

# THE BENTHAM NEWSLETTER



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## EDITORIAL

The two main articles in this issue of The Bentham Newsletter were originally presented at the conference sponsored by the International Bentham Society held at University College London in July 1987, and are a reflection of the success of that event. Professor Long, basing his paper on extensive research in the early manuscripts, offers a reinterpretation of Bentham's political radicalism, while Professor Collison Black considers the nature of Bentham's influence on the political economists of the nineteenth century. On a more contemporary note, Mr. Lewis attempts to trace the source of a quotation attributed to Bentham by participants in the recent debate on the right to silence, and proceeds to expound Bentham's own position on the question. The issue is completed by two book reviews and the regular bibliography.

Bentham scholars will be pleased to hear that two new volumes in the Collected Works have been published this year, Correspondence, volume 7 (1802-1808), ed. J.R. Dinwiddy, and Correspondence, volume 8 (1809-1816), ed. S.R. Conway. Members of IBS are able to purchase these volumes at a substantially reduced price. Meanwhile First Principles preparatory to Constitutional Code, ed. T.P. Schofield, containing four essays, 'Economy as applied to Office', 'Identification of Interests', 'Supreme Operative' and 'Constitutional Code Rationale', is currently at the press, and Correspondence, volume 9 (1817-June 1820), ed. S.R. Conway, is nearing completion and ought to be published in 1989.

This is the last issue of The Bentham Newsletter. It is being merged with The Mill News Letter to create a new journal, Utilitas: A Journal of Utilitarian Studies, which will be published twice yearly from May 1989 by Oxford University Press. Utilitas, containing articles, notes, documents, reviews and bibliographies, will reflect the growing international interest in all aspects of utilitarian thought and its historical context. As a cross-disciplinary journal, it will publish contributions from students of history, politics, economics, philosophy, law, sociology and literature. We would like to take this opportunity to thank our contributors and subscribers for their past support of The Bentham Newsletter, and to express the hope that they will in future give their support to Utilitas.

T.P.S.

# CENSORIAL JURISPRUDENCE AND POLITICAL RADICALISM: A RECONSIDERATION OF THE EARLY BENTHAM<sup>1</sup>

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Prefat. Utility of these speculations. If ... I explain these matters clearly I may be a means of giving perpetuity to the constitution of my country, I may stifle in embryo or rather interrupt the conception of all manner of political disputes, prevent civil wars, and save the lives of millions /fix the peace of empires/. (UC lxix. 56, 'Preparatory Principles Inserenda' 271)

## Introduction

In an article in an earlier number of this Newsletter Professor J.H. Burns observed that, 'it is only in the last twenty-five years or so of his long life that we can regard Bentham as in any sense a committed radical in political terms'. He also pointed out, quite rightly, that 'the seeds' of Bentham's political radicalism 'had been sown and had even begun to sprout many years earlier'.<sup>2</sup> The present paper may be seen, at least in part, as a collection and examination of such 'seeds' and 'sprouts': a procedure which presumably would have appealed to Bentham's Linnaean side. Being concerned with radicalism, however, I shall have to speak also of 'roots', and I shall pay special attention to the extent to which Bentham's political radicalism was 'rooted in' his philosophy of law. A little farther along in his most illuminating discussion, Professor Burns offered an assessment of Bentham's legal philosophy interestingly different from his view of Bentham's political commitment. He asserted that Bentham's analysis of law as command, and indeed of volition and imperation as such, 'entail[ed] not merely a radical analysis in intellectual terms but also an analysis which [had] radical consequences in ... the real world'.<sup>3</sup> This characterization of the early Bentham's jurisprudential theorizing is in my opinion both important and sound. My wanderings in the labyrinth of Bentham's early manuscripts, however, suggest to me that the legal analysis so perceptively portrayed by Professor Burns also had a strong, perhaps even indelible, political tincture. Thus in the present paper I want to explore the possibility that in a sense Bentham's 'censorial jurisprudence' expressed and entailed a mode of political radicalism.

One might, as Professor Burns' discussion makes clear,<sup>4</sup> mean many things by the statement that a thinker is 'a committed radical in political terms'. In the context of a study of Bentham the phrase 'in political terms' possesses a particularly useful ambiguity. For I want to argue that Bentham was a radical about political terms virtually from the beginning of his intellectual career. He was, I think, a political radical in what he might have called an 'adjective' rather than a 'substantive' sense: that is, a 'radical thinker' rather than simply 'a radical' (let alone 'a Radical').<sup>5</sup> I shall refer to him as a 'penetrative' rather than a 'subversive' radical, though I shall want to maintain that when a penetrative

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<sup>1</sup> A paper read to the conference of the International Bentham Society at University College London on 6-7 July 1987.

<sup>2</sup> J.H. Burns, 'Jeremy Bentham: From Radical Enlightenment to Philosophic Radicalism', The Bentham Newsletter, VIII (1984), 6.

<sup>3</sup> *Ibid.*, 9.

<sup>4</sup> *Ibid.*, 5-9.

<sup>5</sup> According to the Oxford English Dictionary the adjectival usage of 'radical' predates its 'substantive' use (i.e. 'a radical') by more than fifty years. Instances of 'radical' as a noun date from 1802, whereas Bolingbroke spoke of 'a radical Cure of the evil, that threatens our Constitution' in On Parties (1735).

analysis of political language or action or institutions led to implicitly or explicitly subversive conclusions he did not shrink from them. Thus I hope to reconcile my interpretation with another claim quite correctly made by Professor Burns, the claim that 'throughout his early and middle years' Bentham was 'prepared to seek means of working with and within any political system which seemed to be susceptible of conversion to his principles'.<sup>1</sup> The implication of Professor Burns' analysis seems to be that these 'principles' were legal and philosophical but not essentially political in character. But perhaps philosophy, jurisprudence and political theory were too intimately interwoven in Bentham's thought, even early in his career, for this distinction to be sustained.

In a sample of early (pre-1782) Bentham manuscripts amounting to just over 1000 sheets<sup>2</sup> the word 'radical' is used only five times, and always as an adjective. It occurs twice in the context of Bentham's attempts to improve what he was wont to refer to as the science of grammar, a science whose imperfect state he regarded as a major obstacle to the development of philosophy and jurisprudence. His usage of 'radical' in this connection, however, is purely technical. In the course of his discussion of etymologically related terms, or 'conjugates', he observes that men naturally assume that words are 'connected in signification' when 'their radical letters' are similar or identical in sound or appearance.<sup>3</sup> But it is only with hindsight that we can see here the embryonic beginnings of Bentham's later war against fallacies and fictions in the language of philosophy, law and politics.

Elsewhere he uses the phrase 'radical idea' to refer to the abstract, generic idea of 'a House' employed in the established 'Lawyer-like' approach to the law of real property:

the radical idea of a House shall be the same in all [cases] ... other terms shall be employed to express those different masses of matter which are ... the passive objects of the Law ... [in] different cases.<sup>4</sup>

Thus even when the term 'radical' found its way into Bentham's analysis of law, he used it solely in a technical, linguistic sense. Thus 'the two Primary or Radical operations of Law are Command and Prohibition' (UC lxix. 109), and one of eight pairs of terms suggested for conveying the distinction between 'Substantive' and 'Adjective' laws names the former as 'Radical' and the latter as 'Subservient' (UC lxix. 91). But this is no more than an extension of the grammatical distinction between the radical and servile parts of words. There is no hint here of any political connotation or context, reformist or otherwise.

Bentham might have said of the term 'radical' in the 1770s what he said of the label 'Benthamiste' in 1802 in a letter to Étienne Dumont: 'what sort of an animal is that?'<sup>5</sup> No doubt he thought of himself as a critical philosopher, a 'censor', one whose 'speculations' might be of immense legal and political significance. But he could hardly adopt the language of 'radicalism' in which to convey his sense of his intellectual mission: he would have had to create it. His first publication<sup>6</sup> was a denunciation, intended to be scathing but in the end rather pompous, of duplicity and dishonour among the Wilkites. Its hostility towards what has since come to be called Wilkite radicalism is thoroughly evident. More importantly for present purposes, neither the term 'radical' nor anything functionally equivalent to it is employed in the text. Neither was Bentham enamoured of the terms 'revolution' or 'revolutionary'. He associated their use with arguments based on principles

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<sup>1</sup> Burns, 'Jeremy Bentham: From Radical Enlightenment to Philosophic Radicalism', 7.

<sup>2</sup> The manuscripts involved are those headed 'Preparatory Principles Inserenda' [hereafter 'PPI'] (UC xix, cxl), 'Crit[ical] Jur[isprudence] Crim[inial] (UC lxix, cxl, clix), and 'Key [Terms in Universal Jurisprudence]' (UC lxix).

<sup>3</sup> UC lxix. 161 ('PPI' 291).

<sup>4</sup> UC lxix. 189. Marginal: 'Individualization - Instance, of a House.'

<sup>5</sup> Bentham to Dumont, 28 June 1802, Correspondence (CW), ed. J.R. Dinwiddy, vii. 65.

<sup>6</sup> 'To John Glynn, Esq., Serjeant-at-Law', signed 'Irenius', in The Gazetteer and New Daily Advertiser, 3 December 1770, p.2, col.1. See D. Long, Bentham on Liberty, Toronto, 1977, pp.50-1.

of natural rights, which principles he heartily despised. His synonym for the noun 'revolutionary' in the case of Frenchmen was 'Pandemonian', or madman.<sup>1</sup> But as early as 1781 he imagined himself (in his famous 'dream'<sup>2</sup>) the founder of a 'sect' of 'utilitarians', and this use of the vocabulary of religious contestation seems significant. Opposition to religious establishments is often paired with opposition to political establishments in his early work. More than once he identified Warburton's Alliance as a work in which, though the method of analysis and the sentiments motivating the author were both misguided, the bonds between sacred and secular authorities were correctly identified.<sup>3</sup> In the Bentham manuscripts the 'dream' of 1781 is recounted in language both pseudo-biblical in style and replete with theological allusions (UC clxix. 79): Bentham portrays himself as providing a needful Britannia and her greatest statesmen with a sacred text - a bible, as it were, of moral and political reform. But the substantive aim presented here in pseudo-religious style is unmistakably that of political and constitutional transformation: Bentham's aspiration to 'give perpetuity to the constitution' of England, to transform or even foreclose upon 'all manner of political disputes' by persuading statesmen to 'take up [his] book'<sup>4</sup> is perfectly clear in the 'dream' of 1781. Indeed, in this paper I shall seek to show that it is perfectly clear in the mid-1770s. The sectarian language of Bentham's 'dream' was a symptom, not a cause, of his radicalism. He saw himself as a sectarian because he was already, in all but name, a radical.

Dr. John Dinwiddy is surely correct in asserting that Bentham made a 'transition to political radicalism' only after he met James Mill in 1808-9, some thirty years after the period with which the present discussion is concerned.<sup>5</sup> Yet in another sense it seems equally evident that it was not James Mill who made Bentham a radical. Mill's admiration for the Traité de Legislation, expressed in his almost excessively appreciative review of Bentham's published letters on 'Scotch Reform' in 1808,<sup>6</sup> together with his continuing attentions thereafter, restored Bentham's sense of political efficacy and involvement after the disillusionment of the Panopticon affair. Bentham could again dream of reform, and now the dream could be couched in purely secular language: he could move from 'Catechisms' to 'Plans'.<sup>7</sup> Nonetheless, it was not the encounter with Mill that gave to Bentham's thought its radical, nor even its politically radical, character. Nor, M.P. Mack to the contrary notwithstanding,<sup>8</sup> was it the French Revolution which radicalized Bentham. Nor did the American rebellion, rooted as it was in the 'nonsense' of natural rights discourse.<sup>9</sup> Bentham's genuine admiration for the Americans' political experiment arose after and in spite of the revolution itself. My thesis is that Claude Adrien Helvetius made Jeremy Bentham a radical when in 1769 (aet 21), after reading De L'Esprit, Bentham concluded that

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<sup>1</sup> See Bentham to the Duc de Liancourt, 11 October 1795, Correspondence (CW), ed. A.T. Milne, v. 161.

<sup>2</sup> See UC clxix. 79. Printed in D. Baumgardt, Bentham and the Ethics of Today, New York, 1966, Appendix I, pp.549-50.

<sup>3</sup> For discussion of Bishop Warburton and his conception of an 'Alliance' of Church and State, see UC cxi. 1-2; lxix. 40; xcvi. 153, 208, 288.

<sup>4</sup> UC lxix. 156. See the headnote to this paper.

<sup>5</sup> J.R. Dinwiddy, 'Bentham's Transition to Political Radicalism, 1809-10', Journal of the History of Ideas, XXXVI (1975), 683-700.

<sup>6</sup> See Annual Review and History of Literature, 1808, 'History and Politics' section, article XXXVIII, pp.198-203, especially p.198.

<sup>7</sup> UC cxxviii. 1-48 show Bentham outlining his 'Catechism of Parliamentary Reform' in 1809. By 1817 (UC cxxix. 385-630), the 'Catechism' had been swallowed up by the larger and more secular conception of a 'Plan'.

<sup>8</sup> M.P. Mack, Jeremy Bentham: an Odyssey of Ideas, 1748-1792, London, 1963.

<sup>9</sup> For more details see Long, op. cit., pp.51-5.

he had a 'genius' for 'legislation'.<sup>1</sup> My study here is of the 'censor' as political radical, and particularly of Bentham's 'censorial jurisprudence' as a foundation and vehicle for political radicalism. I shall proceed in three stages, by examining:

1. Helvetius's influence on Bentham: how De L'Esprit was uniquely instrumental in inducing Bentham to see himself as a critical and innovative contributor to the development of the sciences of morals and legislation,
2. Bentham's critique of Blackstone as a political critique, reflecting Bentham's 'censorial jurisprudence' as (by his own definition) a theory of government, and
3. a few selected features of Bentham's early political writings, purporting to show that the seeds of utilitarian, and perhaps embryonically democratic, political radicalism were beginning to take root in Bentham's thought as early as the middle of the 1770s.

Like Dr. Ross Harrison, I hold that 'Bentham is consistently an Enlightenment thinker all his life'.<sup>2</sup> Like him too, I hold that in so far as Bentham changed his mind in moving to advocacy of a platform of democratic reform during the last 25 years of his life,

this change of mind is merely a change of idea about the appropriate methods for getting his reforms accepted. The basic ideas of the reforms themselves and the final end to which they were devoted, the maximization of utility, did not change at all. Nor [did] the intellectual foundations or attitudes which make such an end seem appropriate.<sup>3</sup>

The transition to political radicalism so accurately charted for us by John Dinwiddy is a transition from one political strategy to another, not from one way of thinking about morals and politics in toto to another. The reader of William Thomas' remarkable essays on the philosophical radicals<sup>4</sup> can hardly avoid the conclusion that Bentham was not transformed as a thinker by the formation of the Benthamite circle, nor were those in the circle as comprehensively dominated by Bentham's specific mode of thought as scholars might, until Thomas' work, have believed. Bentham's reforming ideas, and the 'intellectual foundations' and 'attitudes' which accompanied them, do seem to me to have their roots in Bentham's early writings, and to endure, as Harrison suggests, throughout the vicissitudes of his many-chaptered career. It is in this spirit that I shall pursue the claim that one may retrospectively apply to Bentham the label of 'political radical' not from the year 1809 onward, nor exclusively after 1789, but instead as of 1769.

### Helvetius and Bentham's 'Genius for Legislation'

I am indebted (once again) to Ross Harrison for reminding me that Bentham sent to D'Alembert in the late 1770s a sketch of his (Bentham's) 'system', asserting that 'it could be seen that it was founded on the ideas of Helvetius'.<sup>5</sup> This was not mere rhetorical exaggeration. No doubt figures such as Locke, Priestley, Hume and Beccaria are of great importance to our understanding of Bentham's adoption and interpretation of the principle of utility, but Helvetius, aside from proposing 'the public utility' as 'the principal end of [his]

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<sup>1</sup> The story is told in The Works of Jeremy Bentham, ed. J. Bowring, 11 vols., Edinburgh, 1843, x. 26-7, and in Mack, op. cit., pp.55-6.

<sup>2</sup> R. Harrison, Bentham, London, 1983, p.8.

<sup>3</sup> Ibid., pp.8-9.

<sup>4</sup> W. Thomas, The Philosophic Radicals: nine studies in theory and practice. 1817-41, Oxford, 1979.

<sup>5</sup> Correspondence (CW), ed. T.L.S. Sprigge, ii. 117, quoted in Harrison, op. cit., p.7; cf. Bentham's draft letter to Voltaire of November 1776, Correspondence (CW), ed. T.L.S. Sprigge, i. 367-8: 'I have built solely on the foundation of utility, laid as it is by Helvetius.'



work [i.e. De L'Esprit],<sup>1</sup> appears to have influenced and even inspired Bentham in a uniquely comprehensive way. De L'Esprit, which seems to have been a 'political football' rather than an intellectual milestone in the world of French letters after its publication in 1759,<sup>2</sup> nonetheless conjured up for Bentham in its characteristically picturesque way vivid and theatrical images of the heroic figures of the 'genius' and the 'censor'. These glowing portrayals of the moralist and the contributor to the art and science of legislation as inventors of ideas both industrious and gifted seem to have shaped Bentham's very self-image, and his conception of his grand intellectual enterprise, in a manner both fundamental and lasting.

