted much of the detailed critique of English law and the legal profession and he set out to expound Bentham's theory as simply and clearly as he could. Parts of the Traité appear to be taken almost verbatim from Bentham's manuscripts, but like others of Dumont's redactions it is largely a distillation of Bentham's thought in Dumont's limpid French prose. Dumont's rendering of the substance is remarkably faithful and, for the most part, exact; but the style and the selection are his own. The result is that the Traité, and its English translation, are by far the most readable of the primary works on evidence.⁸ However, it is not comprehensive and perhaps lacks the authority of Bentham's ipsissima verba. Unfortunately, Bentham's own attempt at a précis, An Introductory View, is not very satisfactory either in respect of comprehensiveness or of comprehensibility.

The third editor to work on the manuscripts was the young John Stuart Mill, who at the age of eighteen undertook the daunting task of editing Bentham's magnum opus, the Rationale. Mill's account in his Autobiography is as follows:

About the end of 1824, or beginning of 1825, Mr. Bentham, having lately got back his papers on Evidence from M. Dumont (whose *Traité des Preuves Judiciaires*, grounded on them, was then first completed and published) resolved to have them printed in the original, and bethought himself of me as capable of preparing them for the press; in the same manner as his *Book of Fallacies* had been recently edited by Bingham. I gladly undertook this task, and it occupied nearly all my leisure for about a year, exclusive of the time afterwards spent in seeing the five large volumes through the press. Mr. Bentham had begun this treatise three times, at considerable intervals, each time in a different manner, and each time without reference to the preceding: two of the three times he had gone over nearly the whole subject. These three masses of manuscript it was my business to condense into a single treatise; adopting the one last written as the groundwork, and incorporating with it as much of the two others as it had not completely superseded. I had also to unroll such of Bentham's involved and parenthetical sentences, as seemed to overpass by their complexity the measure of what readers were likely to take the pains to understand. It was further Mr. Bentham's particular desire that I should, from myself, endeavour to supply any lacunae which he had left; and at his instance I read, for this purpose, the most authoritative treatises on the English Law of Evidence, and commented on a few of the objectionable points of the English rules, which had escaped Bentham's notice. I also replied to the objections which had been made to some of his doctrines by reviewers of Dumont's book, and added a few supplementary remarks on some of the more abstract parts of the subject, such as the theory of improbability and impossibility. The controversial part of these editorial additions was written in a more assuming tone than became one so young and inexperienced as I was: but indeed I had never contemplated coming forward in my own person; and as an anonymous editor of Bentham, I fell into the tone of my author, not thinking it unsuitable to him or to the subject, however it might be so to me. My name as editor was put to the book after it was printed, at Mr. Bentham's positive desire, which I in vain attempted to persuade him to forego.⁹

Different views have been expressed about Mill's editing. The Edinburgh Review criticised 'the slovenly and careless confidence with which this office of editor has been performed' and compared Mill unfavourably to Dumont, both as editor and disciple.¹⁰ From others Mill's contribution has received high praise.¹¹ My own judgment is that it must rank as one of the most remarkable editorial feats in history. Anyone who has had occasion to work with Bentham manuscripts will recognise the magnitude of the task: the crabbed script, the convoluted prose, the tendency to repetition and, above all, the sheer volume of the material, are enough to daunt committed and experienced editors. That it was undertaken by a nineteen year old with almost no legal background is remarkable; that it should have been completed within about a year during his 'leisure' (he was by then a clerk at India House) is still hard to believe. The only unsurprising fact is that shortly afterwards Mill suffered his famous breakdown.¹²

The quality of the achievement is less easy to assess. Mill succeeded in organising the material into a reasonably coherent structure; he judiciously preserved many eloquent passages in Bentham's early, more direct, style;¹³ no doubt he made it more readable than the original manuscripts, although much of it falls far short of the clarity and simplicity of Dumont. Mill competently filled in a number of gaps; he was generally scrupulous in identifying passages of which he was the author and in indicating points where he disagreed with Bentham. His youth and his lack of training may have been an advantage in allowing him to approach the task boldly with few inhibitions, yet there is little to suggest that he misrepresented, distorted or suppressed any of Bentham's views.

The Rationale can confidently be treated as an authentic and complete work by Bentham, with only minor editorial glosses. We do not know how carefully Mill's work was checked by Bentham, but it went to press with his full approval and, as we have seen, in spite of his protestations, Mill's name was appended as editor.

It is largely a matter for speculation whether someone else might have done the job better or differently. There are some inconsistencies and gaps and a few errors. There is a good deal of repetition. Some sections are fragmentary; others show signs of hasty editing. In respect of both clarity and elegance the Rationale is rather uneven. There is some force in the point, made by one reviewer, that a legally trained editor might have compensated for, rather than increased, Bentham's remoteness from the details of the law and the realities of practice.¹⁴ But too much could be made of this. It is a remarkable fact that all three editors of Bentham's writings on evidence were non-lawyers. An English practitioner might have been tempted to soften or even censor some of Bentham's invective; he might also have been more respectful of the technical details. But in these respects he would have run counter to the spirit of the work.

In its negative aspect the Rationale is a sustained polemic on the legal profession, the judiciary, the regime of corporations, and the unnecessary complication, absurdity and obscurity of this branch of judge-made law. On the positive side it is an attempt to establish a coherent set of principles ab initio on a solid philosophical basis. In respect of theory Bentham was well served by his non-lawyer editors. Where lawyers might have made his views more acceptable to the legal establishment by curbing his rhetoric, his editors allowed the authentic voice of Bentham to speak out. In an ordinary legal work a cavalier attitude to technical detail would have been a disaster. But in a genuinely radical work, designed to show that the system was rotten to the core, the disdain for detail is, at one level, a source of strength. Here Leslie Stephen puts his finger on a crucial point:

In spite of the wearisome effort to say everything, and to force language into the mould presented by his theory, Bentham attracts us by his obvious sincerity. The arguments may be unsatisfactory, but they are genuine arguments. They represent conviction; they are given because they have convinced; and no reader can deny that they really tend to convince. We may complain that there are too many words, and that the sentences are cumbrous; but the substance is

always to the point.¹⁵

So far I have emphasised some of the difficulties for the contemporary reader: the extent, the style, the connection with his other writings, the need to take account of the interpositions of editors and the importance of understanding the historical context of Bentham's concerns. But these difficulties can be exaggerated and the benefits of making the effort greatly outweigh the pains. The Rationale is wearisome because of its length and the repetitiveness of some of the invective. But it has some claims to be treated as Bentham's magnum opus. Mill called it 'one of the richest in matter of all Bentham's productions'¹⁶ and Halévy said of it: 'of all Bentham's works The Rationale of Judicial Evidence...is the most voluminous and also without doubt the most important'.¹⁷ Mary Mack calls it 'Bentham's masterpiece'.¹⁸ It is without doubt the single most important work on the theory of evidence in the Anglo-American tradition. No specialist on evidence and no Bentham scholar can afford to neglect it. Parts of it today may be only of historical or specialist interest. But there is much in it that is of general significance. Taken in manageable doses large parts of it are very readable, with sufficient purple passages for Stephen to concede 'that I am tempted even to call the book amusing'.¹⁹

Most readers will prefer to try some less exacting ascents before (or instead of) attempting to scale the Rationale. It has been said of Dumont's Traité and of similar works: 'The French...are the only nation in Europe who feel the necessity of literary form and method.... The learned ox, from the stalls of Germany and England, has been stewed down, into one such pot of potable soup for French consumption'.²⁰ The soup was soon re-imported into England as A Treatise on Judicial Evidence and, for those who can get hold of a copy, this is clearly the best place to start. An Introductory View is a good second best; this is only available in the tiresome small print of the Bowring edition. The published version of Scotch Reform, also in Bowring, contains a clear and succinct account of the natural system of procedure.

There is a remarkably sparse secondary literature on Bentham's writings on adjective law. Outstanding is Halévy's masterly chapter on 'The organisation of justice and the state', which sets the Rationale in its historical and political context and contains a number of penetrating insights.²¹ The Edinburgh Review published a brilliant review of Dumont's Traité²² and a powerful, though uneven, critique of the Rationale.²³ Holdsworth, Stephen, and Keeton and Marshall give competent brief accounts of the Rationale.²⁴ Recent writings by Gerald Postema throw valuable light on Bentham's theory of adjudication and the philosophical underpinnings of his theory of evidence.²⁵ There are scattered discussions of particular topics, especially in nineteenth-century treatises on evidence, but, Halévy apart, there has up to now been no substantial secondary account of Bentham's theory of evidence.

NOTES

¹ This note was originally prepared as an appendix to my book, Theories of Evidence: Bentham and Wigmore, London, 1985, but was excluded for reasons of space. The book seeks to provide an introduction to the

theories of the two leading Anglo-American scholars on evidence written in the context of the history of secondary writings about the law of evidence in the common law tradition. The note is merely intended to provide some preliminary guidance to Bentham scholars and others who wish to tackle this fascinating, but daunting, aspect of his thought.

- ² There is ample manuscript evidence to suggest that Bentham kept changing his mind whether to treat some topics, such as oaths and forthcomingness, under 'evidence' or 'procedure'. Nothing much turned on the distinction for him.
- ³ Report to Executive Committee of the Bentham Project by Claire Gobbi and William Twining, October 1981.
- ⁴ Other works which throw important light on Bentham's theory of evidence include:
 - (a) Draught of a New Plan for the Organization of the Judicial Establishment in France, London, 1790;
 - (b) Scotch Reform, first published in 1808, second edition, 1811;
 - (c) 'Court of Lords' Delegates', largely unpublished - a fragment, written in 1808, is included in The Works of Jeremy Bentham, ed. J. Bowring, 11 vols., Edinburgh, (1838-43), v. 184-6.
 - (d) Swear Not at All, written in 1811-12 and printed in 1813; first published in 1817;
 - (e) Three Tracts relative to Spanish and Portuguese Affairs, with a continual Eye to English ones, first published in 1821;
 - (f) Justice and Codification Petitions, first published in 1829;
 - (g) 'Principles of Judicial Procedure', edited by Richard Doane from manuscripts written between 1802 and 1827 (mainly 1820-27), and published at Bowring, ii. 1-188.
 - (h) 'Equity Despatch Court Proposal' and 'Equity Despatch Court Bill', published respectively at Bowring, iii. 297-317 and 319-430.
 - (i) Lord Brougham Displayed, 1832.
- ⁵ Bowring, x. 35.
- ⁶ See L.J. Hume, Bentham and Bureaucracy, Cambridge, 1981; this view is, however, contested by some scholars currently engaged on detailed study of Bentham's intellectual development; see also UC xlvi and lia.
- ⁷ UC xlva and xlvb. Cf. A. Bain, James Mill, London, 1882, p.120 and 'Note on the Introductory View' by Ian Morrison, Bentham Project.
- ⁸ A Treatise on Judicial Evidence appears to be a reasonably good rendering of Dumont's French, but it omits a number of footnotes and appendices.

- ⁹ J.S. Mill, Autobiography, London, 1929, pp.96-9.
- ¹⁰ W. Empson, Review of Bentham's Rationale of Judicial Evidence, Edinburgh Review, XLVIII (1828), 457.
- ¹¹ For example M. Mack, Jeremy Bentham: An Odyssey of Ideas 1748-1792, London, 1962.
- ¹² Whether editing Bentham contributed to Mill's breakdown is a matter for speculation; anyone who has had any experience of editing Bentham is likely to be sympathetic to the view that it did. R.F. McRae, Introduction to Mill's System of Logic, Toronto, 1973, pp.55-7, explores the possible influence of the Rationale on Mill's Logic.
- ¹³ L. Stephen, The English Utilitarians, 3 vols., London, 1900, i. 273; Mill, op.cit., pp.98-9.
- ¹⁴ Empson, op.cit., 464-5n. This is a common refrain among commentators. Cf. C.J. Best in Hovill v. Stephenson 130 E.R. 1152, at 1153 (1829).
- ¹⁵ Stephen, op.cit., i. 273.
- ¹⁶ Mill, op.cit., p.98.
- ¹⁷ E. Halévy, The Growth of Philosophic Radicalism, Boston, 1955, p.383.
- ¹⁸ Mack, op.cit., p.3.
- ¹⁹ Stephen, op.cit., i. 273.
- ²⁰ Empson, op.cit., 458.
- ²¹ Halévy, op.cit., Part III., Ch.2.
- ²² Thomas Denman in Edinburgh Review, XL (1824), 169-207.
- ²³ Empson, op.cit.; see also J.A. Roebuck in Westminster Review, XI (1828), 198-205.
- ²⁴ W.S. Holdsworth, A History of English Law, 17 vols., London, 1903-38, xiii. 83-6; Stephen, op.cit., 271ff; G. Keeton and R. Marshall in Jeremy Bentham and the Law, ed. G. Keeton and G. Schwarzenberger, London, 1948, Ch.5.
- ²⁵ G. Postema, 'The Principle of Utility and the Theory of Procedure: Bentham's Theory of Adjudication', Georgia Law Review, XI (1977), 1393; 'Facts, Fictions, and Law. Bentham on the Foundations of Evidence' in Facts in Law, ed. W. Twining, Wiesbaden, 1983, p.37 (with response by the author). For further references see the bibliography in Twining, Theories of Evidence.