Bentham ranked Locke and Helvetius together as 'great physicians of the human mind' (UC xcvi. 65). The 'great and original Genius' of Locke had, he asserted, 'sown the seeds' of a scientific approach to morals. In due course a 'full Harvest of Intelligence' was 'gathered' by the likes of Hume, D'Alembert, Voltaire, Beccaria - and Helvetius (UC xcvi. 101). We know that Bentham had read Hume's Treatise of Human Nature:<sup>3</sup> he must then have been aware of Hume's monumental attempt to found a science of human nature on the application of experimental method to the study of morals. Yet when he came to characterize his entire oeuvre in a very Humean way, as founded upon an experimental approach to 'moral science', he made no reference to Hume or his works. Instead he hinted at playing Newton in relation to the Baconian accomplishments of Helvetius:

The present work as well as every other work of mine that has been or will be published on the subject of legislation or any other branch of moral science is an attempt to extend the experimental method of reasoning from the physical branch /department/ /world/ to the moral. What Bacon was to the physical world, Helvetius was to the moral: The moral world has therefore had its Bacon, but its Newton is yet to come. (UC clvii. 32)

He might even have conceded the Newtonian role to Helvetius, who had in De L'Esprit anticipated several of the characteristics which Bentham's science of man was to exhibit: universal scope, postulation of moral laws analogous to the physical laws of motion, and reliance on a fundamental concept of 'interest' rather than of 'right' -

If the physical universe be subject to the laws of motion, the moral universe is equally so to those of interest. Interest is, on earth, the mighty magician, which to the eyes of every creature changes the appearance of all objects.<sup>4</sup>

As Bentham was to do in An Introduction to the Principles of Morals and Legislation,<sup>5</sup> Helvetius went on to connect the idea of 'interest' with that of 'sensibility', and to situate these two conceptions at the heart of both political and philosophical discussions:

natural sensibility and personal interest have been the authors of all justice

<sup>1</sup> Claude Adrien Helvetius, De L'Esprit, or Essays on the Mind and its Several Faculties, translated [anonymously] from the French, to which is now prefixed a life of the Author, New York, 1810, reprinted 1970, Essay II, Chap.v, p.59.

<sup>2</sup> See David Smith, Helvetius: a Study in Persecution, Oxford, 1965.

<sup>3</sup> Bentham called Hume's Treatise 'that celebrated book: of which the criminality in the eyes of some, and the merits in the eyes of others, have since been almost effaced by the splendour of more recent productions of the same pen.... That the foundations of all virtue are laid in utility, is there demonstrated, after a few exceptions made, with the strongest force of evidence: but I see not, any more than Helvetius saw, what need there was for the exceptions.' A Comment on the Commentaries and A Fragment on Government, ed. J.H. Burns and H.L.A. Hart, London, 1977 (CW), [hereafter Comment/Fragment], pp.439-40.

<sup>4</sup> Helvetius, De L'Esprit, II. ii. 42. And on the same page: 'personal interest is the only and universal estimator of the merit of human actions'.

<sup>5</sup> See An Introduction to the Principles of Morals and Legislation, ed. J.H. Burns and H.L.A. Hart, London, 1970 (CW), [hereafter IPML], Ch.I, para.4: 'Interestofthecommunity, what', and Ch.VI, 'OfCircumstancesInfluencingSensibility'.

... this proposition cannot be denied, without admitting innate ideas.<sup>1</sup>  
This emphasis on sensibility and interest as the bedrock of human motivation, and this hostility to innate ideas, both passed into, or at least were echoed in, Bentham's thought. The critique of innate ideas may have been the one thing above all else for which Bentham revered Locke's *Essay*. He was at one with Helvetius in thinking that no scientific approach to morals and legislation should retain a shred of reliance on that discredited category of entities. More importantly, however, he agreed with Helvetius that the foundation for such a new science must be 'sensibility'. Beside the marginal heading 'Beginning' on a manuscript sheet dating from the 1770s, Bentham wrote, 'Physical sensibility the ground of Law-proposition most obvious and incontestible.' (UC lxix. 10)<sup>2</sup>

In the matter of the formulation of the principle of utility, Helvetius' influence should not be over-estimated. He had, for example, singularly little faith in the model of a calculus of pleasures and pains as a basis for the analysis of human motivation:

it ought not to be imagined, as [some men's] vanity would persuade them to believe, that, before they take a resolution, they calculate the advantages and inconveniences of it: were this the case, these men would only be determined in their conduct by reflection; but experience informs us that they are always moved by sensations.<sup>3</sup>

The idea of applying a calculus to sensations was a feature of Bentham's particular scientific method, and one which he could hardly have found in Helvetius. Perhaps it was in this sense that Bentham saw the Newtonian role as his own. *De L'Esprit* was, after all, a work more impressionistic and imaginative than systematic and rigorous. From it Bentham could take some vivid mechanical metaphors, but scarcely a vestige of mechanistic methodology. To be told that 'Passions are in the moral what motion is in the natural world', or, for good measure, that 'It is in morality as in physics',<sup>4</sup> was all very well, but the classification and characterization of passions, the development of 'axioms of mental pathology',<sup>5</sup> was a task for which Helvetius showed little or no inclination. That was to be Bentham's function.

The metaphors used by Helvetius to depict the activities of the Legislator-as-Genius in the context of the state exhibit a characteristic blend of mechanism and mysticism. A state, he tells his reader, is

a machine moved by different springs, the force of which is to be increased or diminished, according to the reciprocal action of those springs, and the effect intended.<sup>6</sup>

The Legislator, if he be a true 'genius', is the master of these 'springs' of social action, able to harmonize them and direct them toward the ultimate end of 'public utility'. 'Armed with the ... power' of distributing pleasures and pains, he may be as readily obeyed as are the mandates of nature themselves, for 'the love of pleasure ... is a bridle by which the passions of individuals might always be directed to the public good'.<sup>7</sup> If this result has not been attained in the past, it is surely because 'in almost every government, all the laws, being incoherent and inconsistent ... seem to be the work of mere chance'.<sup>8</sup> The movement toward perfection in the sciences of morals and legislation requires the systematic creation of 'entire bodies of laws' in which 'the dependence of laws on each other' will reflect 'the uniformity of the legislator's views'.

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<sup>1</sup> Helvetius, *De L'Esprit*, III. iv. 213.

<sup>2</sup> For details of the context of this remark, see Long, *op. cit.*, pp.17-18.

<sup>3</sup> Helvetius, *De L'Esprit*, IV. xv. 477.

<sup>4</sup> *Ibid.*, III. vi. 229, 240.

<sup>5</sup> For a discussion of these, see Long, *op. cit.*, pp.18, 193-4.

<sup>6</sup> Helvetius, *De L'Esprit*, I. vi. 24n.

<sup>7</sup> *Ibid.*, III. xvi. 291.

<sup>8</sup> *Ibid.*, II. xvii. 135.

But in order to establish this dependence, it would be necessary to refer them all to one simple principle, such as that of the public utility, or, that of the greatest number of men, subject to the same form of government: a principle more extensive and more fruitful than imagination can conceive; a principle that includes all the morality and all the legislation, of which many men discourse without understanding them, and of which the legislators themselves have yet but a very superficial idea, at least if we may judge from the unhappiness of almost all the nations upon earth.<sup>1</sup>

It is this unimaginably comprehensive and potent principle of utility, its nature still largely unknown to moralists and legislators, which is to constitute the foundation of a science of morality, and, given 'the necessary dependence there is between manners and the laws of a country', a basis for a science of legislation as well. For 'the science of morality is nothing more than the science of legislature'.<sup>2</sup>

Bentham's well known comparison, at the beginning of Fragment on Government,<sup>3</sup> of reform in the moral world to fresh discoveries in the physical world had a striking antecedent in De L'Esprit:

O, ye envious! might one say, is it to the ancients that we owe printing, clocks, glass, fire engines? Who, besides Newton, in the last age, fixed the laws of gravitation? Does not electricity every day afford an infinite number of new phenomena? There are, according to you, no discoveries left to be made: but in morality itself, and even in politics, where every thing ought perhaps to have been said, is the species of luxury and commerce of most advantage to a nation yet determined? Are their bounds fixed? ... Have they pointed out the form of government most proper to render men happy?

We do not even understand the principles we repeat every day: to punish and reward is a maxim; every body knows the words, but few are acquainted with the sense. Whoever could perceive its full extent, might resolve, by<sup>4</sup> the application of this principle, the problem of a perfect legislation.

This surely was an invitation to which Bentham set out to respond: to use the principle of utility to give sense to the notions of reward and punishment hitherto used every day without being understood; to 'point out the form of government most proper to make men happy'; to produce a perfect system of legislation. But Helvetius may have done more than to help Bentham define his intellectual enterprise: he may have had a crucial role in shaping Bentham's self-image as a thinker. For in De L'Esprit Bentham encountered the figure of the moralist as 'censor'. The moralist whose pen was activated only by motives of self-interest, Helvetius argued, was 'no more than a mere egotist', unworthy of the name of moralist. The true moralist, the true 'censor' as Helvetius calls him, must be one whose hatred of vice is 'proportioned to its detriment to the state':

Thus it is only by an absolute detachment from personal interest, by a profound study of the science of legislation, that a moralist can become serviceable to his country.<sup>5</sup>

After reading Helvetius Bentham dedicated himself to the study, not of utility, nor of jurisprudence, but of 'legislation'. To be precise, he concluded that he himself possessed a 'genius', and that it was a genius for legislation. Helvetius had proclaimed that 'In the sciences, genius, like a bold navigator, searches for and discovers unknown regions'.<sup>6</sup> Bentham was to begin his Preface to Fragment on Government by comparing reformation in the moral world with the discovery of 'the most distant and recondite regions' of the

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<sup>1</sup> Ibid.

<sup>2</sup> Ibid., II. xvii. 134.

<sup>3</sup> Fragment (CW), p.393.

<sup>4</sup> Helvetius, De L'Esprit, IV. vii. 420 and n.

<sup>5</sup> Ibid., II. xvi. 126.

<sup>6</sup> Ibid., IV. v. 405.

natural world.<sup>1</sup> Helvetius had claimed that the man of genius need have 'no advantage over other men but the habit of application, and a method of study'.<sup>2</sup> That Bentham exhibited absolutely dogged habits of application and a near obsession with method no one will doubt who has ever laid eyes on the Bentham manuscripts or explored Bentham's attempts therein to define his own methods of analysis for various purposes. The essence of genius, Helvetius had written, both etymologically and in practice, is 'invention':

genius is derived from *gignere, gigno*; I bring forth, I produce; it always supposes invention, and this quality is the only one which belongs to all the different kinds of genius.<sup>3</sup>

Just as imagination consists in the capacity to invent images, he maintained, so genius consists in the capacity to invent ideas. A typical discovery of genius is

a new combination, or a new relation perceived between certain objects, or ideas. A person obtains the title of a man of genius, if the ideas which result from this combination form one grand whole, are fruitful in truths, and are of importance with respect to mankind.<sup>4</sup>

Helvetius' gallery of geniuses in the sciences included Kepler, Newton and John Locke.<sup>5</sup> These men had been willing, as Bentham was subsequently to be, to 'cite, before the tribunal of reason, the opinions, prejudices, and errors, consecrated by time'.<sup>6</sup> But the man who would claim genius must confront more than past errors - he must deal with current prejudices. And he must appear before the tribunal of the public, not only before that of reason:

a man who declares that he has a great genius, without giving any proof of his abilities, is exactly in the case of a man who pretends to be noble, without any titles of nobility. The public can neither know nor esteem any merit, that is not proved by facts ... they ask ... a private person, 'By what work have you enlightened the human mind?' ... Sheltered from influence, exempt from all private interest, the public judge as the stranger.... He who would exactly know his own value, can then only learn it from the public, and ought therefore to expose himself to its judgment.<sup>7</sup>

It is one thing to show that Helvetius wrote certain things, and quite another to establish that his, rather than any other's, formulation of them had an impact on the young Bentham. But Bentham himself leaves us in no doubt about this. Recall that in the early 1770s Bentham was (so he later said) considering abandoning the study of law altogether to journey to South America in search of 'natural knowledge' in 'Chymistry' and 'Botany'. It was from Helvetius that he 'gathered instruction' such as to 'gradually wean [him] from that idea':

From him I got a standard to measure the relative importance of the several pursuits a man might be engaged in and the result of it was that the way of all others in which man might be of most service to his fellow creatures was by making improvement in the science which I had been engaged to study by profession.<sup>8</sup>

Given these remarks, it would appear to be more than mere coincidence that the earliest manuscripts catalogued by Alexander Taylor Milne are headed 'Legislation - raw materials'

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<sup>1</sup> Fragment (CW), p.393.

<sup>2</sup> Helvetius, De L'Esprit, III. xxx. 360.

<sup>3</sup> Ibid., IV. i. 365-6.

<sup>4</sup> Ibid., IV. i, 365, 373. Bentham also placed an extraordinary emphasis on 'invention' as an aspect of his genius: see Long, op. cit., 70.

<sup>5</sup> Helvetius, De L'Esprit, IV. i. 366-7.

<sup>6</sup> Ibid., IV. i. 369.

<sup>7</sup> Ibid., II. x. 90-1.

<sup>8</sup> Bentham to Rev. John Forster, April/May 1778, Correspondence (CW), ii. 98-9.

and dated 1770-5 (UC xcvi. 98-127 et alii). The young Bentham had been moulded to a remarkable degree by his reading of De L'Esprit: it would not be too much to say that in Helvetius he had found a mentor. Like David Hume, however, Bentham was attracted to the Frenchman's work not for its rigour, but for its rhetoric. The mature Hume dismissed Helvetius's opus as amusing but insubstantial.<sup>1</sup> The young Bentham seems to have let Helvetius articulate his very dreams. He did not dream of a career as a philosopher of jurisprudence in any narrow sense. He dreamed of a project of Baconian scope and Newtonian rigour. His subjects would be the sciences of morals and legislation. His arena would be the public and political one. The censor depicted by Helvetius was no closet philosopher: he was a builder of states and an advisor of great leaders. The dream of 1781, and even the bitterness of post-Panopticon disillusionment, can be better understood if we recognize the intellectual enthusiasm and ambition of the Bentham who wrote Fragment on Government. Perhaps more importantly for our present purposes, the radical (in the sense of 'censorial') and political qualities of Bentham's early work will not escape notice if we attend to the nature of Helvetius' characterization of the censor as contributor to the sciences of morals and legislation.

### Blackstone and 'Censorial Jurisprudence'

By 1772, when the composition of manuscript 'raw materials' on 'legislation' was well under way, Bentham's 'genius' had been brought to self-consciousness because he had found a mentor. But what (or who) might be the source of 'opinions, prejudices, and errors, consecrated by time' which genius would bring before 'the tribunal of reason' - and before the public? Who would be Bentham's foil? Who better than Sir William Blackstone, universally admired embodiment of established error and incoherence and celebrated author of Commentaries on the Laws of England?<sup>2</sup> In 1773 Bentham began the formation of a friendship with an Oxford acquaintance, John Lind.<sup>3</sup> As Professors Burns and Hart suggest, it seems to have been John Lind who set his sights on Blackstone's Commentaries in 1774. Prior to taking a critical interest in Lind's work Bentham had focussed his attention, as we have seen, on the task of reforming the science, as opposed to practising the profession, of law.<sup>4</sup> Collaboration with Lind, however, brought Blackstone as the false idol of legal practitioners to the very centre of Bentham's attention.

The standard view of the Bentham/Lind partnership sees Bentham the legal philosopher adding his talent for fine distinctions and exhaustive if pedantic analysis to Lind's store of practical political ideas and sentiments drawn from years of experience in political and diplomatic circles in England and Poland. T.L.S. Sprigge points out that Lind was a 'well known political writer' and a notable figure in the Polish court during this period.<sup>5</sup> In practice, however, Lind and Bentham did not assume the roles that this portrayal of them implies. It was Bentham, not Lind, who took charge of the most political elements of their joint salvo. While the portion of Lind's 'comment' on the Commentaries devoted to the treatment of 'Our Author's Account of Municipal Law' occupies ten pages in the text of the Collected Works edition of Comment on the Commentaries,<sup>6</sup> Bentham's response to Chapter

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<sup>1</sup> Hume sent a copy of De L'Esprit to Adam Smith with a letter dated 12 April 1759 which included the following comment: 'It is worth your reading, not for its philosophy, which I do not highly value, but for its agreeable composition.' Quoted in the 'Life of the author' prefixed to the 1810 anonymous translation of De L'Esprit, p.xiv. See also New Letters of David Hume, ed. R. Klibansky and E.C. Mossner, Oxford, 1954, pp.52-3.

<sup>2</sup> W. Blackstone, Commentaries on the Laws of England, 4 vols., Oxford, 1765-9.

<sup>3</sup> See Comment (CW), p.xxv.

<sup>4</sup> See Ibid., p.xxiv. n.1.

<sup>5</sup> See Correspondence (CW), i. 23n.

<sup>6</sup> Comment (CW), pp.374-84.