ECONOMY AS APPLIED TO OFFICE

T.P. Schofield

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The Bentham Project has been awarded a grant from the Economic and Social Research Council to undertake the transcription and editing of Bentham's early 'Constitutional Code' writings of 1822-3. Under the terms of the award, which allows for the employment for three years of a full-time and a part-time member of staff, two volumes are to be fully edited and published as part of the Collected Works and material for a further two transcribed. The major piece in the first volume will be Economy as applied to Office, while the second will be entitled Writings for Greece and Tripoli and include Bentham's 'Observations' on the Greek constitution and 'Securities against Misrule'. The materials to be transcribed, and hopefully edited and published soon afterwards, are some of the essays which Richard Doane incorporated into Book I of his version of Constitutional Code, published in the Bowring edition of Bentham's Works.¹

This 'sub-project' is linked to the development of book production by means of new technology. As a result of the generosity of University College London, the Project has acquired a Sirius microcomputer and Diablo printer, with Scientex word-processing software. The two projected volumes will be sent on floppy disks, specially encoded with typesetting instructions, to Oxford University Press, where they will be passed directly to computerized typesetting equipment. OUP are offering active support to the endeavour, and it is hoped that this pioneering attempt will lead eventually to the production of camera-ready copy at the Project.

Editing of Economy as applied to Office is now well under way. This largely unknown work² had its genesis in a score of manuscript sheets written intermittently in February and March 1822 under the heading 'Thoughts on Official Economy', but which barely went beyond a few introductory remarks and general statements on the curtailment of government expense. Bentham at this time was preoccupied with Codification Proposal and his Iberian writings, hence his irregular attempts to draft 'Official Economy'. However in April, when he received an acceptance from the Portuguese Cortes of his offer to draw up a code of laws, he began to concentrate his efforts on Economy, which he continued to draft until late June. There survive from this period about three hundred manuscript sheets of text appertaining to Economy, all in the University College London Library collection, bar four which are in the Bentham Papers held at the British Library. Additionally there are 45 marginal-summary sheets in the hand of John Colls, Bentham's secretary, which correspond to marginals on 176 sheets of manuscript, while there are a further 45 sheets of marginalized manuscript for which no corresponding marginal sheets have been found. The remaining text has not been marginalized. The manuscripts are scattered through eight boxes, with odd sheets in a further four, and are in Bentham's most difficult handwriting, while to add to the confusion several sections

have been re-written, sometimes more than once. Moreover there is no satisfactory plan of the work.

The state of the manuscripts perhaps goes some way towards explaining the obscurity of Economy as applied to Office. Never published as a work in its own right, very little of the material intended for it has appeared in print elsewhere. Doane used seventeen manuscript sheets or parts of sheets in the section on the 'Public Opinion Tribunal', and one sheet contrasting 'Good Government' with 'English Government' in the section on 'Good Rule and Bad Rule', in Book I of Constitutional Code, and a further sheet in the section on 'Judges', etc., 'Securities for appropriate aptitude' in Book II.³ Another fifteen sheets were published by C.W. Everett in 1926, making up the first section of Anti-Senatica.⁴ These were materials collected together in 1830 and sent by Bentham to President Andrew Jackson of the United States, in the hope that Jackson might give his approval to their content. With such encouragement, Bentham promised to bring them into a state in which they would be 'fit to be sent to the press'.⁵ Their common theme was the mischievousness of a second legislative chamber, but being composed of fragments written independently over a period of two and a half years, and with no attempt made to link them into a coherent whole, the result was, as Bentham himself appreciated, unsatisfactory. Bentham never regarded it as a completed work, but rather an outline of arguments which might be marshalled against the existence of a second chamber, and form the basis of an essay on the subject. Indeed, Doane seems to have been responsible for preparing the manuscripts, and it is Doane's rough copy, rather than the Bentham original, that Everett appears to have taken for his text.⁶

Perhaps another reason for the obscurity of Economy is that Bentham does not mention it at all in his memorandum book which survives for this period,⁷ and only once in the extant correspondence. But this reference does reveal the importance he attached to it. In his letter to Etienne Dumont of 26 May 1822, he noted:

To stop the creation of useless, needless, overpaid, and mischievous Offices - that, being much easier than to annihilate them when created, by way of a forerunner and in part of my Constitutional Code...I have been occupied with a work intituled "Economy applied to Office". Motto and memento, "Aptitude maximized, Expencc minimized". In this, both being understood in the largest sense, every thing is contained.⁸

He suggested then that the scope of the work was extensive, and would form an introduction to Constitutional Code. Underlying the analysis was Bentham's axiom, 'The greatest happiness principle requires on the part of all persons employed by government the maximum of aptitude at the minimum of expence'.⁹ The title Economy as applied to Office was intended by Bentham to be interpreted in a wide sense. The maximization of aptitude and the minimization of expense thereby became corresponding principles. These ends were to be achieved by the establishment of securities for appropriate aptitude, in all three of its branches, moral, intellectual and active, on the part of government officials. To maximize aptitude was to ensure that functionaries promoted as far as possible the greatest happiness of the greatest number, produced the

greatest amount of pleasure and the least amount of suffering. Expense was suffering of any sort; one end in view of government being to minimize suffering (the other being to maximize pleasure), this was also to minimize expense. Hence economy was directly proportional to aptitude.