III of Book I, 'Of the Laws of England', grew into a pamphlet which soon assumed the dimensions of a book. This work, Fragment on Government, should not on account of its title be seen as insubstantial, episodic or merely polemical in nature. When Bentham referred to it as 'a comment on a digression stuffed into the belly of a definition',<sup>1</sup> he was engaging in rhetorical exaggeration. He thought it to be to his advantage to have the Fragment received as a mere harbinger of a massive work still to come, and its author perceived as but a herald announcing the arrival of 'he that should come'.<sup>2</sup> In this last assertion disingenuousness is joined to hyperbole: it was Bentham himself, as we have seen, who aspired to play Newton to Helvetius's Bacon in moral science.

Neither its title nor Bentham's belittling characterization of it should blind us to the richness and incisiveness of the Fragment as a work of political theory. Analyses of sovereignty and citizenship, government and constitution figured more prominently in its pages than did those of law and jurisprudence. The object of the book, as Bentham emphasized at its conclusion, was practical and political, not merely metaphysical or methodological. It was to teach the twin arts of citizenship - free censure and punctual obedience.<sup>3</sup> It was to acquaint men with what Aristotle (whom Bentham much preferred to Plato) would have called excellence at being ruled, and to instruct sovereigns in the rights and duties constitutive of excellence in ruling. And it was no mere impulsive digression from Bentham's ongoing magnum opus, the 'Elements of Critical Jurisprudence'. From the manuscripts which he penned in the 1770s as he struggled to define the form and content of this intended master-work, Bentham drew concepts such as that of the crucial political 'habit of obedience', distinctions such as that between 'society natural' and 'society political' or between 'free' and 'despotic' governments, and central definitions such as those of the state, liberty and property. These elements of what Bentham himself might have called his intellectual armature were used as central building blocks in the composition of Fragment on Government, IPML, Of Laws in General,<sup>4</sup> and other works of the 1770s and 1780s. My contention here is not merely that the Fragment is an important political work, but that its political character reflects the hitherto unappreciated political nature of Bentham's magnum opus itself. 'Elements of Critical Jurisprudence' was conceived as a work more political in orientation and tone than scholars have generally assumed it to be.

Attempting, in the manuscripts headed 'Preparatory Principles Inserenda', to draft a 'Prefat', apparently to Comment on the Commentaries, Bentham inserted the marginal heading 'This work but introductory', and tried to parry in advance a certain kind of critical thrust:

What cannot escape observation is, that in all this work /these speculations/ nothing is in appearance done towards the attainment of that great and only legitimate end of all political speculations, the ascertaining in matters of law the point of expedience or inexpedience. (UC cxl. 21, 'PPI' 364)

The Comment might, he seems to have feared, be seen as a work of arcane philosophical analysis, lacking in practical utility. In retrospect the writing of the Fragment can be seen as a response to this sense of political deficiency. What Bentham actually points to in the manuscript passage we are now examining as compensating for the metaphysical and technical nature of the Comment is the work that lies beyond the Fragment, the hypothetical master-work comprizing IPML, OLG, and much more. This work was imagined as involving 40 chapters in a letter to Lord Ashburton of 3 June 1782,<sup>5</sup> and as requiring ten volumes in the 1789 Preface to IPML.<sup>6</sup> Its scope and much of its nature were foreseen, however, in 1774-5:

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<sup>1</sup> See Fragment (CW), p.473.

<sup>2</sup> Ibid., p.501.

<sup>3</sup> Ibid., pp.500-1.

<sup>4</sup> Of Laws in General, ed. H.L.A. Hart, London, 1971 (CW), [hereafter OLG].

<sup>5</sup> Correspondence (CW), ed. I.R. Christie, iii. 123-30. See also OLG (CW), Appendix E, pp.304-11.

<sup>6</sup> IPML (CW), pp.5-7.

The truth is the present is but a vestibule of the /Prodromus to a/ building that is to come; which has for its object no other than that important point which has been mentioned [i.e. the political point of the expediency of laws]. A work the business of which is the construction of a standard of right and wrong and the application of it to the several Laws that shall present themselves, and in consequence to the /several/ modes of conduct that are the objects of them: This was the end of all; this was that which presented itself to my mind, before the necessity of the present one was even so much as suspected.

Here Bentham asserts that his ultimate purposes are political: his 'speculations', he says, aim at legal 'expedience', which is to say political feasibility and applicability. It was en route to this political goal, he claims, that he found it necessary to embark on a tedious but essential philosophical project - the reconstruction of the language of legal analysis:

I found that in proceeding with the common stock of words I was unable so much as to name that branch of the Law or of man's conduct that was the subject of my disquisitions. Here, then, I was obliged to make a pause: to undertake a new and difficult work, in order to put myself into a condition to undertake what seemed then to me a work still more difficult, but which now I trust will be less so. Before I enter'd on the main work I had as it were my tools to make; I had my materials to parcel out and to describe, and to find names for. (UC cxl. 21)

Later in life Bentham was to turn to the concoction of tongue-twisting and sometimes eminently forgettable neologisms as his way of constructing a radically new vocabulary of legal and moral science. His earlier practice was quite different: the early manuscripts contain page after page of clarification, qualification and explication of established concepts. The analysis began with the question 'What things exist?',<sup>1</sup> to which the answer was that particular, discrete, concrete objects - and they alone - truly exist. This was a philosophical working hypothesis which Bentham could never see the use of questioning. He found it absurd that important elements even in the language of philosophy should be abstractions which were, worse still, defined only by resort to other abstractions. Theory must be connected to practice, to reality, by means of a language consisting entirely of terms definable and defined by reference to the perceived characteristics and motions of specific material objects. Devices such as 'Parsing',<sup>2</sup> and 'paraphrasis',<sup>3</sup> were thus not mere pedantic conveniences or curiosities but 'tools' of whose ultimate utility Bentham had not the slightest doubt. His fascination with the idea of a universal grammar and his pursuit of a complete code of laws applicable to the situations of all civilized nations went hand in hand. His search for a language which would convey reality seemed to him a necessary condition for the attainment of human control over that reality in practice. He thus felt compelled to enter the metaphysical maze, to explore the labyrinth of 'driest of dry metaphysics',<sup>4</sup> following a path which became so long and convoluted that he tired and despaired of it. He drafted apologies to his readers, explaining that the bulkiness of his explications made it impossible to publish them (UC cxl. 21). Eventually he decided that it was important that such endless disputations about words not be preserved in print (UC lxix. 36).

Bentham's response to Blackstone illustrates the blending of metaphysical/linguistic analysis with practical utilitarian purposes which we have just outlined. Bentham's Comment on the Commentaries was intended as a demonstration of the political 'inexpedience' of Blackstone's Commentaries in a very practical sense. On the way to this goal, Bentham

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<sup>1</sup> Cf. UC lxix. 52-3 (headed 'Chap.1, Key. What things exist') with UC lxix. 227 ('What things exist', 'PPI' 602-5) and 228 ('Entities Classed', 'PPI' 606-9) and also with UC lxix. 241 ('Substances the only real entities', 'PPI' 664).

<sup>2</sup> See OLG (CW), pp.243-4.

<sup>3</sup> For 'paraphrasis' see UC lxix. 170. See Ross Harrison's Bentham for a fascinating analysis of the idea of paraphrasis, especially pp.53-74.

<sup>4</sup> For Bentham's sense of the importance but tediousness of metaphysics, see UC lxix. 155.

became entangled in the web of philosophical analysis. He did not publish the bulk of that analysis. Instead, he completed and published the most direct and practical part of his response, the Fragment. In the Comment, however, and in other manuscripts still unpublished from the same period, Bentham expounded at length the philosophical and methodological presuppositions of the political theory of the Fragment, presuppositions which could only be suggestively sketched in the Fragment itself. In the remainder of this section we shall be concerned specifically with Bentham's characterizations in his 'Preparatory Principles Inserenda' manuscripts of 'Jurisprudence' in general, and of 'censorial jurisprudence' in particular.

It was, of course, in the role of 'censor' that Bentham attacked Blackstone. Bentham's own work combined exposition with censure. But Blackstone's failure was most evident in the uncritical nature of his work.<sup>1</sup> Bentham was convinced that this failure to censure was rooted in deficient metaphysics, but he chose, perhaps wisely, not to pursue that aspect of his case against the author of the Commentaries in the first instance. He gave to the public a dashing denunciation of the consequences of Blackstone's views - not (at least by his standards) an exhaustive analysis of their foundations. He contrasted the mere 'copying' of the Commentaries with the genuine 'thought' of other analysts of the British Constitution such as Jean-Louis Delolme<sup>2</sup> and the Baron de Montesquieu.<sup>3</sup> Ita lex scripta est, he said, was the 'only motto' Blackstone had 'stood engaged to keep in view'.<sup>4</sup> And in contrast to this politically ineffectual credo Bentham provided his own motto for a 'good citizen' under the rule of 'a government of Laws': 'to obey punctually; to censure freely'.<sup>5</sup>

There is irony in Bentham's use of the phrase ita lex scripta est to characterize and disparage Blackstone's jurisprudence. Was it not in fact rather Blackstone's heavy reliance on leges non scriptae that Bentham meant to pillory? Was it not Bentham's desire that both individual laws and bodies of law should be as fully scriptae as possible? Ita lex scripta est would do nicely as a fundamental motto of law and politics in a utilitarian society possessed of a complete corpus juris. Bentham's point was that only a law whose text conveyed fully and unambiguously its complete and exact meaning could be expected to evoke punctual obedience even from the most dutiful and civic-minded citizen body. His disagreement with Blackstone on this point was both categorical and crucial: it involved nothing less than Bentham's rejection of the tradition of natural jurisprudence, and his identification of 'censorial jurisprudence' as a radically different alternative approach to legal science.

Near the end of his discussion of 'the Nature of Laws in general' Blackstone had emphasized that laws must be understood and interpreted 'by their reason and spirit',<sup>6</sup> not merely textually. He cited Hugo Grotius' definition of equity as a principle used to 'correct' laws in adapting them to individual cases. It would, he argued, 'destroy the very essence' of equity were the juriconsult to attempt through 'established rules and fixed precepts' to 'reduce it to a positive law'.<sup>7</sup> Law without equity might be 'hard and disagreeable', but the pursuit of 'equity without law ... would make every judge a legislator, and introduce most infinite confusion'.<sup>8</sup> But the source of infinite confusion here, Bentham wrote in his manuscripts, was simply the Blackstonian/Grotian conception of equity. Theirs, he observed, was the language of what 'right reason dictates etc.' This was 'nonsense' and 'rubbish' which must be 'cleared away' if 'a new face' was to be put on the science of legislation. That task accomplished,

Grotius and Puffendorf, rich in facts /history/ but almost altogether

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<sup>1</sup> Fragment (CW), pp.397-8.

<sup>2</sup> Ibid., p.473.

<sup>3</sup> Comment (CW), Appendix A, pp.278-9.

<sup>4</sup> Fragment (CW), p.398.

<sup>5</sup> Ibid., p.399.

<sup>6</sup> Blackstone, Commentaries on the Laws of England, ii. 61.

<sup>7</sup> Ibid., ii. 61-2.

<sup>8</sup> Ibid., ii. 62.



destitute of all reasoning but what is of the kind just-mentioned, will be consulted only as historical common-place books. Burlamaqui who has no facts, and whose work is made up altogether of this mock-reasoning, will sleep altogether undisturbed.... Utility will reign sole and sovereign arbitress of all disputes.... The only evidence admitted will be matters of fact ... against opinion, under every other guise than that of mere opinion, the door will be shut inexorably. (UC lxix. 232)

It was its dependence on this sort of 'mock-reasoning' that reduced Blackstone's treatment of the nature of laws to a mere 'digression stuffed into the belly of a definition' in Bentham's eyes.<sup>1</sup> After barely alluding to the process whereby 'the rule of civil conduct' was 'prescribed to the inhabitants of England',<sup>2</sup> he moved directly to a loose and rhetorical history of how the laws of England had come to be just as they should be.<sup>3</sup> Bentham's own history of law was a story of a totally different nature. He explained the 'original sense' of 'Law' thus:

The term Law ... was invented it should seem to denote a general Command of Public Government ... [which] was observed to produce a certain degree of uniformity among the human acts that were the objects of it.

By a 'slight' and 'natural extension', the term 'Law' came to be applied not only to an article of statute law, but to one of common law. Next in this rather conjectural history came a 'second extension of it from an article of municipal Law, to a supposed Moral Law of Nature, prescribing what ought to happen' (UC lxix. 142). The sequence, apparently meant to reverse the conventional chronology, concluded with a 'Third extension of it ... to a quite different thing under the name of a Law [of] Nature, asserting what in certain cases, as it is supposed, does happen'. (UC lxix. 143) By comparison to this account Blackstone's 'digressed' not by virtue of its historical character, but because it failed to focus attention on the roots of law in reciprocal political relations of command and obedience. In Bentham's conjectural history of law, notions of equity were the children twice removed, not the parents, of the habitual political conduct of rulers and ruled.

Beyond his claim that Blackstone has misunderstood and/or misrepresented the socio-political origins of law, Bentham attacked the political consequences of what he referred to as common law jurisprudence. His pejorative label for it was 'expository' or 'conjectural jurisprudence' (UC lxix. 203), and he denounced it as a basis for lawless government:

There are in the world two ways of carrying on the business of Government. The one is that of governing by Laws. The other is that of governing without laws. When the business is carried on without Laws, it is either by particular transient commands, or by punishment: by punishment alone; without any commands general or particular to announce it. Of these three methods the two first may be comprehended under the common denomination of enuntiative; for under [both] ... the mode of conduct which it is the will of the governing power to have observed is announced a time before a man is punished for not observing it. The last may be indicated by the epithet silent; For by this nothing is in words announced.... The process in the two first is, first a word, then a blow: in the last it is pure blows without a word.... On the three objects thus distinguished shall we now stamp their current appellations? The two first are Statute; the last is Common Law - Lawyers, behold your idol. (UC lxix. 195)

The only genuine law was thus statute law: civic life in a common-law-based community was but a series of 'blows without a word'. Similarly, the only genuine jurisprudence was the jurisprudence of statute law. Jurisprudence in general Bentham defined as 'the science of /art of knowing/ what has actually been done in the way of internal Government'. The 'Jurisprudence of Common Law' was, naturally, 'the art of knowing what has been done in the way of Government according to the silent method', while that of statute law expounded government by the 'enuntiative method'. Common law jurisprudence could only enable its practitioners, on the basis of past cases, to 'conjecture what will probably be done in future ones supposed similar'. In statute law jurisprudence the declared intent of government

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<sup>1</sup> See Fragment (CW), p.396.

<sup>2</sup> Blackstone, Commentaries, iii. 63.

<sup>3</sup> See Fragment (CW), pp.400, 407.

proceeding by the enuntiative method could be known with 'certainty' (Ibid.). But all of this was, as Bentham put it, mere 'words and blows'. The censorial element essential to a true science of jurisprudence was entirely absent. A politically critical jurisprudence was needed, but none as yet existed:

A Science which might be conceived is, the art of knowing what ought to be done in the way of internal Government. Now the fact is no such science as yet existeth. No wonder therefore there should be no name for it ... no such book hath as yet appeared as professes to contain a body of any such science, or any regular branch of such a body.... Bodies of Jurisprudence we have several: For our own state and for most others (that are tolerably civilized). Body of this art that I am speaking of, we have none. The science (the art, it matters not which) is not born. Montesquieu and Beccaria have made large advances towards it's production - Our Author [i.e. Blackstone] has done what he could to prevent it's birth....

What name shall we find for it? Shall we call it the Art of Legislation? Shall we call it critical Jurisprudence? Shall we call it the Science of Internal Politics? Shall we call it the science of Legal Politics? Shall we call it the science of Jurisprudential Politics?<sup>1</sup>

Characteristically, Bentham soon conceived of a cluster of works which might contribute in various ways to the development of this science. One bore the working title of 'A Key to Universal Jurisprudence', with the following considered as possible alternatives: 'Elements of the Metaphysics of Jurisprudence', 'Metaphysics of Jurisprudence', 'Novum Organon Juris', 'A Key to the Nomenclature of Universal Jurisprudence', 'Nomenclature of Universal Jurisprudence'. (UC lxix. 214, 'PPI' 506) This array of titles shows that this particular work was aimed at that defining of terms, that 'making of tools' which Bentham, as we have seen, found necessary as a preliminary to the exposition of his new science, his new 'Theory of Politics' (UC cxl. 60). This initial treatise, he thought, would have to deal with metaphysics, to show 'the origination' of our ideas; logic, to clarify our 'method of marshalling them'; 'Grammar Universal', concerning 'the species of the signs of them'; and 'Grammar Particular', dealing with 'the different individual signs that are made use of in the different languages for the same species of idea' (UC xcvi. 342). A proposed book on the 'Principles of Universal Law - applied chiefly to the /estimating the merits [of the]/ Laws of England' (UC lxix. 227) might well have formed a bridge between the pure linguistic analysis of the 'Key to Universal Jurisprudence' and more practical works to follow. Almost three hundred pages of manuscripts headed 'Crit[ical] Jur[isprudence] Crim[inal]'<sup>2</sup> were to provide the basis for a work on the 'Policy of (Penal) Jurisprudence' (UC lxix. 13), which in turn may well have been expected to form part of a still larger work on punishment. The 'Theory of Punishment' Bentham described in 1776 as part of 'a work to which if ever it should be completed I intend to give some such title as Principles of Legal Policy'.<sup>3</sup> Judging by the titles Bentham considered in some measure appropriate for it, this last work appears to have been that book which was to give Bentham's new science of censorial jurisprudence to the world: 'Principles of Legal Policy', 'Philosophy of Jurisprudence', 'Law as it ought to be', 'The Policy of Jurisprudence', 'Principles of Legal Policy adapted to the Jurisprudence of all nations ... but more particularly to the English. Part the 1st comprehending so much of the Penal Law as relates to offences against individuals. With an introduction in which is contained what is thought necessary to be premised ... relating to Law in General.' (UC cxl. 14) Fragment on Government and Comment on the Commentaries are but as the tip of an iceberg in relation to this larger work, or family of works. The full scope and exact nature of Bentham's art-and-science of censorial jurisprudence will only be seen clearly when more of the components of the 40-chapter work described in the 1782 Ashburton letter, more of the tomes in the series outlined in the 1789 Preface to IPML, and

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<sup>1</sup> This passage begins on UC lxix. 195, 'PPI' 432, beside the marginal heading 'Jurisprudence Critical', and is continued to completion on UC lxix. 197, 'PPI' 438, under the same heading.

<sup>2</sup> These are found at UC lxix. 1-42, UC cxl. 1-20 and UC clxix. 262-70.

<sup>3</sup> See Bentham's draft letter to Voltaire, November 1776, Correspondence (CW), i. 367.

more of the manuscript materials relating to Bentham's 'capital work' on jurisprudence<sup>1</sup> are available to the interested public. What I have seen among the relevant unpublished materials suggests that we have yet to appreciate the extent to which the early Bentham was, whether he availed himself of the term or not, a political radical from 1769 onward.

### Censorial Jurisprudence and Utilitarian Politics

As the various titles Bentham considered for his most comprehensive work on critical jurisprudence indicate, 'philosophy', 'jurisprudence' and 'policy' were all aspects of one massive project in his eyes. In the Fragment he had spoken of the perfection of knowledge.<sup>2</sup> It seems that nothing less would in his view suffice as a final philosophical goal. Indeed, some of his frustration at the tediousness and complexity of his philosophical researches may have resulted from the initial establishment of such lofty standards for success. If Bentham was a Utopian thinker, his Utopianism began with his simplistic and impossibly ambitious metaphysical theorizing. It was only because he refused even to pause over the sorts of epistemological considerations with which David Hume had wrestled heroically that Bentham could speak of the perfection of knowledge with such confidence. What to a more subtle philosopher would have been working hypotheses about basic metaphysical questions were to Bentham certainties - certainties in the sense that there was no use in questioning them:

I assume in a word the existence of what is called the material world.... All this I say I assume; and that without scruple: notwithstanding it has been the subject of so much controversy. I assume it boldly for this reason: because in point of practice, no bad consequences can as every one is ready to acknowledge possibly arise from supposing it to be true; and the worst consequences can not but arise from supposing it to be false.<sup>3</sup>

It was as a result of this firm belief in the perfectibility of knowledge for practical purposes<sup>4</sup> that he could go on to dream of 'the perfection of the law' and even the optimization of 'the condition of mankind as far as depends upon the law'.<sup>5</sup> But he never, even at his most utopian moments, spoke of the 'perfection' of the human condition comprehensively. Indeed, he emphasized the limits to what the perfection of the law could accomplish. Pain, involuntary toil, inequality between rich and poor, frustrated hopes and aspirations, and incorrigible vulnerability to the alternative evils of insecurity and coercion could never be eliminated. They were direct results of man's material and hedonistic nature (UC cxlii. 200). Bentham deliberately and explicitly dissociated himself from utopians mesmerized by 'paradisaical' visions of a human nature and human societies transformed beyond recognition.<sup>6</sup> Nor in the realm of politics was he guilty of expounding that sort of utopian theory which proposes a politics to end all politics: which aspires to resolve precisely those sorts of disputes whose essentially interminable quality gives rise to the need for political institutions and processes in the first place. His political theory assumed continuing contestation among individuals. It aimed to transform the terms of such disputes

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<sup>1</sup> Bentham to Jeremiah Bentham, 1 October 1776, Correspondence (CW), i. 358: 'I am now at work upon my capital work: I mean the Critical Elements of Jurisprudence.'

<sup>2</sup> See Fragment (CW), p.393.

<sup>3</sup> See UC lxix. 52-3, headed 'Key. What Things Exist. 1-5.' Cf. UC lxix. 241, 'PPI' 611, marginal heading 'Substances the only real entities'.

<sup>4</sup> To 'perfect' knowledge for Bentham meant firstly, to organize and exhaustively classify it, and secondly, to maximize its utility.

<sup>5</sup> This interesting and important passage is quoted at much greater length in Long, op. cit., pp.148-9.

<sup>6</sup> He had in mind particularly Joseph Priestley and the Marquis de Chastellux. See UC cxlii. 211-13.

such that they would all become in principle resolvable. But it never assumed that society could become friction-free, so to speak. Utilitarian policy aspired to the management and reduction of disputes, but never to their elimination.

We have seen, however, that while he did not speak of the perfection of the condition of mankind without qualification, he did speak of the optimization of that condition 'as far as depends upon the law', and also of bringing 'the perfection of the law' to its 'acme'. The subject matter of the science of law, like that of metaphysics, was in his view complex but finite. Both sciences could therefore be perfected: both their contents and their functions could be exhaustively enumerated. Indeed, the attempt to enumerate them is the story of much of Bentham's life. In a remarkable manuscript passage not, I think, hitherto noticed, Bentham considered the consequences for the science of law itself of the attaining of such perfection. He observed that the perfecting of the science of critical jurisprudence would - at least theoretically - so transform, so improve the operation of the law that further developments in critical jurisprudence would be rendered redundant or nugatory. He imagined this process as having two stages. First, the transformation of common into statute law would deprive common law jurisprudence of its 'object', or point. By such a development Bentham felt that 'the common end of both would be (infinitely) better answer'd' (UC lxix. 197). The second stage of the process was even more remarkable:

Make Statute Law speak plain and the whole science vanishes.

Why should it be a matter of Science to understand that which is nothing but a description of the ordinary modes of action the parties concerned in [a case] are liable to be engaged in?<sup>1</sup>

The perfection of the law would render it dispensable. But politics is not co-extensive with the law. Politics deals with human nature comprehensively, and not only with that part of it which 'depends upon the law'. Were the utopian search for perfection the only, or even the central, thrust of Bentham's 'Theory of Politics', one might be tempted to dismiss his political thought as a simplistic by-product of his philosophical encyclopedism, more notable for its neatness than for its substance - or its utility. But this would be a mistake. Reflections on the distant logical implications of the perfection of a radically new science of legislation did not distract Bentham altogether from the task, undertaken with zest in the Fragment, of attacking the manifest demerits of the existing British Constitution and a variety of concrete features of contemporary political life. The censor as Bentham saw him could be neither a philosopher of jurisprudence in any narrow or esoteric sense nor a political dreamer: he must, as Helvetius had warned, be ready and able at any point to convince a self-interested public of the practical value of his works.

Bentham was not lacking in specific complaints nor in concrete proposals regarding the practice of politics in the England of his day. In one manuscript attempt to 'sum up' Blackstone's 'demerits', he contrasted himself as 'censor' and 'citizen' with his predecessor as slavish 'Panegyrist'. Blackstone's failure, this passage asserts, stemmed from a faulty conception of his role as an author. It was regrettable, Bentham observed,

[t]hat he should so often be the divine when he should be the politician, the Orator when he should be the Preceptor, the Copyist when he should be the Author, the Panegyrist when he should be the Censor, the subject, not to say the slave, when he should be the citizen. (UC xcvi. 66)

Bentham's understanding of the citizen as censor was central to his political thought, and it was a radical concept - radical in the sense that the balance of punctual obedience and free censure characterizing the civic life of the citizen presupposed at least the possibility of a community of individuals who would, like Bentham, praise their great men 'not because they occupied their station, but because they deserved it'.<sup>2</sup> Moreover, Bentham's theories of sovereignty and citizenship were inter-dependent. A government of laws could co-exist with, indeed originate from, an omniscient Parliament only given a body of citizens of the Benthamite kind. The idea of 'a legal limitation' to Parliamentary power he considered a 'dangerous notion', reducible to a 'use of [the] idea of L[aws] of N[ature] to generate disobedience' (UC lxix. 146, 'PPI' 229). 'Locke's dictum', he wrote, 'that by a violation of the original compact the constitution is dissolved' was both 'mischievous' and 'futile' (UC lxix. 146, 'PPI' 230).

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<sup>1</sup> See UC lxix. 197, marginal heading 'Jurisprudence - what makes it a Science'.

<sup>2</sup> Fragment (CW), p.473.

The only thing that gives the sovereign body the power it possesses is the habit of submission. The only thing that can limit the same power is the same habit of submission. (UC lxix. 145, 'PPI' 228)

Only by improperly separating his theories of citizenship and sovereignty can an interpreter portray Bentham as an inconsistent thinker attracted in youth to the idea of despotism and in old age to democracy. It is true that he scorned the 'multitude of warm hearts and weak heads' who would stigmatize an author for using the very word 'despotism' without appropriately pejorative intent. His view was that even in a 'well-modelled Government' like England's, legislative and executive power must in principle be susceptible to combination in the hands of one 'Supreme' agency. Adjectives such as 'Despotal', 'Magisterial' or even 'Autocratic' could properly be used to describe this power (UC lxix. 186-7). But the intelligent citizen would realize that such power was functionally essential to the existence of a sovereign state, and that theories of politics which promised to eliminate it dealt in fiction and fantasy. Sovereignty entailed 'despotism' in this sense. On the other hand this form of despotism was entirely compatible with the modes of democratic politics advocated by the Bentham of Constitutional Code. It was precisely because of his continuing belief that there must be a 'supreme' power of some description in every 'well-modelled' government that Bentham reached the conclusion that this power must be lodged with the majority of the electorate after his own experiences had convinced him of the impossibility of avoiding the domination of 'sinister interests' under any other arrangement. There is no inconsistency in this regard between the young and the old Bentham. But his theories of sovereignty and citizenship must always be read in tandem if misunderstandings of his thought are to be avoided.

The spectre of 'despotism' must not be used to arouse popular resistance to the necessary plenitude of sovereign power in any state worthy of the name. But 'despotism' properly understood could be clearly distinguished from a lawful and responsible government, and Bentham made his support for the latter type of regime quite clear. He held that the distinction between a despotic government and what was generally referred to as a 'free' government depended not on any difference in the quantity or degree of power possessed by the sovereign - in each case it must be acknowledged that the extent of such power was, if not 'infinite', at least 'indefinite'<sup>1</sup> - but on 'the responsibility of the governors' and the security of the governed, both groups operating within the law.<sup>2</sup> In his 'Preparatory Principles Inserenda' manuscripts he argued that 'Free Government' and 'Free Constitution' were improper, 'metonymical' expressions, arising

from the improper sense of the word liberty, where it is used for /domestic/ security against those in authority. The proper expression would be, a popular government, a popular constitution. Every government being necessarily powerful can be no otherwise than free; that is unrestrained by any restraint that can be called legal. Yes but in another sense a Government may be said to be free, as providing for the freedom /i.e. security/ of the governed. A Government may be said to be more or less free, as more or less care is taken in it /by it/ of the /political liberty/ security of the people. (UC lxix. 153, 'PPI' 258)

Not freedom, but responsibility and accountability are the virtues to be sought in constitutions and governments. These can be achieved, as we shall see, if judges and legislators are provided with a standard comprehensible to all and consistent from case to case, such that the plenitude of sovereign power ceases to carry with it the implication of arbitrariness. Censorial jurisprudence, embodying as it does the standard of public utility, offers the possibility of such open, accountable and yet strong government. Political liberty is really popular security against misrule, and it flows directly from the attainment of consistency and accountability in government. The unhappy reality of his England, Bentham wrote, was that: 'instead of a House of Commons and of Lords, we have 2 Houses of Lords, or two secret inquisitions -two Venetian Senates'. He saw in this development a worrisome parallel with Augustus' prohibition of the publication of the acts of the Roman Senate in a period of incipient despotism of the arbitrary type. He called for 'Notoriety' - for publicity: for the promulgation and public discussion of the acts of government as the obvious remedy

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<sup>1</sup> Ibid., p.484.

<sup>2</sup> Ibid., p.485.

(UC xcvi. 242).

But did he call for democracy? As with the question: was he a political radical in the 1770s?, the answer has two parts. He did not in either case use the term at issue. He did not call himself a democrat, nor a political radical. But I have argued that the term 'political radical' may none the less be applied to him in a certain sense, and the case is similar with the label 'democrat'. It seems unlikely that the step of declaring himself a democrat ever occurred to Bentham before 1789, and for some years after that date it would have been highly imprudent for him, as he clearly saw, to do so. His political thought in the 1770s and 1780s was simply not couched in terms of mutually exclusive or morally competitive concepts of aristocracy and democracy. But he does seem to have grasped, at this early phase in his career, a number of implications flowing directly from his advocacy of the utility principle which point toward the principle which J.S. Mill many years later claimed to have found in Bentham's writings: that in matters of morals and legislation, each should count for one and none for more than one. In that interesting chapter (II) of the Fragment on 'Forms of Government', to which surprisingly little attention has been paid by commentators, Bentham observes that Blackstone, perhaps because of his eagerness to 'hold the cup of flattery to high station',<sup>1</sup> has managed in his account of the 'Antients' to make a nonsense of the idea of democracy. He has so defined democracy that it constitutes, not a form of political society at all, but a 'state of nature'.<sup>2</sup> Bentham's response, after a brief review of the elitist nature of Athenian democracy, is as follows:

Civil lawyers, indeed, will tell you, with a grave face, that a slave is NOBODY; as Common Lawyers will, that a bastard is the SON OF NOBODY.

But, to an unprejudiced eye, the condition of a state is the condition of all the individuals, without distinction, that compose it.<sup>3</sup>

Perhaps following Helvetius, Bentham adopted the view that the task of the moralist and political theorist was to induce beings invariably (and in that sense equally) motivated by self-interest to maximize public utility. His interdependent theories of sovereignty and citizenship may have been designed to make this possible. His early manuscripts show that he went farther, however, with his investigations of the problems of a politics based on 'interest'. Anticipating the problem of 'sinister interests' which was later to occupy so much of his attention, Bentham asked himself when, and under what circumstances, the 'interest' of the 'Governors' in a society might be 'the same as that of subjects'. His answer was that where citizens had 'the right of voting in the Election of [their Governors]', and thus 'the same persons [were] alternately Governors and subjects', then and only then would it be 'in the interest of persons in Government to consult the interest of the subjects' (UC lxix. 158, 'PPI' 277). Elsewhere, reflecting on another aspect of the concept of 'interest' in its political context, he distinguished between an interest strong in 'magnitude' (i.e. intensity) and 'one that is strong only in extent ... that is in the number of those that are partakers of it'. The intensive interest, he noted, has 'many a great advantage' over the extensive:

A strong interest has more weight in politics than an extensive one. A great interest is felt when perhaps a little interest is scarce seen. Those among whom a great interest is shared, being few may form themselves into a body and learn to act in concert; if they are already embodied, their power is still more formidable.

If the stronger interest taking extent into consideration were universally prevalent, every thing would be as it should be: there would /could/ be no bad government; men would every where be as happy as good government could make them. (UC lxix. 168, 'PPI' 317)

Was the phrase 'every thing would be as it should be' in this passage a deliberate (if antiphonal) echo of 'every thing is as it should be' Blackstone? In that case, Bentham might seem to be saying that in opposition to Blackstone's aristocratic vision of a civilized political society he offers a conception of 'good government' as consisting essentially in majority rule. This formulation, however, goes too far. The 'universal prevalence' of what we may call the 'majority interest' in society is one thing: majority rule is quite another.

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<sup>1</sup> Ibid., p.412.

<sup>2</sup> Ibid., pp.458-9.

<sup>3</sup> Ibid., pp.459-60.

Where the latter entails rule by the people, the former only implies rule for them, i.e. in their interest. Bentham spent many years trying to improve the performance of existing political and legal elites before resorting to democratic reform to secure the public interest. But he seems to have recognized from a surprisingly early date that rule in the majority's interest and a broadened franchise were major implications of his analysis of 'intensive' and 'extensive' group interests, and of their relationship to the public interest as a paramount object of political theory and practice.

In Bentham's legal and political theory, with its reliance on the principle of utility and the felicific calculus, legislators and judges would be expected to weigh and balance competing interests, considering carefully, among other things, their intensity and extent. In another section of his 'Preparatory Principles Insuperanda' manuscripts, beside the marginal heading 'Laws and Decisions - Calculation they ought to be grounded on', he provided a hypothetical example: the case of a courtroom dispute between 'Titius' and 'Sempronius' over a piece of property. To justify an award to one or the other party, Bentham asserted, the judge or legislator would have to be able to prove 'that the happiness of the state, Titius and Sempronius both included, will be greater' following this award than it would have been in the wake of any alternative one. As we would expect, he asserts that 'to do this he must sum up ... accounts'. A standard rendering of felicific accounts follows. The goal of the exercise is to maximize the 'ballance of pleasure accruing to the society'. This is the form taken in practice by the principle cited above, that the most extensive interest in society should be in all cases 'prevalent'. Neither Titius' nor Sempronius' interest is the supreme factor in the judicial or legislative calculus. The public interest, the 'happiness of the state', includes - and is included in - the personal or group happiness of parties in disputes at law. Bentham imagines the 'ballance' of pleasure or good accruing to society from a given decision or policy as having a numerically represented value: 'The value of the number that represents [this] ballance', he asserts, will 'represent the chance that the act of our Legislator or Judge has for being conformable to utility' (UC lxix. 98-9, 'PPI' 441-3, 445-6).