Economy as applied to Office reveals the central importance of official aptitude to Bentham's theory of government. In considering the measures necessary to be taken to promote official aptitude, it discusses the relationship between the constitutive and operative powers in the state, shows how the natural opposition of interests leads inevitably to the 'sinister sacrifice' - to political corruption - and advocates universal suffrage as a means for bringing about an artificial identification of interests. The theoretical analysis of aptitude in Economy will form a valuable complementary volume to the detailed administrative arrangements in Constitutional Code, and will begin to give scholars a much clearer insight into the scope and extent of Bentham's theory of representative democracy than has been possible through the incomplete, imperfect and confused arrangement of the introductory material presented by Doane.

NOTES

- ¹ The Works of Jeremy Bentham, ed. J. Bowring, 11 vols., Edinburgh, 1838-43, ix. 1-145.
- ² For a brief discussion of the content, see L.J. Hume, Bentham and Bureaucracy, Cambridge, 1981, pp.202-8.
- ³ UC clx. 409, 410-12, 414-15, 416-18, 456-7, 461-4, 472-3 are at Bowring, ix. 41, 45, 43, 45, 42-3, 41-2 respectively; UC clx. 114 is at Bowring, ix. 59-60; UC xliib. 615 is at Bowring, ix. 536-7.
- ⁴ C.W. Everett, ed., 'Anti-Senatica. An attack on the U.S. Senate, sent by Jeremy Bentham to Andrew Jackson, President of the United States', Smith College Studies in History, XI (1926), 207-67. The manuscripts are at UC xliv. 14-28.
- ⁵ Bentham to Jackson, 14 June 1830, Nicholas P. Trist Papers, Library of Congress.
- ⁶ The original is at UC xliv. 14-77; Doane's copy is at UC xliv. 78-137.
- ⁷ UC clxxiii. 62-106.
- ⁸ Bentham to Dumont, 26 May 1822, Dumont MSS, Bibliothèque Publique et Universitaire, Geneva, 33/v, fos. 24-7.
- ⁹ UC cxiii. 1.

THE CORRESPONDENCE: A PROGRESS REPORT

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Since I wrote my short report for last year's Newsletter the bulk of the work on volume 8 of the Correspondence has been completed. The letters have been checked and all but a handful of the notes researched and written. Catherine Atkinson and I have now made a start on volume 9, which will cover the period 1817-20.

Progress in transcription, checking, and annotation for these volumes has been matched by success in the search for hitherto untraced correspondence. A circular letter to British libraries and record offices uncovered a number of items either newly-acquired or uncatalogued at the time of enquiries in 1976 and 1981. Photocopies of letters have been obtained from Aberdeen University Library, the Bodleian Library, the Brotherton Library of the University of Leeds, Derbyshire Record Office, King's College Cambridge Library, and the Scottish Record Office. Interesting subsidiary material emerged in other repositories: letters of Jeremiah Bentham (Cambridgeshire and Norfolk Record Offices); an account of a meeting with Bentham, dated 7 February 1831 (Essex Record Office); and papers of Thomas and Walter Coulson, Bentham's amanuenses (Cornwall Record Office). The response to a similar circular to French Archives Départementales was disappointing, but we were able to locate much useful material in the United States. California (Berkeley), Cornell, Columbia, Harvard, Minnesota, and Yale University Libraries all sent photocopies of Bentham letters previously unknown to us. In total our various circulars brought to our notice some 40 new items, a satisfying, if not spectacular, return on the time and effort invested.

More correspondence has been unearthed by other means. Over the past twenty years Project staff have been in regular contact with Mr D.R. Bentham of Loughborough, Leicestershire, who has kindly supplied us with copies of Bentham letters in his collection. In the last few months Mr Bentham has sent a further set of xeroxes of newly-purchased items, for which we are most grateful. As a result of information from Mr Bentham we were able, in addition, to track down an important letter from Bentham to Robert Owen, now in the possession of Mr Hamish Riley-Smith, who has generously given permission for it to be reproduced in volume 8 of the Correspondence.

While much of our detective work is conducted through the medium of communications to libraries, record offices, and private owners, our quest for new Bentham letters has also taken the form of visits to repositories. We already knew of Bentham material in Greece, and in a trip to Athens last year Dr Fred Rosen found three new letters from Edward Blaquiere to Bentham in the National Library. Nearer home, the George Bentham papers at the Linnean Society of London were examined, and yielded up not only new correspondence but also important information in his nephew's writings on Bentham's life, work, and contacts.

A combination of serendipity and careful research by Philip Schofield led to the uncovering of further letters in a well-known location. Last year Dr Schofield visited the Kew branch of the Public Record Office to find some missing letters that should have been in the Treasury papers. He discovered some, together with letter-book copies of a few more items of which there was no other trace. He also came across a note in the Skeleton Register of Treasury Papers for 1813 (T3/5) explaining that a bundle of documents relating to the Panopticon scheme had been removed by a Treasury clerk, Alfred Compton, on 20 November 1813, and apparently not returned. During a trip to the Chancery Lane branch of the PRO a few weeks later, I had the good fortune to find this missing bundle in what initially appears an unlikely collection of papers. We knew that Bentham had corresponded with the Office of Woods and Forests about land adjacent to his Queen's Square Place property, and I was looking for the original of his letter (for which we had a draft) and the reply. I expected them to be in the Crown Estates Office Papers (CREST) but found neither. Typically, however, I came across a quite different letter, or copy of a letter, from Henry Rhodes, deputy registrar in the Land Revenues Office, to Bentham, asking for payment of rent on land leased from the Crown in St. James's Park (CREST 24/6, pp.332-3). Turning again to the index of papers in the Crown Estates Office Collection in order to trace the letters I had originally been looking for, I noticed a reference to an unsorted bundle of documents relating to the construction of a penitentiary at Millbank. I immediately ordered the bundle (CREST 2/675) and discovered that it contained Bentham's letters and memorials to the Treasury 1794-1813, accompanied by a covering letter to the Commissioner of Woods and Forests, dated 9 December 1813, stating that it was now appropriate that these papers should be lodged in his hands. Here, then, were the letters withdrawn from the Treasury files by Compton on 20 November, plus others also missing from the Treasury papers.

None of these documents, I hasten to add, is completely new to us. Drafts and copies of those before 1802, either from the British Library or University College collections, have been used in the volumes of Correspondence already published. But it is pleasing to be able to reproduce the originals in volume 8, and to find the earlier autograph letters that were assumed to have been lost.

WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE

London: Weidenfeld and Nicolson, 1985

California: Stanford University Press

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The law of evidence, as Professor Twining points out, has been well served by writers and commentators for the last two and a half centuries. Yet only three names dominate the field: Bentham, Thayer and Wigmore; writing at the beginning of the nineteenth century in the case of the first and around the turn of the present century in the case of the latter two. Bentham's copious writing on the subject had great direct influence in its day and has indirectly affected our present perception of the subject although it is nowadays largely neglected. The cause of the neglect lies principally in the fact that Bentham's published work is both voluminous and stylistically hard to digest. Having written on the subject for many years Bentham left it to his editors to do the best they could in sifting through enormous quantities of disorganised and often repetitive manuscript. To make matters even more difficult, Bentham's writing contains many terminological idiosyncrasies and ad hominem tirades, as well as closely argued theory. Consequently, while Bentham's themes may be detected in almost every discussion of evidence, direct reference is seldom made to his work. Conscious of these difficulties Professor Twining sets out to provide an introduction to Bentham's theory of proof.

Wigmore, by contrast, has not only had a lasting influence but his principal work, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, still thrives in the hands of both academics and practitioners. His Principles of Judicial Proof on the other hand seems to have failed, from its very publication, to generate any interest and is now entirely forgotten. It is to this work of Wigmore that Professor Twining renders a service.

Professor Twining's essay on Bentham achieves three salutary goals: it provides a useful overview of Bentham's work, it distills the essence of Bentham's general theory of proof and it offers us an evaluation of his contribution. Bentham's unrivalled contribution lies in the fact that he brought a general theory of proof and of adjudication to bear on a subject largely concerned with mundane trial procedures. Bentham believed that the sole function of adjudication was the correct application of substantive laws to the true facts. His theory of proof was simple too: all evidence likely to further the making of a correct inference about the truth of the disputed facts should be admitted at the trial and taken into account. These two principles drove Bentham to condemn as obstacles to the ascertainment of truth virtually all the rules of evidence requiring the exclusion of certain kinds of evidence, including hearsay, the testimony of interested parties and the like. Consequently Bentham came to be regarded as the founder of what Professor Twining calls the 'anti-nomian theory' or, as it is also known, the principle of free proof.

Bentham's principles were not, however, free of complication, as Professor Twining explains. Bentham could not and did not ignore the fact that institutional constraints must limit the scope for the search for truth. Consequently he allowed for the exclusion of evidence when, on a utilitarian calculus, any gain from admitting the evidence was outweighed by the disadvantage of delay, expense or vexation. Two important questions arise at this point. First, what weight is to be given to the countervailing considerations of expense, delay and vexation? Secondly, how much freedom are we prepared to give to our judges in carrying out the weighing exercise? Professor Twining explains that while Bentham did not face these questions directly there are some indications of the solutions he would have favoured.

For example, Bentham did not consider that the disadvantages involved in submitting the accused to cross examination constituted sufficient countervailing vexation to justify the privilege against self-incrimination. Nor did he believe in the desirability of determining utility in advance of the trial by formulating a priori rules. He thought that the judge should not be bound to exclude any relevant evidence by rules, but should be free to calculate the balance of utility in the individual case before him. Professor Twining draws attention to an apparent paradox here. Bentham was prepared to give considerable discretion to judges although the judiciary is subjected to biting criticism throughout the entire work. However, Professor Twining explains that Bentham's criticism was directed at the system existing then whereby judges were paid fees and had an institutional interest in fostering litigation. According to Professor Twining, Bentham saw no objection in affording judges discretion on admissibility in a reformed institution of adjudication. Professor Twining also draws attention to a fundamental difference between Bentham's view on this matter and his aim of removing discretion from the application of substantive rules which, he believed, should be drawn in such a way as to make discretion in their application unnecessary.

Perhaps the most important contribution made by Professor Twining here is to draw attention to the connection between Bentham's views on the role of rules about admissibility and political philosophy. Bentham refused to allow rules of evidence to be used as forms of checks and balances on the organs of the state. He set his face against using legal formality and complexity as a safeguard to liberty. Bentham's aversion to such liberal strategies was nowhere more evident than in his treatment of the privilege against self-incrimination, which he insisted should not be used as a safeguard against potential abuse by the state. He believed that abuses should be prevented by direct legislative action against the sources of abuse rather than by indirect procedural measures that merely treated the symptom of abuse. Thus if there was a danger that the state might use the obligation of the citizen to account for himself in order to punish him for his beliefs, then the laws that allowed punishment for beliefs should be abolished rather than giving the citizen a right of silence. The debate about the desirability of procedural checks on authority is still very much with us and it is a pity that, having drawn our attention to this important subject, Professor Twining does not carry his investigation further but contents himself with pointing out fruitful paths of investigation to us.

Similarly, the question of how to gauge the countervailing considerations of expense, delay and vexation are left uninvestigated. To answer this question we need a well developed theory of the function of the trial as dispute settlement. This question depends, to put it crudely, on how much we are prepared to pay for ascertaining the truth, which in turn depends on the extent to which we regard the truth as important in the settlement of disputes. Bentham was ambiguous about this. It is unclear, for instance, to what extent he was prepared to accept a distinction between the burden of proof in civil and in criminal cases; whether he was prepared to allow that the conviction of the innocent had a sufficiently detrimental effect to justify the requirement of proof beyond reasonable doubt. Nor, indeed, is it clear what he thought about the civil burden requiring proof only on the balance of probabilities; whether it was justified to give judgment for the plaintiff when he was only just able to tilt the balance in his favour, thus leaving a substantial probability that the defendant was in the right (the proverbial 51:49 ratio). Perhaps one should not be disappointed in failing to find solutions to such problems in Professor Twining's analysis when Bentham himself was unable to provide them.