Bentham has sometimes been seen as blithely confident that the utilitarian calculus would remove all doubt and uncertainty from the making of difficult legal/political decisions. His actual position is not so naive. 'There is', he says, 'no certainty in these calculations'. They are 'but guess-work'. Yet he 'boldly affirms' that 'bad as the chance may be which this method gives us of judging right, no other method is there that affords so good an one'. With all its limitations, the criterion for judging private claims and public policies outlined in his example is still, he maintains, the standard of standards, that from which deviation constitutes error. It alone is fully 'satisfying to the mind'. Judges and Legislators whose work has risen above the capricious and arbitrary will always be found to have 'proceeded at least upon some implicit[?] and confused perception of this mode of calculation' (Ibid., 'PPI' 443). Thus, to ease the minds of 'the sages of the Law', after the 'wild metaphysical excursion' of this hypothetical model, Bentham promises to 'set them down ... in the old beaten track they have been used to travel in': he assures them that for them 'in general the line of uniformity is the line of utility - That the road to utility lies in the beaten track of precedent'. His analysis, he maintains, is but a 'just' account of what judges and magistrates already actually do. Like M. Jourdain, he says, they have been 'talking prose' all of their lives 'without knowing a syllable of the matter' (UC lxix. 199, 'PPI' 446). His intention is to be radically penetrating, but not (yet) radically subversive in his portrayal of the essence of the legal and political process of the weighing of private and group interests in relation to that most extensive and prevalent of interests, the public one. It is a portrayal that is fundamental to the political theory of Fragment on Government. That it should have been so clearly laid out in the manuscripts of the 1770s and so confidently relied on in the Fragment, not to speak of later works, is an important indication of the depth and significance of Bentham's early political thought.

The features of Bentham's early political thought which I have reviewed here are only sketchy and suggestive. But I think that they are sufficiently striking and unambiguous to permit me to put forward, at least for the sake of argument, a claim that in expounding and developing the principles and prescriptions of his 'censorial jurisprudence' Bentham also began to outline a distinctively utilitarian but far from utopian conception of a 'well-modelled' political society. It was a law-governed society exhibiting balanced and reciprocal relations between sovereign and citizens; a society in which public interests, defined as those most extensively shared among subjects and citizens, outweighed intense but localized interests in the scales of utilitarian calculation; a society whose well-being was understood to be identical with the security (or political liberty) of 'all the individuals, without

distinction, that compose[d] it'. It was no ideological commitment, no spirit of partisanship, no allegiance to any particular tradition of political thought or writing that led Bentham to integrate such characteristics into his model of a desirable political society. Nor did some abstract Utopian urge lie behind his theorizing about politics. His prescriptions flowed simply and directly from the logic of censorial jurisprudence itself: they were merely the results of a critical approach to the 'business of government'. They were the 'elements of critical jurisprudence'. They were also the elements of a uniquely Benthamic - not to be confused with Benthamite - political radicalism.



# BENTHAM AND THE POLITICAL ECONOMISTS OF THE NINETEENTH CENTURY<sup>1</sup>

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## I

Jeremy Bentham's influence on political economy both in and since his own time has been long and widely discussed and the discussion has produced widely varying assessments. Perhaps the assessment which has gained the widest acceptance is that made by Halévy who wrote that 'the part played by Benthamism in [the] evolution of Utilitarian political economy between Adam Smith and Ricardo ... is generally held to have been an important one'.<sup>2</sup> Evidence for this view is provided by earlier commentators such as James Bonar who held that 'the influence of Utilitarianism, and especially of Bentham's Utilitarianism, on Political Economy has been profound and enduring'.<sup>3</sup> Later, and yet more generally, Wesley Mitchell viewed Bentham as 'one of the men who has exercised the most potent influence upon the development of economic theory'.<sup>4</sup>

Yet there have been equally weighty dissenting opinions expressed. Notable among them is that of Schumpeter, according to whom

there is no point in calling Ricardo a utilitarian, though he was personally connected with the group and may have professed sympathy with its creed.... It was natural for Bentham and the Mills to see themselves in the role of philosophical patrons of economics and to assume responsibility for an alliance between economics and utilitarianism that was acquiesced in by many later economists, such as Jevons and Edgeworth, but it was neither necessary nor useful. This alliance is the only reason why utilitarianism looms so large in the economists' picture of nineteenth-century thought, much larger than is justified by its importance either as a philosophy or as a factor of the *zeitgeist*.<sup>5</sup>

Another dissenting view, of a rather different type, has been more recently expressed by Professor D.P. O'Brien who has particularly stressed the limited contribution of the utilitarians to classical economic theory.<sup>6</sup>

While it is thus not difficult to demonstrate that Bentham's influence on political economy has been very variously assessed, it has not been very thoroughly surveyed, at least since the time of Halévy. My purpose in this paper is to undertake a fresh review of the relations between Bentham's ideas and those of the political economists, not only of the classical Ricardo-Mill school, but also of the later nineteenth century. Through it I shall try to suggest reasons for the widely varying assessments of the influence of Bentham on economic thought. The emphasis of the paper will be mainly on Bentham's ideas as perceived by the economists rather than as presented by Bentham himself.

Perhaps one reason why such a review has not been undertaken recently is that the

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<sup>1</sup> An earlier version of this paper was presented to the conference of the International Bentham Society at University College London on 6-7 July 1987. The author wishes to acknowledge the help which he has received in its revision from Dr. J.R. Dinwiddy, Professor D.P. O'Brien and Professor Donald Winch.

<sup>2</sup> Élie Halévy, *The Growth of Philosophic Radicalism*, trans. Mary Morris, London, 1928, p.265.

<sup>3</sup> James Bonar, *Philosophy and Political Economy*, London, 1893, p.218.

<sup>4</sup> Wesley C. Mitchell, *Types of Economic Theory from Mercantilism to Institutionalism*, ed. Joseph Dorfman, 2 vols., New York, 1967-9, i. 193-4.

<sup>5</sup> Joseph A. Schumpeter, *History of Economic Analysis*, London, 1954, p.408.

<sup>6</sup> Denis P. O'Brien, *The Classical Economists*, Oxford, 1975, p.25.

influence of Bentham's ideas on economists has been more general and pervasive than specific and localised. It is consequently not easy to identify and even less easy to measure. In an attempt to make the problem more manageable, let us begin from a familiar proposition in Bentham studies - that when intellectual influence is in consideration there are various Benthams to be taken into account.<sup>1</sup> So if we paraphrase Professor Robson's question and ask 'Which Bentham was the nineteenth-century economists' Bentham?' it might at first appear that there is an obvious answer. Surely it must be Bentham the political economist, for Bentham published much, and wrote more, on economic subjects and is regarded by modern scholars in the history of economic thought as a political economist of no small stature.<sup>2</sup>

At first sight it would seem that this must have been what Bentham himself had in mind when he made the often quoted statement attributed to him by Bowring - 'I was the spiritual father of Mill, and Mill was the spiritual father of Ricardo: so that Ricardo was my spiritual grandson.'<sup>3</sup> Yet a closer reading of the context of this remark makes clear the truth of Professor Hutchison's comment that 'as regards economic ideas ... there seems to be no more misleading claim than [this of] Bentham's'.<sup>4</sup> The claim in fact related to political rather than economic ideas; Bentham mentions that Ricardo had several times intended to quote A Fragment on Government in the House of Commons, 'but his courage failed him, as he told me'. In the next sentence, he goes on to reveal no very high opinion of Ricardo's economic analysis: 'In Ricardo's book on Rent, there is a want of logic. I wanted him to correct it in these particulars, but he was not conscious of it, and Mill was not desirous. He confounded cost with value.'

Overall these few paragraphs give a very clear indication of the true relation between Bentham the economist and his classical contemporaries. Bentham appears as critical of the economics of Ricardo and James Mill; but his own economic ideas were not held in great regard by them or their successors in the nineteenth century. True, his Defence of Usury was well known to all of them, and highly esteemed; John Stuart Mill seems to have summarized opinions on this fairly when he wrote that a legal limit to the rate of interest 'though approved by Adam Smith, has been condemned by all enlightened persons since the triumphant onslaught made upon it by Bentham in his Letters on Usury [sic], which may still be referred to as the best extant writing on the subject'.<sup>5</sup>

If Defence of Usury was Bentham's best known economic work so far as nineteenth-century economists were concerned, this was largely because of its special position as one of the few accepted criticisms of Adam Smith's Wealth of Nations. Like his later Supply without Burthen (1795), it was mainly a tract on policy containing little economic analysis and there seems much merit in Professor Lieberman's recent suggestion that it should be seen as a direct application of legislative rather than economic principles.<sup>6</sup>

As to the core topics of economic theory - value, production and distribution, growth, employment and money - it has always to be borne in mind that much of what we now know Bentham to have written on these topics was either not accessible to nineteenth-century economists at all or accessible only in more or less garbled form after 1843 through the Bowring edition. The 'Manual of Political Economy' (1793-5) and the 'Institute of Political Economy' (1801-4) are perhaps the most important cases in point.

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<sup>1</sup> John M. Robson, 'Which Bentham was Mill's Bentham', The Bentham Newsletter, VII (1983), 15-26.

<sup>2</sup> Terence W. Hutchison, 'Bentham as an Economist', Economic Journal, LXVI (1956), 288-306.

<sup>3</sup> The Works of Jeremy Bentham, ed. John Bowring, 11 vols., Edinburgh, 1843, x. 498.

<sup>4</sup> Hutchison, 'Bentham as an Economist', 305.

<sup>5</sup> John Stuart Mill, Principles of Political Economy (vols. ii and iii of Collected Works of John Stuart Mill, ed. V.W. Bladen and John M. Robson) Toronto, 1965, iii. 923.

<sup>6</sup> David Lieberman, Political Economy and Jeremy Bentham (forthcoming), cited by permission of the author.

Even so, such of Bentham's writings on the central questions of economic analysis as were available to his contemporaries and successors among the political economists do not seem to have impressed them much. The leading case which has to be cited here involves the very same two economists whom Bentham regarded as his 'spiritual son and grandson', James Mill and David Ricardo. As is now well known, for about two years prior to 1801 Bentham had been much occupied with monetary issues and in April 1801 was considering publishing a pamphlet entitled 'The True Alarm, or Thoughts on Pecuniary Credit', as a contribution to current debate. When he later abandoned that project in favour of the idea of a larger treatise on money and prices, he turned over his manuscripts for editing and translation to Étienne Dumont in Geneva. Some ten years later, when interest in monetary questions had reached a new peak in the Bullion Controversy, Dumont sent the French translation, which he had made with no little difficulty from Bentham's papers, to James Mill who in turn asked Ricardo to write out his comments on it.

These comments were not published until the appearance of Volume iii of Sraffa's edition of Ricardo's Works in 1951, but from them it is clear enough why, after a meeting with Ricardo and Mill in January 1811, Dumont did not proceed with publication. From the time of Smith onwards it had increasingly become a feature of the accepted economic orthodoxy that all savings were translated into productive investment and that an increase in the money supply must lead to an increase of prices rather than an increase of economic activity and employment. From this orthodoxy Bentham chose to depart - in ways which many modern economists would consider valid and perceptive, but which to Ricardo and Mill seemed little more than a series of fallacies and heresies. As Professor Hutchison has said, 'Ricardo, in fact, could see nothing at all in Bentham's doctrine, just as he could see nothing at all in Malthus' ideas on effective demand, and J.B. Say's ideas on utility and value.'<sup>1</sup> Likewise, it might be added he could see nothing in Bentham's ideas on utility and value, for where these were set out in the translation Ricardo's only comment was, 'I like the distinction which Adam Smith makes between value in use and value in exchange. According to that opinion utility is not the measure of value.'<sup>2</sup>

On the other hand, in a paper read at the first Bentham Studies Conference in 1979, Professor Hollander has indicated the possibility that Ricardo's case for making the falling profit rate a consequence of land scarcity - rather than of 'competition of capitals', as Smith had contended - may have been due to the influence of Bentham's ideas. On the available evidence, though, this remains no more than 'an open possibility'<sup>3</sup> and as such would not seem to justify any major revision of Jacob Viner's earlier judgement that 'the Ricardian economics was not wholly acceptable to Bentham, nor Bentham's economics at all acceptable to Ricardo'.<sup>4</sup> Since, largely through the influence of the Mills, father and son, and J.R. McCulloch, it was Ricardian ideas which dominated English political economy until the 1860s, Bentham's ideas on economic theory came to be little regarded. When a new generation decided to 'fling aside, once and for ever, the mazy and preposterous assumptions of the Ricardian School'<sup>5</sup> it was not to Bentham the economist that they looked for inspiration, but to another Bentham.

What other Benthams were there, then, in the perception of the economists of the last century? Two others, I would suggest, although in reality these were only aspects of one - Bentham the 'writer on jurisprudence', as the Dictionary of National Biography described

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<sup>1</sup> Hutchison, 'Bentham as an Economist', 299.

<sup>2</sup> The Works and Correspondence of David Ricardo, ed. P. Sraffa, 11 vols., Cambridge, 1951-73, iii. 284.

<sup>3</sup> Samuel Hollander, 'The Role of Bentham in the Early Development of Ricardian Theory: a Speculative Essay', The Bentham Newsletter, III (1979), 13.

<sup>4</sup> Jacob Viner, 'Bentham and J.S. Mill: the Utilitarian Background', American Economic Review, XXXIX (1949), 321.

<sup>5</sup> W.S. Jevons, The Theory of Political Economy, 2nd edn., London, 1879, p.xliii.

him. Yet while, as Dr. Harrison has stressed, Bentham was always a practical thinker,<sup>1</sup> since he wrote much on the principles which must underlie legislative reform and much on specific legislative proposals, the economists tended to see in him two Benthams - Bentham the philosopher and Bentham the social reformer. It is these two Benthams, much more than the third, Bentham the economist, whose influence pervaded both classical and neoclassical economics, and so I turn to consider these perceptions of Bentham by each of these two schools of thought. That is not to say that other nineteenth-century schools of economic thought, notably the historical and the Marxian, did not have their perceptions of Bentham also: but the limitations of time and space will not permit me to follow out those ideas on this occasion.

## II

I begin from another statement about Bentham made by Dr. Harrison:

that pleasures and pains as guides to action enter in two quite different and separable ways into his system. As the guide to the action of the reformer or legislator, they lay down what ought to happen, and here it is the greatest happiness of the greatest number which ought to be promoted. As the guide, or motive, of the actual actions of actual people, they lay down what will happen, and here it is the greatest happiness of the individual which any individual will attempt to promote.<sup>2</sup>

Now I suggest that most of the classical economists would have accepted both these propositions, but that in relating them to political economy they found the first much more interesting than the second. As Dr. Harrison says, for Bentham the end is set by the principle of utility, and reason and law are the means of achieving it - but 'it must also be known how this means can be used to promote that end. For this a psychology is required; that is, a factual or descriptive study of the nature of human beings which would enable a reasoner to predict how they will behave in specified particular circumstances.'<sup>3</sup> It was for this purpose that Bentham wrote nine psychological chapters (III-XI) into An Introduction to the Principles of Morals and Legislation, including the well-known Chapter IV, 'Value of a Lot of Pleasure or Pain, how to be measured'.

If then some of the classical economists were thorough-going utilitarians, and most of them were at least favourably disposed towards utilitarian ideas, it might be expected that they would have taken up these questions of human behaviour and used the results to explain the actions of economic agents, producers and consumers. Yet for the most part they were content to assume that people know their own 'best interests' and pursue them, and leave the matter there.

That such is the case has generally been accepted without comment by most historians of economic thought, yet it seems to me to pose some interesting questions about the relations between Bentham's philosophy and classical political economy. It has long since come to be accepted by modern economists that their classical predecessors 'were concerned, not as much with the problem of maximising consumers' satisfaction in the modern sense, as with the problem of increasing the total physical output'.<sup>4</sup> Evident in the work of Adam Smith, this 'physical' approach to the treatment of economic problems was further developed by Ricardo. Given Ricardo's predilection for 'imagining strong cases' and concentrating on long-run outcomes rather than short-run processes, it was natural that he should, as we have already noted, have little use for a subjective approach to the problem of value determination, particularly when his main interest was in establishing an invariable measure of value to enable him to analyse changes in shares of real income over time. In this respect at any rate, Schumpeter's view that 'there is no point in calling Ricardo a utilitarian' would seem to be justifiable.

The case of James Mill is more interesting and more difficult to explain convincingly. For in matters of government and politics it is generally agreed that 'Mill became an

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<sup>1</sup> Ross Harrison, Bentham, London, 1983, p.vii.

<sup>2</sup> *Ibid.*, p.111.

<sup>3</sup> *Ibid.*, pp.108-9.