We may even be unjustified in criticising Bentham in this respect. For although Professor Twining suggests, in the opening essay entitled 'The rationalist tradition of evidence scholarship', that Bentham worked in a field in which writers such as Gilbert had already attempted to impose some order and to provide coherent rationales for various current doctrines, in fact the theoretical contribution of Bentham's predecessors in the legal field was negligible. It is true that Gilbert, writing in the first quarter of the eighteenth century, made reference to Locke's epistemology, but his subsequent treatment of decided cases provides little evidence that he benefited from his study of Locke and he certainly does not touch on any of the matters I have been discussing. As for the other writers mentioned by Professor Twining, such as Buller and Peake, their works are little short of random compilations of individual rulings.

In setting Bentham's work in a wider theoretical framework it would have been perhaps more profitable to show the connection between his work and the great strides made in the seventeenth century in the development of inductive logic. During that period Protestant attempts to prove the existence of God by appeal to common sense reasoning brought about the development of inductive epistemology. What is mysterious, and Professor Twining does not touch on this, is the fact that while scholars were prepared to bring inductive reasoning to bear on the issue of the existence of God, there is hardly any reference to the theory of probabilistic inference in discussions concerning fact-finding in the courts. It cannot even be suggested that the lawyers of the late seventeenth and early eighteenth centuries were unaware of these developments. Some of them were active in the movement that developed the new philosophy and which culminated in the establishment of the Royal Society in 1666. One of them, Hale, wrote a treatise on the theological question in which he shows considerable ability in working with the new theory of probable inference. Yet there is no reference to this theory in Hale's own treatise, Pleas of the Crown, in which he sets out, inter alia, the rules of evidence.

As I have mentioned earlier, Professor Twining's second aim is to rescue Wigmore's Principles of Judicial Proof from obscurity. In this work Wigmore set out to construct a 'probative science' of judicial proof. Accepting that inference from evidential facts to facts in issue turned on ordinary logic and common sense he attempted to offer a better way for the management of the 'ratiocinative process of contentious persuasion'. For this purpose he classified the most common types of probanda, such as 'the doing of a human act', 'event', 'identity' and the like and suggested that reasoning involving such probanda should be carried out in a more systematic way than is common. Wigmore's system is the chart method, by means of which every step in the inferential process is identified and connected to every other step or argument in the process. Professor Twining's account of Wigmore's method is the clearest and most persuasive that I have seen; certainly much easier to follow than Wigmore's own account which is laden with cumbersome notations contrived for his system. However, I doubt that even this simplified version of Wigmore's system can rescue it from neglect. It is true that the chart method draws attention to every step in the inferential process. But not every step deserves equal attention, and the commonly used method, which he calls the 'narrative method', can do just as well as far as the significant inferential moves are concerned. Furthermore, Wigmore's method has little if anything to offer on the question of the validity of generalisations used to support individual inferences and even less on the question of probabilistic assessment of inferential support. Consequently, the general neglect of Wigmore's Principles is not altogether to be wondered at.

Fortunately, Wigmore's reputation does not, and never has, depended on this book. His great work, A Treatise on the Anglo-American System of Evidence, has had a profound effect on evidence practice and scholarship. Professor Twining does not deal in detail with the underlying principles of this work, but does provide us with a useful evaluation of its merits and an interesting account of its author's career. While I am in general agreement with Professor Twining's high regard for the tenacious scholarship that went into its writing I would like to express one reservation. No one has managed to provide as comprehensive and as rational an account of the practice of evidence in England and in some fifty American jurisdictions. But reading through the nine volumes of Wigmore's text one is left in some doubt about the extent to which he had evolved a coherent theory concerning the purposes and strategies of the law of evidence. His Herculean attempts to make sense of almost every line of cases in every field of evidence has done much to invest many rules with spurious respectability. Referring to countless decisions on corroboration Wigmore wrote:

As recorded precedents of supreme courts, they are mere useless chaff, ground out by the vain labor of able minds mistaking the true material for their energies. (Vol. 3, sec. 2059)

Yet he all too often forgot this himself.

Professor Twining has gathered a wealth of references not only valuable to Bentham scholarship but also to modern philosophical debate about almost

every aspect related to proof. It is a pity though that the publishers decided to relegate these invaluable references to the end of the book where they cannot be easily consulted while reading the text.

Professor Twining's major contribution lies in reminding us of the great value still to be got out of Bentham's work. He draws our attention to Bentham's view that fact-finding procedures cannot be devised and operated independently of the ends that they set out to serve and that, in turn, these ends have deep roots in our social and political outlook. Bentham may not have provided complete solutions or offered a socially acceptable account of the aims of adjudication but he opened up a debate which is still very much in public view over a century and a half later. Professor Twining's essays render Bentham's work more easily accessible and highlight the areas in which his contribution is as pertinent to contemporary problems as ever. It will doubtless continue to provide analytical stimulation long after Wigmore's work, great as it undoubtedly is, has fallen into obscurity.

R.G. FREY, ed., UTILITY AND RIGHTS
Oxford: Basil Blackwell, 1985

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In recent political and moral philosophy there has been a growing concern with attempts to reconcile utilitarianism with a doctrine of moral rights, or else, to reject either moral rights or utility as an adequate basis for an account of morality. The essays in this volume are a useful and significant contribution to this debate, containing as it does important papers by J. Raz on the inadequacy of rights theories, James Griffin on the possibility of locating a substantive theory of moral rights within a utilitarian framework, as well as, among others, an exchange between R.M. Hare and the late J.L. Mackie.

While the arguments contained in these essays show a degree of technical sophistication rarely to be found in the classical utilitarians and their critics, the issues discussed nevertheless have their origin in the writings of Jeremy Bentham. Bentham's importance as the source of many of the issues still very much to the fore in contemporary political and moral philosophy, either as a result of his rejection of the logical coherence of natural-rights arguments or through his advocacy of utilitarianism as the sole basis for morality, is witnessed by the frequent citation of his works even by those contributors who reject his position and arguments.