<sup>4</sup> Hla Myint, Theories of Welfare Economics, London, 1948, p.12.

unreserved disciple of Bentham and an ardent propagator of his ideas';<sup>1</sup> but in matters of political economy he became an equally unreserved disciple of Ricardo and showed no tendency to attempt to blend Bentham's pleasure-and-pain analysis of human behaviour onto Ricardo's predominantly physical approach to problems of production and distribution. Why was there this seemingly rigid separation between Mill's Benthamite politics and his Ricardian economics? After all, James Mill did spend much time studying the workings of the human mind, and developing associationist psychology.

In order to found legislation as a science, first to found psychology as a science, and for this purpose, to destroy the illusion of psychical activity, understood as an irreducible power endowed with a mysterious efficacy, to reduce everything to constant and in some sort mechanical relations between elements which should be as simple, as possible, this was the great and altogether new concern of James Mill.<sup>2</sup>

Yet in order to found political economy as a science, to found psychology as a science, or to use any of its findings, does not seem to have appeared necessary to James Mill.

I confess I can find no single reason for this which seems adequate. Part of the explanation may lie in the fact, to which Professor De Marchi has drawn attention, that associationist psychology was not well adapted to deal with the idea of increments of satisfaction which is central to subjective value analysis.

Not only was attention directed more to the conjunction of sensations than to the sensations themselves, but, although 'degrees of pleasurable sensation' were sometimes spoken about, there was no clear separation made between the sensation itself and the degree of pleasure which might go together with it.<sup>3</sup>

The main reason, however, would seem to lie less deep. Mill's Elements of Political Economy was intended as a 'didactic treatise' embodying the doctrines of 'Ricardo's great work ... in a manner fit for learners'.<sup>4</sup> In it, Mill wrote that 'the relative value of commodities ... depends upon demand and supply, in the first instance; but upon cost of production, ultimately; and hence, in accurate language, upon cost of production, entirely'.<sup>5</sup> In the further analysis of cost of production he felt entitled to cut through the tangle of Ricardo's Laocöon-like struggles with the labour theory of value to state 'that quantity of labour, in the last resort, determines the proportion in which commodities exchange for one another'.<sup>6</sup> Mill may equally have felt entitled to cut through the mazes of consumer psychology to reach his firm and simple statement that 'Demand creates, and the loss of demand annihilates, supply.'<sup>7</sup> It may be, as Professor Winch has said, that the Elements was 'Mill's attempt to do for Ricardo what he had already done for Bentham in the field of law and government';<sup>8</sup> but it was surely cutting Ricardo's exposition of value to the bone to omit even a mention of his view that utility was a necessary, though not a sufficient, condition for commodities to possess value. Certainly Mill gave little or no place to Bentham's philosophy in expounding the truths of political economy as he saw them.

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<sup>1</sup> Jack Lively and John Rees, Utilitarian Logic and Politics, Oxford, 1978, p.3.

<sup>2</sup> Halévy, *op. cit.*, p.458.

<sup>3</sup> Neil De Marchi, 'Mill and Cairnes and the Emergence of Marginalism in England', in The Marginal Revolution in Economics, ed. R.D.C. Black, A.W. Coats and C.D. Goodwin, Durham, N.C., 1973, pp.86-7.

<sup>4</sup> John Stuart Mill, Autobiography (vol. i of Collected Works of John Stuart Mill, ed. John M. Robson and Jack Stillinger) Toronto, 1981, p.31.

<sup>5</sup> James Mill, Elements of Political Economy, 3rd edn., London, 1826, in James Mill, Selected Economic Writings, ed. D. Winch, Edinburgh, 1966, p.257.

<sup>6</sup> *Ibid.*, p.260.

<sup>7</sup> *Ibid.*, p.256.

<sup>8</sup> *Ibid.*, p.188.

It has been argued by some historians of economic thought that there were in fact two traditions in political economy during its classical period, both stemming from Smith. On the one hand the Ricardian tradition, later to be developed by Marx, sought to make quantities of labour expended in production the basic determinant of value. On the other, a tradition which runs from Malthus through Senior, Longfield and other 'dissenters' of the 1820s and 1830s treated value as the sum of the various costs involved in production, viewed in a general supply and demand framework, but with some of its exponents particularly stressing demand influences.<sup>1</sup> If Bentham's utilitarian philosophy found little place in the work of political economists of the Ricardian tradition, it is tempting to suggest that it must have found more ready acceptance among those in the 'other tradition'.

Unfortunately, the facts of intellectual history do not really support this neatly symmetrical hypothesis. Malthus, for example, was indeed a utilitarian in philosophy, but his utilitarianism derived from Paley rather than Bentham and his interest in demand did not lead him to take up the problem of consumer psychology and link it with utility. In fact the ranks of the non-Ricardian value theorists in the first half of the nineteenth century seem to have contained only one thorough-going Benthamite. This was Samuel Bailey, who in 1825 published A Critical Dissertation on the Nature, Measures and Causes of Value, which has come to be recognized as one of the most penetrating critiques of the Ricardian system produced in the whole nineteenth century. Bailey, a Sheffield banker, was so convinced a utilitarian that he was known in his own day as 'the Bentham of Hallamshire'. That philosophy, in his case, led him to the view that the laws of political economy were 'expressive of the operation of certain motives on the human mind'<sup>2</sup> - a view which contrasts sharply with the physical and material one of Smith and Ricardo.

Bailey, who had won warm praise from James Mill in 1821 when he published Essays on the Formation and Publication of Opinions, urging the independence of belief on the will and advocating the free publication of all opinions, saw his Critical Dissertation on Value savagely attacked in the Westminster Review of January 1826 by an anonymous reviewer now widely accepted as having been James Mill.<sup>3</sup> If this is so, it provides another sharp illustration of the dichotomy between James Mill's Benthamite politics and Ricardian economics. In the event Bailey's criticism did not prevail against the skilled advocacy of James Mill and J.R. McCulloch and in the public mind political economy came to be largely, if not altogether correctly, identified with 'the Ricardo-Mill School'. For most of its members, the idea of the greatest happiness principle as a motive for individual action may have been one to which, had they thought about it, they would have given broad assent; but it was not an operational part of their theoretical system.

What of the greatest happiness principle as a guide to the actions of the reformer or legislator? This is a question, indeed perhaps the question, which lies at the heart of Bentham's thinking. His many writings on it, and the reactions of his contemporaries and successors to them, have created a vast literature of commentary in which Bentham has been portrayed as everything from the high priest of laissez-faire to the patriarch of collectivism.<sup>4</sup>

My concern here is with only one facet, though an important one, of this larger area of debate - in their many writings on economic policy, to what extent were the classical economists influenced by Bentham the social reformer and hence followers of his ideas? There has been a tendency stemming from the writings of Dicey and Halévy, to see Bentham's influence as dominating classical economic policy, and the reason for this is not far to seek. In a certain limited sense (and one must be careful to keep the limits in mind) James Mill, David Ricardo and John Stuart Mill did provide a continuing backbone for the classical school of economists from about 1808 to 1848 and beyond - and they were all, in

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<sup>1</sup> See Maurice J. Dobb, Theories of Value and Distribution since Adam Smith, Cambridge, 1973, pp.112-16.

<sup>2</sup> Robert M. Rauner, 'Samuel Bailey and Classical Economics', University of London PhD, 1956, p.498.

<sup>3</sup> Robert M. Rauner, Samuel Bailey and the Classical Theory of Value, London, 1961, Appendix II.

<sup>4</sup> For a summary see Arthur J. Taylor, Laissez-faire and State Intervention in Nineteenth-Century Britain, London, 1972, Ch.V.

varying degrees, Philosophic Radicals. I say 'in varying degrees' with good reason: Ricardo's comment to Maria Edgeworth - 'My motto, after Mr Bentham, is "the greatest happiness to the greatest number"' - is well known,<sup>1</sup> but, as Professor Hollander has argued, 'Ricardo was not wholly won over by [James] Mill' in the latter's attempt to educate him in Bentham's social and political philosophy.<sup>2</sup> John Stuart Mill's reaction against, and eventual return to Benthamite ideas, are even better known; nowhere perhaps did the Victorian reader find a clearer exposition of social and economic policies founded on utilitarianism than in J.S. Mill's Principles of Political Economy, with its significant sub-title - 'with some of their Applications to Social Philosophy'.

Yet surely the first lesson which the researchers of the last fifty years in the history of economic thought should have taught us is that we must not treat the Ricardo-Mill school as identical with the classical school as a whole. Indeed the umbrella title of 'the classical economists' covered so many original and independent thinkers that we may well be chary of dividing them into two traditions or indeed making any generalizations about them. Nevertheless, one can perhaps say this much - that while there were many classical economists who were not in a strict sense Philosophic Radicals or even more loosely Benthamites, there were none who opposed, or would have opposed, the use of the greatest happiness principle as a touchstone for economic policy. Similarly, the four subordinate aims, security, subsistence, abundance and equality, which Bentham proposed should be pursued in seeking the greatest happiness of the greatest number, would generally have commanded their assent, nor would they have quarreled with the order in which Bentham placed them. Thus J.R. McCulloch supported his view that 'there may, no doubt, be institutions which tend to increase those inequalities of fortune that are natural to society, but the right of property is not one of them' by a quotation from 'an able writer' - from, that is, Bentham.<sup>3</sup> While other examples like this might be quoted, there still seems to be considerable validity in the view put forward by Lionel Robbins, that 'it is in the Humean rather than the Benthamite sense that we may claim to label the entire Classical school as utilitarian in outlook'.<sup>4</sup>

There remains the further question of whether, within this broad interpretation of utilitarianism, the classical economists generally felt that the greatest happiness principle would imply or require policies of a laissez-faire or an interventionist stamp. In this connection another point made by Robbins is important - 'they were indeed utilitarians; but they were more than this: they were individualist utilitarians ... we do not conceive that [Classical] theory correctly unless we recognise the essential role played in it by the individualist norm'.<sup>5</sup> Now this, I think, predisposed the classicals to think in terms of self-reliant individuals left free to pursue their own interests within a system of competitive markets; but it does not follow from this that they assumed a natural harmony of interests. To quote Robbins again - 'if they assumed anywhere a harmony, it was never a harmony arising in a vacuum, but always very definitely within a framework of law'.<sup>6</sup> Hence the classical economists could contemplate without any sense of contradiction the situation which Parris has suggested existed in the mid-nineteenth century - 'the application of this principle [to utility] led to considerable extensions both of laissez-faire and of state intervention simultaneously'.<sup>7</sup> Yet I would suggest that John Stuart Mill was not

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1 Works and Correspondence of Ricardo, ed. Sraffa, ix. 239.

2 Samuel Hollander, The Economics of David Ricardo, Toronto, 1979, p.597.

3 John Ramsay McCulloch, The Principles of Political Economy, 2nd edn., London, 1830, pp.90-1, citing Dumont's recension of Bentham's writings, Traité de législation civile et pénale, 2 vols., Paris, 1802, ii. 37.

4 Lionel C. Robbins, The Theory of Economic Policy in English Classical Political Economy, London, 1952, p.178.

5 *Ibid.*, pp.181-2.

6 *Ibid.*, p.191.

7 Henry Parris, 'The Nineteenth-Century Revolution in Government: a reappraisal reappraised', Historical Journal, III (1960), 35.

misrepresenting greatly, if at all, the attitude of his fellow-economists when he wrote in 1848, 'Laissez-faire, in short, should be the general practice; every departure from it, unless required by some great good, is a certain evil.'

### III

Stefan Collini has recently written that 'when surveying the terms of criticism from the 1860s onwards one can readily see why the verdict on Utilitarianism has generally been "death at the hands of the later nineteenth century's obsession with history"'.<sup>2</sup> To many economists in the 1860s it may well have seemed that such was to be the fate of utilitarian ideas in their field, as dissatisfaction with the apparent stagnation of classical theory grew and writers like Cliffe Leslie persuasively interpreted the possibilities of constructing a better alternative with the aid of the historical method which was rapidly gaining ground in Germany, France and Belgium. In point of fact in English economics by the end of the century it was not the historical but the neoclassical school which had gained the upper hand. The label 'neoclassical' is often explained as having arisen from the fact that the new generation of economists used a revised form of the deductive method which their classical predecessors had employed. It could almost equally well be said that they were neoclassical in that they reinterpreted the utilitarian concepts which the classical economists had learned from Bentham the philosopher and Bentham the social reformer.

According to the earliest and still the best-known detailed account of the development of economic thought in this period, 'it is Jevons's Theory of Political Economy (1871), with his marginal utility theory of value, and his incisive attack on the labour and cost-of-production theories, which is generally taken today as the decisive moment in the transition from the classical system'.<sup>3</sup> Hutchison went on to remark that 'what was important in marginal utility was the adjective rather than the noun'.<sup>4</sup> True as that may be for the neoclassical economists generally, for Jevons the noun was undoubtedly important. Indeed it is arguable that amongst all the political economists of the nineteenth century, W.S. Jevons was, if not the most sophisticated utilitarian, still the most thorough-going Benthamite.

Reacting vigorously against the Ricardo-Mill school, and particularly against its theory of value, Jevons went back to that aspect of the greatest happiness principle which Ricardo and the Mills had passed over - pleasure and pain as the guide or motive of the actual actions of actual people. After an introductory chapter Jevons proceeded straight to the question of 'Pleasure and Pain as Quantities', quoting from Chapter IV of Bentham's An Introduction to the Principles of Morals and Legislation.<sup>5</sup> Jevons, then, took on the task which Bentham's 'spiritual son and grandson' had never felt it necessary to attempt - that of constructing a theory of value on the basis of 'the felicific calculus'. His outline of the theory of pleasure and pain is followed by a chapter on the theory of utility, explaining how pleasure results from the consumption of goods and services and emphasizing the vital distinction between total utility and final degree (= marginal increment) of utility. The keystone of the arch is the chapter on the theory of exchange in which Jevons gave his pioneering mathematical demonstration of the maximization of utility by the parties to an exchange. The counterpart of the theory of utility - the other half of the arch, to continue the analogy - is then the theory of labour, which is in fact a theory of cost in terms of disutility, because 'labour is the painful exertion which we undergo to ward off pains of greater amount, or to procure pleasures which leave a balance in our favour'.<sup>6</sup>

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<sup>1</sup> Principles of Political Economy (Collected Works) iii. 945.

<sup>2</sup> Stefan Collini, Donald Winch and John Burrow, That Noble Science of Politics, Cambridge, 1983, p.281.

<sup>3</sup> Terence W. Hutchison, A Review of Economic Doctrines, 1870-1929, Oxford, 1953, p.14.

<sup>4</sup> *Ibid.*, p.16.

<sup>5</sup> An Introduction to the Principles of Morals and Legislation, ed. J.H. Burns and H.L.A. Hart, London, 1970 (CW), pp.38-42.

<sup>6</sup> W.S. Jevons, The Theory of Political Economy, London, 1871, p.162.



'The problem of economics may, as it seems to me, be stated thus', wrote Jevons: 'Given, a certain population, with various needs and powers of production, in possession of certain lands and other sources of material: required, the mode of employing their labour which will maximize the utility of the produce.'<sup>1</sup> Now, as has often been remarked, this statement of the economic problem in terms of constrained maximization marks a fundamental shift of focus from the classical approach, and that may in itself be enough to account for the new emphasis on the individual economic agent, seeking pleasure and avoiding pain. Be that as it may, the structure of Jevons' solution to the problem is, as I have elsewhere said, 'perfectly symmetrical, and perfectly Benthamite'.<sup>2</sup>

It may safely be said, I think, that no other neoclassical economist was as much or as directly influenced by Bentham as was Jevons; but there were others who were equally definitely utilitarians. Foremost among them by present-day standards, though not the best known in his own time, was F.Y. Edgeworth (1845-1926), one of Jevons' few disciples. Edgeworth had already acquired an interest in moral philosophy and a considerable skill in mathematics when he first met Jevons in 1879; it was his contact with Jevons which led him to link these talents to the study of economics, of which he ultimately became Drummond Professor at Oxford.

Edgeworth's best known work is his Mathematical Psychics (1881) which bore the subtitle 'An Essay on the Application of Mathematics to the Moral Sciences'. In it Edgeworth suggested that 'the Calculus of Pleasure may be divided into two species - the Economical and the Utilitarian'. The first principle of economics is an egoistic version of the greatest happiness principle, assuming that every agent is actuated only by self-interest. Starting from this assumption, Edgeworth developed what are now recognized to be classic mathematical solutions of certain problems of exchange between such agents. He was able to demonstrate that with a large number of buyers and sellers a single determinate exchange rate would result, and that this rate would be identical with the equilibrium price ratio; but 'where the field of competition is sensibly imperfect, an indefinite number of final settlements are possible'.<sup>3</sup> In cases of indeterminacy he argued 'from mathematical considerations that the basis of arbitration between contractors is the greatest possible utility of all concerned; the Utilitarian first principle, which can of course afford only a general direction - yet, as employed by Bentham's school, has afforded some direction in practical affairs'.<sup>4</sup>

Moving from the 'Economical' to the 'Utilitarian Calculus' introduces a new conception of 'Greatest Happiness' as 'the greatest possible sum-total of pleasure summed through all time and over all sentience'.<sup>5</sup> Now this necessarily involved deciding on a principle of distribution which would yield an optimal distribution of resources. Edgeworth recognized that 'Bentham, who ridicules the metaphysical rights of man and such like "anarchical fallacies", reasons down from Greatest Happiness to Equality by a method strictly mathematical',<sup>6</sup> and he himself does the same, but, as Sir John Hicks has said, 'it is a conclusion that he was most unwilling to accept.... Now if one wished to avoid that conclusion, while keeping to the strict Utilitarianism so dear to Edgeworth, the only way was to insist on inequality, inequality between persons in ability to get "pleasure" or to bear "pain".'<sup>7</sup> All this, as Edgeworth recognized, lay in the domain of ethics rather than economics; most later economists have preferred not to enter that domain, and he himself did not return to the question in later work.

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1 Ibid., p.255.

2 Jevons, The Theory of Political Economy, intro. R.D. Collison Black, Harmondsworth, 1970, p.19.

3 F.Y. Edgeworth, Mathematical Psychics, London, 1881, p.47.

4 Ibid., pp.vi-vii.

5 Ibid., p.vii.

6 Ibid., pp.129-30.

7 Sir John Hicks, 'Francis Ysidro Edgeworth', in Economists and the Irish Economy, ed. A.E. Murphy, Dublin, 1984, p.171.

In matters of moral philosophy Henry Sidgwick might be said to have been a stronger influence on Edgeworth than was Bentham.<sup>1</sup> Sidgwick himself contributed significantly to the utilitarian strand in neoclassical economics, not only through the influence of his famous Methods of Ethics (1874) on writers like Edgeworth, but through the publication of his own Principles of Political Economy in 1883. In certain respects the contrast between Sidgwick and Edgeworth here is striking: Edgeworth, with the aid of mathematics, made path-breaking contributions to economic theory, the full significance of which has only recently come to be understood and appreciated. In Sidgwick's Political Economy 'the very conception of the work was intellectually conservative ... the model remained Mill's Principles ... though it was Mill modified in the light of Jevons' marginalist theory of value'.<sup>2</sup>

For the purposes of this paper, Sidgwick is something of a peripheral figure for although his Methods of Ethics was 'the last authoritative utterance of traditional Utilitarianism',<sup>3</sup> his political economy seems to have been influenced by Bentham only indirectly through J.S. Mill. Nevertheless, Sidgwick finds a place here, for two reasons - first, for his influence on Marshall; and second, in connection with his views on economic policy.

Of the English economists of the last thirty years of the nineteenth century, Alfred Marshall was probably the greatest and certainly the most influential. Of Sidgwick, his senior at Cambridge, Marshall said: 'Though not his pupil in name, I was in substance his pupil in Moral Science ... I was fashioned by him. He was, so to speak, my spiritual father and mother.'<sup>4</sup> Marshall indeed came to economics through ethics, and in his first Cambridge post, a special lectureship in Moral Science at St. John's College, he gave courses on Bentham in the early 1870s. According to Keynes,

Marshall never departed explicitly from the Utilitarian ideas which dominated the generation of economists who preceded him. But it is remarkable with what caution - in which respect he goes far beyond Sidgwick and is at the opposite pole from Jevons - he handled all such matters. There is, I think, no passage in his works in which he links economic studies to any ethical doctrine in particular. The solution of economic problems was for Marshall not an application of the hedonistic calculus.<sup>5</sup>

Whatever he may have owed to Sidgwick in his early years, Marshall at the end of the nineteenth century was using his great influence not merely to divorce economics from hedonism, but also to build up the concept of the subject as an independent science - 'after his time Economics could never be again one of a number of subjects which a Moral Philosopher would take in his stride, one Moral Science out of several, as Mill, Jevons and Sidgwick took it'.<sup>6</sup>

Despite their growing desire to be taken seriously as independent scientists, the neoclassical economists remained anxious also to provide guidance on economic policy. The result was a growing emphasis on a distinction which can be traced back to Nassau Senior in 1836, between the science and the art of political economy, which roughly corresponded to what later became the distinction between positive and normative economics. Over time, that part of economics which is mainly concerned with policy came to be known as welfare economics. Its development can scarcely be more succinctly described than in the words of two recent commentators:

All post-classical and contemporary developments in welfare economics are therefore of two fundamental origins: (1) the development of subjective

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<sup>1</sup> John Creedy, Edgeworth and the Development of Neoclassical Economics, Oxford, 1986, p.25.

<sup>2</sup> Collini, Winch and Burrow, op. cit., p.283.

<sup>3</sup> Ernest Albee, A History of English Utilitarianism, London, 1902, p.358.

<sup>4</sup> J.M. Keynes, 'Alfred Marshall', in Memorials of Alfred Marshall, ed. A.C. Pigou, London, 1925, p.7.

<sup>5</sup> Ibid., p.9.

<sup>6</sup> Ibid., p.57.

utility theory as the foundation of a theory of value, including the development of the marginal utility concept ... and (2) the refinement and application of Bentham's utilitarian precepts, and his suggestion, mainly through philosophical premises, that competitive markets and free exchange might not lead to global welfare maximisation in society.<sup>1</sup>

So we come back again to the greatest happiness principle as a guide to the action of the reformer or legislator. How was it employed by the new generation of economists of the late nineteenth century, and how did their use of it differ from that made by their classical predecessors? If we reject (as almost everybody now does) Dicey's old distinction between a 'period of Benthamism or individualism' and a 'period of collectivism',<sup>2</sup> then the difference can only be one of degree - although that does not prevent it from being significant.<sup>3</sup>

Undoubtedly, there was a difference, in that the neoclassicals were, to say the least, usually prepared to admit a greater degree of interference with the market mechanism than their classical predecessors had been. Again, as in the field of economic theory proper, W.S. Jevons provides a pioneering example, for in the field of policy also he was prepared to carry Benthamism to its logical limits. Jevons affirmed that 'the State is justified in passing any law, or even in doing any single act which, without ulterior consequences, adds to the sum total of happiness'. At times he seemed to suggest that even the justification of liberty was purely utilitarian:- 'the liberty of the subject is only the means towards an end; it is not itself the end; hence, when it fails to produce the desired end, it may be set aside, and other means employed'. Nevertheless, Jevons insisted that in matters of economic and social policy it is practical common sense which must be applied, rather than abstract philosophical principle, and he asked 'what are the means of proving inductively or deductively that a certain change will conduce to the greater sum of happiness? ... In the case of any novel and considerable change direct experience must be wanting.... A heavy burden of proof, therefore, lies upon him who would advocate any social change which has not or cannot be tested previously on a small scale'.<sup>4</sup>

Hence Jevons can be seen as ultimately an advocate of incremental rather than radical change, but while this may be a cautious approach, it is also true that 'incrementalism not only reinforces but accelerates reliance on the state in the resolution of problems'.<sup>5</sup>

Jevons' approach was to judge each individual policy proposal on its merits in accordance with the greatest happiness principle. Sidgwick, on the other hand, moved towards a more general approach. For him, the art of political economy 'consists mainly of the theory of what ought to be done to improve production and distribution'<sup>6</sup> and on this basis he 'succeeded in laying down the foundations of the modern approach to welfare economics in its essential form'.<sup>7</sup> On distribution, he reasoned from

two propositions laid down by Bentham as to the relation of wealth to happiness: namely (1) that an increase of wealth is - speaking broadly and generally - productive of an increase of happiness to its possessor; and (2) that the resulting increase of happiness is not simply proportional to the increase of wealth, but stands in a decreasing proportion to it.

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<sup>1</sup> R.F. Hébert and R.B. Ekelund, 'Welfare Economics', in Economic Analysis in Historical Perspective, ed. J. Creedy and D.P. O'Brien, London, 1984, p.53.

<sup>2</sup> A.V. Dicey, Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century, London, 1905, pp.62-5.

<sup>3</sup> See Stefan Collini, Liberalism and Sociology, Cambridge, 1979, Ch.I.

<sup>4</sup> W.S. Jevons, The State in Relation to Labour, London, 1882, pp.12-15.

<sup>5</sup> Frank Petrella, 'Benthamism and the Demise of Classical Economic Ordnungspolitik', History of Political Economy, IX (1977), 232.

<sup>6</sup> Henry Sidgwick, The Principles of Political Economy, London, 1883, p.xix.

<sup>7</sup> Myint, op. cit., p.129.

Consequently,

from the two propositions taken together the obvious conclusion is that the more any society approximates to equality in the distribution of wealth among its members, the greater on the whole is the aggregate of satisfactions which the society in question derives from the wealth that it possesses.<sup>1</sup>

On the production side, Sidgwick identified a series of cases in which the classical 'system of natural liberty' might not result in a socially optimal use of resources. 'Hence complete laissez-faire is not to be taken as a political ideal: the problem for the statesman is to balance its disadvantages against the disadvantages of extending the sphere of government.'<sup>2</sup> On the face of it, there may seem to be little difference between this conclusion and that reached by J.S. Mill some thirty-five years earlier; except that the number of instances in which Sidgwick found the disadvantages of laissez-faire to exceed those of extending the sphere of government seemed to be significantly greater than in Mill's case.<sup>3</sup> However, there is a more important distinction between Mill and Sidgwick. As Professor Myint has clearly pointed out, during the later classical period

the general tendency was to divide the economic system into two rigid conventional divisions, viz. (i) where private enterprise should function without any restraint, and (ii) extreme cases where, with the sanction of Adam Smith, the State may interfere.... Sidgwick refused to accept this easy conventional partition ... he tried to show that instead of a clear-cut boundary line there is an extensive no-man's land between the zones of private enterprise and state interference and that it should be reduced into order by weighing up the social gains and losses involved in interference with given individual cases on their specific merits.<sup>4</sup>

In this respect economists like Jevons and Sidgwick were not simply swimming with the tide of public opinion; there was more to it than that. We may notice two points which seem significant, one more or less economic, the other more or less philosophical. The economic point is concerned with the switch from the production-and-growth emphasis of classical economics to the pricing-and-allocation emphasis of neoclassical economics, which tended to direct attention towards cases where private action in free markets led to non-optimal results, requiring state action to correct them. The philosophical point has been stated by Professor Petrella in terms of 'the formal triumph of universal ethical hedonism over egoistic psychological hedonism' which suggests an explanation for what he sees as 'the eventual displacement of Ordnungspolitik by Prozesspolitik'.

Crucial to the success of Ordnungspolitik are the nondeliberative forms of social control [morality, religion, custom and education].... The new emphasis on universal ethical hedonism seriously questions these conditions: consequently paternalistic state-centered response to socio-economic problems is more easily rationalized.<sup>5</sup>

At all events, Sidgwick's application of his utilitarianism to the art of political economy in many ways foreshadowed that comprehensive analysis of market failure and the divergence of private and social marginal net products which was later to emerge in the Economics of Welfare built up by Marshall's pupil and successor, Pigou.<sup>6</sup> But the rest of that story belongs to the twentieth century.

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1 Sidgwick, op. cit., pp.518-19.

2 Ibid., p.xx.

3 See Ibid., p.529.

4 Myint, op. cit., p.129.

5 Petrella, 'Benthamism and the Demise of Classical Economic Ordnungspolitik', 227.

6 See Margaret G. O'Donnell, 'Pigou, an extension of Sidgwickian Thought', History of Political Economy, XI (1979), 588-605.

#### IV

I have sought in this paper to trace the way in which the threads of Bentham's ideas can be found weaving their way in and out of the complex fabric of nineteenth-century economic thought. Those ideas were numerous, but the economists picked up comparatively few of them, concentrating mainly on Bentham's key philosophical concept, the greatest happiness principle, but interpreting it in a variety of ways according to their own preoccupations. Consequently, the importance attached to Bentham's ideas fluctuated considerably over the century. They contributed more to the preconceptions than to the technical structures of economics, and certainly more to the art than to the science of political economy; but they were never negligible.

# BENTHAM AND THE RIGHT TO SILENCE

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One of the more improbable appearances of Bentham in the past year was in a speech of the Metropolitan Police Commissioner, Mr. Peter Imbert, to the International Police Conference on 15 September 1987 and widely reported in the national press. Mr. Imbert was speaking in support of a proposal to abolish the so-called 'right to silence' afforded to accused persons in criminal proceedings. He used in support words critical of the rule of law creating this 'right' which he attributed to Bentham:

one of the most pernicious and irrational rules that has ever found its way into the human mind ... if all criminals of every class had assembled and framed a system after their own wishes is not this rule the very first they would have established for their own security? Innocence claims the right of speaking, as guilt invokes the privilege of silence.

A fortnight later in a letter to The Times a former Attorney-General, Lord Shawcross Q.C., quoted an almost identical passage in support of the same argument.<sup>1</sup>

This was not the first time that this quotation or parts of it had been used in this connection. In 1971 the Eleventh Report of the Criminal Law Revision Committee in recommending abolition of the 'right to silence' quoted in support of their recommendation the following passage, cited, according to a footnote, from 'Bentham's Treatise on Evidence p.241':

If all the criminals of every class had assembled and framed a system after their own wishes is not this rule the very first they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence.<sup>2</sup>

The public debate on this proposal came to an end with the publication in 1981 of the report of the Royal Commission on Criminal Procedure which recommended making no change to the present practice. As an example of the contrary view, shared by the enforcement agencies, the Royal Commission could not forbear citing, again from 'Bentham's Treatise on Evidence': 'Innocence claims the right of speaking as guilt invokes the privilege of silence.'<sup>3</sup>

Although the latest round of debate to which Mr. Imbert and Lord Shawcross were contributors seems now to have been brought to an end with the announcement that the Government is not minded to proceed with its proposal to abolish the 'right to silence', it is unlikely that this will be the last of the matter. As Bentham has been quoted in this connexion on previous occasions it is likely that he will be so again.<sup>4</sup>

What is the 'right to silence'? What is the source of the Bentham quotation? And what was Bentham's position in the debate? This note attempts to provide some answers to these questions without, however, contributing to the wider issues of philosophical and political policy.

## The development of the 'right to silence'

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<sup>1</sup> See for instance The Guardian, 16 September 1987, p.1; The Times, 1 October 1987, p.13. As reported in The Guardian, Mr. Imbert's quotation differs from Lord Shawcross', which is the version quoted in the text, in commencing a new sentence, without indicating any omission, at 'If all the criminals in every class', adding the definite article before 'criminals' and reading 'in' for 'of'. Mr. Imbert's version also omits 'has' in the first sentence and the whole of the last sentence beginning 'Innocence claims'.

<sup>2</sup> Cmnd. 4991 (1972) p.18.

<sup>3</sup> Cmnd. 8092 (1981) p.82.

<sup>4</sup> I am most grateful to Lord Shawcross Q.C. for his assistance in tracing the Benthamic origins of the quotations. He is, needless to say, not responsible for the opinions expressed in this article.

When a suspect is charged with a criminal offence, she is cautioned that she need say nothing but that whatever she does say will be recorded and may be used in evidence at her trial. She is thereafter not obliged to answer any questions put to her whether in court by the prosecution or otherwise. Conversely she may, if she chooses, make an unsworn statement or give evidence upon oath. If she chooses to remain silent the prosecution may not comment adversely on her failure to speak. This so-called 'right' would be better described as a privilege of remaining silent. Broadly speaking, opponents of the rule object against it that only a guilty person would take advantage of it: an innocent would speak out in self-defence as early and as often as possible.

The present state of English law on this subject is inseparable from its development out of the very different circumstances of earlier ages. The 'right to silence' is, in effect, a relic of a particular characteristic of the technical system of evidence analyzed and criticized by Bentham at the beginning of the last century and which remains by and large still in place.

One of the consequences of the establishment of the jury, in the early thirteenth century, as the method of trial in criminal suits at Common Law was the relieving the judges of any responsibility for finding the facts. Prior to the introduction of the jury, trial had largely been by ordeal, which called for no presentation of evidence, though confession by an accused could, of course, obviate the need for trial altogether.<sup>1</sup> A feature which resulted however from the adoption of the expedient of trial by jury was the need to persuade unwilling prisoners to accept trial by the country, i.e. the jury. That they should do so voluntarily was thought to be essential: unwillingness meant that they could not be tried at all. A mid-thirteenth century handbook for judges, Placita Corone, illustrates the sort of persuasive interrogation by which a judge might lead a prisoner to accept trial by a jury.<sup>2</sup> Eventual wide acceptance of jury-trial, however, ensured that such direct interrogation of an accused, though by no means unknown especially in treason trials, formed no necessary part of Common Law trial process.

Matters were different in non-Common Law fora. The Ecclesiastical Courts and the fifteenth and sixteenth-century Conciliar Courts, notoriously the so-called Star Chamber, acted as judges of both fact and law. They freely questioned witnesses and accused alike and the Conciliar Courts even resorted to the use of torture to elicit evidence. These practices, which contemporaries viewed as enlightened compared with the mediaeval customs of the Common Law and which came to dominate criminal legal practice in continental Europe, were incorporated into Common Law process itself at the lowest level by two Marian statutes which in effect established the general jurisdiction of justices of the peace. By these statutes magistrates were required to interrogate those brought before them accused of crime, and to record their findings so that they might be transmitted for the use of the trial-court.<sup>3</sup>

In the wake of the constitutional struggles of the seventeenth century the criminal

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<sup>1</sup> On the old ordeals see R. Bartlett, Trial by Fire and Water, Oxford, 1986. The best account of the transition to trial by petty jury is still F.W. Maitland, Pleas of the Crown for the County of Gloucester 1221, London, 1884, pp.xxxviii-xxxix.