Beyond testimony to Bentham's philosophy as the root of much that is still of contemporary relevance in political theory, there are other reasons for reviewing this volume here. The first is L.W. Sumner's paper 'Rights Denaturalized', a philosophical exploration of the arguments used in Bentham's rejection of natural-rights theories. Sumner is unconcerned with the historical question of the reliability of the texts from which Bentham's argument is derived, but given the nature of this volume it is appropriate that he should concentrate on the purely philosophical detail of that argument. That said, Sumner's exploration of the levels of argument found in Bentham's writings on natural rights is both informative and original. While stressing that Bentham's arguments are not conclusive against all arguments for basic moral rights, particularly those derived from contractarian formulas, Sumner succeeds in demonstrating that Bentham provides good reasons for regarding 'natural' formulations of basic moral rights theoretically suspect, and at the same time highlighting the continuing significance of Bentham's criticisms of natural-rights theories.

The second paper of particular interest is Alan Ryan's 'Utility and Ownership'. This paper appears as a development of the argument advanced in Property and Political Theory (1984). Here Ryan is particularly concerned with defending the form of utilitarian argument Bentham advances in support of property rights against the stronger and less flexible defences offered by natural-rights theorists and Hegelians. He is less concerned in this paper with the historical detail of the utilitarian

position and more with its philosophical merits. Nevertheless the paper is important for the light it sheds on the philosophical strengths of Bentham's position and Benthamite defences of property more generally.

This volume provides useful material for an understanding of the strengths and weaknesses of utilitarian argument generally, as well as a particular contribution to understanding the philosophical detail of Bentham's arguments in a number of papers. Utility and Rights is an important and useful work in its own right; it is also a fitting testimony to the continuing significance of issues that were raised by Bentham nearly two hundred years ago.

LOTTE AND JOSEPH HAMBURGER, TROUBLED LIVES: JOHN AND SARAH AUSTIN
Toronto: University of Toronto Press, 1985

LOUIS CROMPTON, BYRON AND GREEK LOVE: HOMOPHOBIA IN NINETEENTH-CENTURY
ENGLAND

London: Faber and Faber, 1985

F. Rosen

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The two books reviewed here are not directly about Bentham but he plays an important role in both of them. Lotte and Joseph Hamburger's attractive study of John and Sarah Austin uses the varied interests of the two authors to provide a stimulating account of two important figures connected with Bentham. Joseph Hamburger, in writing what must be the first substantial study of the development of John Austin's political thought, depicts three stages in this development: 'his early Benthamite radicalism which preceded his jurisprudence; his political theory with its novel ideas about the principle of utility, authority, science and elites, that accompanied his jurisprudence during the middle of his life; and his post-1848 conservatism' (p.xi). As for the last phase, he adds that 'this final transformation of his beliefs was important because it led him to doubt the political theory he had expounded in the Province of Jurisprudence as well as the principle of utility, which was a fundamental part of his jurisprudential system' (p.xi). There is no doubt that Austin began his career under the influence of Bentham. There must be few romances which include recommendations to read Bentham's works; Sarah Taylor read a number of them upon the recommendation of John Austin during their long five-year engagement. When they married in 1819, the Austins settled in London where both were in close contact with Bentham who, in his seventies, was at last enjoying an international reputation as a jurist, philosopher and advocate of representative democracy. Though called to the bar, Austin, like Bentham, was not inclined to pursue a legal career, and his appointment as the first Professor of Jurisprudence in the University of London in 1826 gave him the opportunity he needed to abandon his meagre practice. As the lectures were not to be given until 1828, the Austins went to Bonn where they could live inexpensively while he prepared his lectures. During this very successful period in Germany, Austin, according to Hamburger, abandoned Bentham's radicalism, that is to say, his commitment to representative democracy, while he retained Bentham's utilitarianism and much of his jurisprudence. In Germany he found good government under the rule of a monarchy and bureaucracy, and he became suspicious of the radical view of the virtues of popular sovereignty. It is this difference in attitude towards the people which, according to Hamburger, led to a growing distance in the relationship between John Austin and Bentham after Austin's return from Germany in 1828.

If Austin rejected Benthamite radicalism, it is clear that he did not reject Bentham's ideas generally. Indeed, Bentham himself frequently suggested various schemes and reforms to numerous public figures who were

opposed to representative democracy. Many of Austin's recommendations after the difficult assignment with George Cornewall Lewis as Commissioners to enquire into the affairs of Malta in 1836 were ones for which Bentham would have been enthusiastic. The reluctance to import English law generally and especially that regarding trial by jury and libel into Malta, the elimination of sinecures, the sparing use of pensions, the preference of 'natives' to Englishmen for appointments to numerous offices (which would encourage Maltese radicalism) and the strong advocacy of liberty of the press proved Austin had not strayed too far from Benthamite ideals.

Though Bentham is an important figure in the lives of the Austins, he is clearly not the hero of the story. This book has a heroine and she emerges as the major personality in the Austin partnership. Lotte Hamburger's contribution to the volume is concentrated mostly on the chapters which emphasise Sarah Austin and her relationship with John. Her sacrifice and dedication sustained whatever career the often depressed and ill John Austin managed to achieve, and she developed, against considerable odds, a substantial career as a writer and translator. If John Stuart Mill often exaggerated the merits and influence of Harriet Taylor on his life and work, it would be difficult to exaggerate the importance of Sarah Austin in the career of her husband. The study of their relationship suggests that it was as much a problem of personality as one of doctrine which determined the relationship between Bentham and John Austin, and, indeed, it is easy to see why Bentham was attracted to the lively and intelligent Sarah Austin. After reading this absorbing biography one is more interested in Sarah than John and especially in exploring further the remarkable Taylor family of Norwich, the prominent Unitarian family into which Sarah was born. It was here that her unusual qualities of intellect and dedication were first developed.

Louis Crompton has written a detailed and fascinating account of Lord Byron's homosexuality, set against a background of increasing repression in Georgian England, in which the hero of the story is not the romantic poet but the utilitarian philosopher, Jeremy Bentham. Byron, 'proud of his sexual knowledgeableness', used his bi-sexuality not only for private pleasure but also to mock and challenge society, though he did so in a thinly veiled manner and failed to challenge directly the moral premises on which the repressive force of society was based. He even despised himself (and others) for such sexual inclinations (p.268). In contrast, Bentham, though living the life of an ascetic, did challenge these premises, although admittedly he did not publish the manuscripts in which he did so. But as Crompton has correctly observed, 'Bentham, in an age of acute prejudice, looked at the social phenomenon of homophobia [fear of homosexuality] from a position that had more in common with the late twentieth century than with his own era' (p.2). Crompton is referring to the manuscripts on sexual crimes and punishments and on homosexuality which, though fairly well-known to Bentham scholars, have been published only in part by C.K. Ogden, and have recently been discussed by Lea Boralevi in Bentham and the Oppressed. The manuscripts, written on several occasions between the 1770s and the 1820s, relate mostly to Bentham's writings on penal law and his attempts to deal with what were considered serious moral and criminal offences but were, for Bentham, fairly harmless activities which brought some pleasure to those who

indulged in them. Bentham never published these earlier writings on penal law nor the penal code which he drafted in the 1820s, though he appended a detailed table of the Penal Code to the first volume of the Constitutional Code when it was published in 1830. One wonders if his hesitation was based on his reluctance to express his ideas publicly. Other material was written in 1816-18 as part of his critique of asceticism in religion and connected with Not Paul But Jesus, but none of it appeared in print in the brief version edited by Francis Place and published in 1823. As a student, though not a disciple, of Malthus, Bentham was also interested in non-procreative forms of sex as means of reducing the threat of over-population.

The very existence of these rational, humane writings on sex at this time is used by Crompton to great effect as a contrast with the barbarous practices of the day, and the picture of Bentham which emerges is one of deep humanity and a commitment to individual liberty. Crompton makes only one criticism of Bentham (pp.56-7), that he did not evidently appreciate that the increase in legal prosecutions of homosexuals at this time and the general hostility towards homosexual practices were related to xenophobia and anti-Catholic prejudice deliberately exploited by the clergy and politicians.

As a study of Byron, Crompton utilises the work of earlier writers such as Marchand, Moore and Knight, but adds a good deal of his own to explore the complexities of Byron's attitudes towards sex. He also makes some interesting observations regarding John Cam Hobhouse, the radical politician and close friend of Byron, that explain some of the eccentricities of Hobhouse's behaviour, especially when Byron went to Greece in 1823. Hobhouse has been portrayed as disapproving of Byron's homosexuality, but Crompton shows fairly convincingly that Hobhouse shared Byron's interests, but feared exposure and criminal prosecution (for which the penalty might have been death), and his disapproval of Byron's activities merely conformed to the conventions of the age.

As for Bentham, it would be tempting to see him also as bi-sexual, as at least one reviewer has suggested. Despite his largely male circle of acquaintances and the succession of young male secretaries living at Queen's Square Place, there is no evidence of homosexual activity and despite his youthful romance with Polly Dunkley, this reviewer would suggest that he was more asexual than bi-sexual. Perhaps it was this which gave Bentham, rather than Byron, the detachment to write so clearly and effectively on this theme.

CELIA MORRIS ECKHARDT, FANNY WRIGHT - REBEL IN AMERICA
Cambridge, Mass.: Harvard University Press, 1984

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As this lively and detailed book makes clear, Fanny Wright achieved many things which were generally deemed unthinkable for a woman in nineteenth-century America or Europe. She travelled the world unchaperoned; she appeared in society and at public meetings alone; she was the first woman in America to act publicly against slavery and to address large public meetings, and she was the co-editor of a weekly paper. In addition she published several books and spent the greater part of her life fighting for 'all the victims of the social and political hierarchies of her time'.

Her unusual talents showed themselves at an early age. At eighteen, Fanny was more interested in her writing (poetry, drama, philosophy) than in finding a husband. It was already clear that her nature and inclinations were at odds with the demands of society - she was a woman who wanted to lead the life of a man. Eventually, her sex caught up with her; she became pregnant, and married, and from then on her life conformed more closely to the norm of female experience. In the end, in spite of her courageous attempts, it proved impossible for a woman to lead, unscathed, a free and significant public life, and Fanny Wright's ended in loneliness and disappointment.

However, to a surprising extent Fanny Wright managed to defy convention and to lead a life quite different from that of most women of her time. She was involved in a friendship with Lafayette in which her political and intellectual opinions were respected as those of an equal. As she wrote to him in 1822, 'I dare say you marvel sometimes at my independent way of walking through the world just as if nature had made me of your sex instead of poor Eve's. Trust me, my beloved friend, the mind has no sex but what habit and education give it'. In spite of contemporary rumours to the contrary their relationship does seem to have been primarily an intellectual one.

Jeremy Bentham was another man of some importance who respected Fanny and recognised her unusual talents. He admired her work, and she played an important role as courier for him at a time when communication across the Channel was difficult and dangerous. On her frequent trips to France she was entrusted with letters and packets from Bentham to various French liberals and to Greek exiles living in Paris and supporting the War of Independence in Greece. Indeed it was probably while carrying out a commission for Bentham that Fanny Wright was first introduced to Lafayette. She dined with Bentham at Queen's Square Place and was his guest there on more than one occasion. As Eckhardt says, Bentham was 'old enough' (in the early 1820s) to brush aside worries about how to behave towards a young woman who preferred discussing politics with men to pouring tea for them. Bentham could talk with Fanny in the same way as he would talk with any young and enthusiastic disciple. Her philosophical work, A Few Days at Athens, published in 1822, was dedicated to Bentham,

'as a testimony of her admiration of his enlightened sentiments, useful labors, and active philanthropy, and of her gratitude for his friendship'. Bentham was not the most important figure in Fanny Wright's life, but he does warrant most of a chapter in this book, and his connection with Fanny is fully explored. It is all credit to Bentham's notions of equality and tolerance that he behaved respectfully towards Fanny as a young female writer and intellectual when many others scorned and ridiculed her for being exactly that. However, Bentham's tolerance of disruption to his daily routine was somewhat limited. There is an amusing letter (February 1822) from him to Lafayette (which Eckhardt does not mention) from which we gather that Fanny was on the verge of overstaying her welcome at Queen's Square Place. Bentham proposes that Lafayette could suggest to Fanny her return to Paris, in order to relieve Bentham of the disruption caused: 'As long as she is in the same room with me substitution of her ideas to all mine is the unavoidable consequence'. Bentham is most anxious that this plan should be kept secret, to prevent injury to Fanny's feelings, and he does acknowledge that 'she and I have so many ideas in common'; yet it would seem that an unbroken domestic routine was perhaps (and understandably) more important to the 74 year old Bentham than his continuing encouragement of an eager young woman writer.

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