<sup>2</sup> Placita Corone, ed. J.M. Kaye, Selden Society Supplementary Series, IV (1966). Failing persuasion by argument, the accused would be remanded to prison, a procedure which eventually led to the practice of pressing to death (the peine forte et dure) as a means of forcing acceptance of the jury: see H. Summerson, 'The early development of the Peine Forte et Dure', in Law, Litigants and the Legal Profession, ed. E.W. Ives and A.H. Manchester, London, 1981, p.116.

<sup>3</sup> 1 and 2 Phil. and M., c.13; 2 and 3 Phil. and M., c.10. See J.H. Langbein, Prosecuting Crime in the Renaissance, Cambridge, Mass., 1974, and Torture and the Law of Proof, Chicago, 1977. J.G. Bellamy, Crime and Public Order in England, London, 1973, pp.136ff. argues that this was rather a consolidation of the previous Common Law practice of piecemeal interrogation: cf. his Criminal Law and Society in Late Medieval and Tudor England, London, 1984, Ch.3.

jurisdiction of the Conciliar Courts was suppressed.<sup>1</sup> The substantive jurisdiction was absorbed by the Court of King's Bench but without the distinctive procedural features. Following the Restoration, developments within the Common Law system itself led to an increasing awareness of the need for rules governing what sort of evidence could properly be laid before a jury. In the absence of any certain system of criminal appeals, whereby irregular trial practices could be checked, progress in the sophistication of criminal evidence was slower than in the civil field.<sup>2</sup> However, by the mid-eighteenth century, at the latest, there was a recognizable body of rules of criminal evidence, rules for the most part reflecting those applied in civil process.<sup>3</sup> One of the central features of both civil and criminal systems of evidence was the incapacity of either party to a suit, civil or criminal, to give evidence on the ground of interest, which presumptively contaminated their veracity. Since an accused could not give sworn evidence even if she wished to do so, no conclusions could properly be drawn from a refusal to speak. In practice judges appear to have been generous in allowing prisoners to make unsworn statements at the conclusion of their defence, but this was in the nature of a boon.

The capacity of an interested person to give evidence on oath was progressively liberated by a series of nineteenth century statutes commencing with Lord Denman's Act in 1846 and culminating for criminal matters in the Criminal Evidence Act of 1898. This latter, whilst granting an accused an unrestricted right to give evidence, neither compelled her to do so nor permitted the prosecution to comment on a failure to do so. It is the position reached by the end of the last century in relaxing but not entirely freeing the evidence of an accused from the consequences of exclusion which forms the basis for modern debate.

### Bentham's view of the development of the 'right to silence'

Nearly all this development down to his own time was known to Bentham and is discussed by him in The Rationale of Judicial Evidence, Book IX, Part iv, Chapter III, Section 4 (Bowring, vii. 458-63). Bentham goes on to pour scorn on those who would seek to denigrate the procedural characteristics of the Conciliar Courts by reference to the substance of their jurisdiction. For him, the interrogative mode of seeking evidence was much superior to the technicalities of common law procedure.

Bentham attributes the rule that at Common Law an accused could not be required to give evidence against himself, the privilege against self-incrimination which is the corollary of the 'right to silence', to reactions in the Common Law Courts to the supposed abuse of interrogation *ex officio* in the Conciliar and Ecclesiastical jurisdictions which the Common Law Courts attempted to control by writs of prohibition during the sixteenth century.<sup>4</sup>

Modern understanding of the relationship between the Common Law and the

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<sup>1</sup> This was effected in the main by 16 Car.I, c.10.

<sup>2</sup> There was no formal appeal system in criminal matters until the establishment of the Court of Criminal Appeal by statute in 1907 though informal procedures had filled out the formal deficiency for most of the nineteenth century: see, generally, A.H. Manchester, A Modern Legal History of England and Wales, London, 1980, pp.180-8.

<sup>3</sup> The most widely used practitioners' handbook in the eighteenth century was Gilbert's The Law of Evidence, London, 1756, a work dating from the early 1700s (Gilbert died in 1726), but first printed in Dublin in 1754. Bentham subjects its philosophy and application to rigorous criticism in An Introductory View of the Rationale of Evidence (see The Works of Jeremy Bentham, ed. J. Bowring, 11 vols., Edinburgh, 1843, vi. 143-5, 183-7).

<sup>4</sup> Following Viner's Abridgment (2nd ed., 1791-5) 46, Bentham cites, though not by name, Collier v. Collier (1590), 4 Leonard 194 (Common Pleas) and (1590) Cro. Eliz. 201; Moo. 906 (King's Bench): The Rationale of Judicial Evidence, ed. J.S. Mill, London, 1827 (Bowring, vii. 458). The latter reads: 'En Bank le Roy en une cause d'incontinency, le Spirituel Judge voiloit avoir examine les parties sur serement s'ils font le fact ou nemy. Et prohibition fuit agard qui a ils ne doient eux mesmes prodere lou descreait ensue. Auterment en une cause de matrimony ou d'un testament.'



Ecclesiastical Courts in particular is a good deal more subtle than Bentham's.<sup>1</sup> But this understanding leaves essentially unaffected Bentham's implication that, having formulated the rule against self-incrimination for others at a time when the Common Law's own rules were as yet undeveloped, the Common Law Courts were constrained to follow the logic through into their own practice and accept that an accused could not be compelled to give evidence against himself, even in a context where the supposed dangers of the ex officio oath were absent.

### The source of the quotation

No such work as Bentham's 'Treatise on Evidence' exists. In fact the quotations, or at any rate the common part of them, come from the anonymous English translation of Étienne Dumont's Traité des Preuves Judiciaires published as A Treatise on Judicial Evidence in 1825.<sup>2</sup>

Dumont, of course, compiled his Traité from Bentham's manuscripts. It can be seen that at this point he was relying on passages which were subsequently to be published in the Bowring edition as part of the so-called Introductory View of the Rationale of Evidence (Bowring, vi. 1-187). Chapter XI of Dumont's seventh book, from which the above quotation comes, commences with the sentence:

Parmi les singularités de la loi commune en Angleterre, la plus remarquable est la règle qui défend de faire à l'accusé aucune question judiciaire d'où l'on pût tirer la preuve de son délit.<sup>3</sup>

UC xlv. 266 contains a paragraph beginning:

Among the singularities of English law and (note well) of Judge-made law, for under legislator's law, it will be seen the case is different - may however be seen a rule composed of this very extravagance. To a Defendant in a penal cause, not to speak at present of non-penal ones, be the cause what it may, no question from the answer to which, supposing him guilty, the discovery of his guilt may be facilitated, ought judicially to be put....

The same passage occurs halfway through Chapter XXI of the version of Introductory View published by Bowring (vi. 107).<sup>4</sup> The ensuing argument in the Traité, the Introductory View and the manuscript source follows an identical pattern. A number of reasons are adduced against the rule, some thirteen in the manuscript and the Introductory View, and eight in Dumont's Traité. Dumont rearranges and compresses Bentham's list of reasons but the fourth in both lists is that the innocent have no need of its protection. In the manuscript the paragraph giving the fourth reason begins:

Those who are free from guilt, is it possible that these should have been the persons for whose protection the rule was intended? They are exactly the very persons, and the only persons, to whom it cannot ever be of any use....

And in Dumont:

Considérez maintenant les accusés innocents. Peut-on supposer que la règle en question ait été établie avec l'intention de les protéger? C'est à eux seuls qu'elle ne peut jamais être utile....

But whereas the manuscript (and the Introductory View) give only one paragraph to this fourth reason, Dumont's text continues, in the words of our quotation

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<sup>1</sup> See, for example, R.H. Helmholz, Canon Law and Common Law, Selden Society Lecture, 1982.

<sup>2</sup> É.Dumont, Traité des preuves judiciaires, Paris, 1823, ii. 127, and A Treatise on Judicial Evidence, London, 1825, p.241.

<sup>3</sup> Traité, ii. 124, translated in Treatise on Judicial Evidence, p.240, as follows: 'The most remarkable singularity of the law of England is the rule which ordains, that an accused person shall not be judicially asked any question from which evidence of his guilt may be deduced.'

<sup>4</sup> The text published in Bowring, vi. 1-187, as An Introductory View of the Rationale of Evidence is an unsatisfactory one and a new text, provisionally entitled as Bentham intended, An Introduction to the Rationale of Evidence, is planned for the Collected Works.

Si les criminels de toutes les classes avaient pu s'assembler et former à souhait un système de procédure, cette règle n'est-elle pas la première qu'ils auraient établie pour leur sûreté? L'innocence ne s'en prévaut jamais: elle réclame le droit de parler, comme le crime invoque le privilège de se taire.

Dumont does more than merely translate Bentham into French as he admits in his introduction to the Traité.<sup>1</sup> The nearest Bentham comes in these manuscripts to the forcefulness of the passage in Dumont is in a deleted passage which reads as follows:

The object [of the rule], if any, must have been the affording pro tanto impunity to the guilty: for them alone could the protection it affords have been intended [to benefit].<sup>2</sup>

Despite minor verbal discrepancies, the main part of the various 'Bentham' quotations cited in recent discussion all derive directly or indirectly from the English translation of Dumont's Traité. This passage cannot be shown to be drawn directly from Bentham.

The opening sentence of Mr. Imbert's and Lord Shawcross' quotation is more puzzling. As Lord Shawcross' version rightly shows, it is not part of the immediately following Dumont text. It is not, in fact, to be found in the Traité nor the Treatise, nor has an extensive search revealed it in the printed version of Bentham's Rationale of Judicial Evidence. It is not to be found in either the printed version of the Introductory View nor in the manuscript text which, as shown above, underlies both the Introductory View and this part of Dumont's Traité. The remaining manuscripts of Bentham's writings on evidence are considerable, however, and it cannot be said with assurance that no such sentence occurs therein. Until a systematic search does reveal it, however, it is not possible with any measure of certainty to attribute it to Bentham.

### Bentham's view

Bentham's approach to this issue was heavily influenced by his championship of what he called the natural system of evidence against the excessive technicalities of the Common Law rules of evidence in force in his day. Broadly, he argued that courts of law should operate within the same range of evidential tests as 'the master or mistress of a family'<sup>3</sup> would in examining a breach of domestic order, although he made some allowance for the distinction between public and private investigations and the need to take into account other public interests, such as the secret of the confessional. Bentham considered that defendants should be questioned and could be expected to answer.

Bentham would not have been satisfied with the present state of English law. He positively supported the interrogation of accused persons in court and it is to the protection from interrogation afforded to the guilty that his criticism is addressed. He could see no harm in requiring the innocent to answer in court.<sup>4</sup> But it is important to bear in mind that his was not a piecemeal approach to the problem but one that sought to put the whole law of evidence on a radically different basis. A heavy burden lies on those who wish to abstract the various parts of Bentham's criticism from their context to show why we should not go further and adopt the natural system of evidence he favoured in place of the still-technical system of the Common Law. J.S. Mill expressed this well:

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<sup>1</sup> 'Après avoir exploité les manuscrits originaux, il s'est trouvé que les matériaux étaient loin de former un ensemble intelligible et complet. Selon la nature du texte et le besoin, j'ai dû abrégé ou développer, traduire ou commenter, réunir des fragmens épars, remplir des chapitres sur de simples indications, choisir entre plusieurs essais sur le même sujet ou les fondre en un seul tout.' Traité i. p.ii.

<sup>2</sup> UC xlv. 269. Owing to the heavy erasure the text in brackets is not entirely legible.

<sup>3</sup> Rationale of Judicial Evidence (Bowring, vii. 25).

<sup>4</sup> To do them justice, the Criminal Law Revision Committee were aware of this. In the text of their Eleventh Report introducing the quotation from Dumont cited above, they say, 'Bentham's famous comment on the rule that suspects could not be judicially interrogated seems to us to apply strongly to the right of silence'" (emphasis added): Cmnd. 4991 (1972) p.18.

The truth is, that, bad as the English system of jurisprudence is, its parts harmonise tolerably well together; and if one part, however bad, be taken away, while another part is left standing, the arrangement which is substituted for it may, for a time, do more harm by its imperfect adaptation to the remainder of the old system, than the removing of the abuse can do good.<sup>1</sup>

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<sup>1</sup> J.S. Mill's preface to his edition of Rationale of Judicial Evidence (Bowring, vi. 202).

ACTUALITÉ DE LA PENSÉE JURIDIQUE DE JEREMY BENTHAM

ed. Philippe Gérard, François Ost and Michel van de Kerchove  
Brussels: Publications des Facultés universitaires Saint-Louis, 1987

J.R. Dinwiddy

Royal Holloway and Bedford New College, London

For an English student of Bentham this is an exciting book. Amounting to over 700 pages, it is a lively collection put together by a group of scholars, most of them Belgian, who have been working more or less independently of the Bentham Project. From a 'Project' point of view, some limitations of the collection may be noted. Very few of the contributors have worked on Bentham's manuscripts, and several of them have derived their knowledge of his thought almost entirely from Dumont. Also, while some show a close acquaintance with the recent work of English-speaking scholars, others cover ground which has already been covered by works in English; and it is curious that although the books of Hart, Harrison and Rosen are quite often cited there is not a single reference to what David Lieberman has called the most ambitious assessment of Bentham's intellectual biography since Halévy, L.J. Hume's Bentham and Bureaucracy. On the other hand, the book contains much impressive scholarship and sophisticated thinking, and by relating Bentham's ideas to those of a range of modern Continental writers on legal theory, it offers perspectives on his thought which scholars working in an Anglo-American milieu may well find novel and illuminating.

The volume includes one well-known piece: Hart's essay on the demystification of law, in a French translation. The only other reprinted paper is one by Enrique Mari of the University of Buenos Aires which was first published in 1985. Professor Mari, author of a book on Bentham and Foucault, discusses Bentham's conceptions of fiction - his critique of 'pestilential' fictions in the law, and his theory of linguistic fictions as a necessary element of civilized discourse - and relates these to conceptions of fiction employed by various modern thinkers. He not only treats Bentham (as others have done) as a precursor of Vaihinger and Wittgenstein; he also shows that Jacques Lacan, founder of the Paris school of Freudian psychoanalysis, regarded Bentham's theory of fictions as partially anticipating his own theory that 'toute vérité a une structure de fiction'. A third paper contributed from outside Belgium is one by the Portuguese scholar José de Sousa e Brito: a subtle discussion of some deficiencies in Bentham's analysis of descriptive or expository jurisprudence, and in his application of the method of paraphrasis to the legal concepts of right and obligation.

Of the Belgian contributions, one or two seem to me to go somewhat off the rails, at least in their reading of Bentham. Eric Causin, in a paper on deontology, cites the Collected Works edition of 1983 on his first page, but then draws all his quotations from the French translation of Bowring's very questionable edition of the Deontology published in 1834. He associates Bentham's conception of deontology with social control and 'panopticism', which seems a misunderstanding of what his intention was in this work. Fernand Tanghe's essay on Bentham's poor law writings reproduces a number of exploded myths about the enclosure movement and proletarianization, and ignores the crucial role of population growth in producing rural poverty. Though he cites Brian Inglis and E.P. Thompson, he does not appear to have read Poynter, Himmelfarb or Bahmueller, and his treatment is simplistic and rhetorical. (One of his more striking phrases, which gives some indication of the flavour of the piece, is his description of the principle of utility as 'le cache-sexe du productivisme'.) The majority of the contributions can be recommended, however, though this review cannot do more than indicate very briefly the coverage of those which the reviewer found most interesting.

High on the list of these is Alain Strowel's comparison between Bentham's legal philosophy and Hart's. The subject is tackled on a broader front than it was in de Sousa e Brito's article on an aspect of the same topic in Rechtstheorie in 1979. Strowel emphasizes the difference between the two men's approaches to language, Bentham being anxious to criticize and reform the common usage of legal terms, whereas Hart's analysis of such terms involves a greater respect for the ways in which they are ordinarily used. Strowel also suggests that Hart's treatment of human motivation and action differs from Bentham's in putting the accent on understanding rather than explanation (these terms being used with the connotations attached to them by G.H. von Wright); and it is argued that here, as in the linguistic field, Hart's approach is one that can be described as 'hermeneutic'. Another

stimulating paper is one by Michel van de Kerchove (translator of Hart's The Concept of Law) which examines Bentham's ideas on decriminalization and 'depenalization', and relates them first to the ideas of Beccaria and J.S. Mill on the same subject, and then to recent debates on homosexuality, abortion, and other so-called 'victimless crimes'. He shows convincingly that although most advocates of decriminalization have made extensive use of utilitarian arguments, they have usually supplemented these by appeals to other values such as natural rights and individual moral responsibility. He adds that Bentham himself may, at least tacitly, have founded his case to some extent on non-utilitarian moral principles; but this last point is not very cogently developed. A complementary paper is that of Françoise Tulkens, which gives an efficient summary of Bentham's 'Principles of the Penal Code' as edited by Dumont, and goes on to provide a condensed but interesting discussion of the role of utilitarianism in subsequent penal legislation and penal theory. She outlines the typical lines of argument used by those who have regarded social utility as the fundamental justification of punishment, and she also touches on other approaches which have given priority to considerations of justice and retribution.

The best essay with a political focus is the one by Hughes Dumont on the issue of majority rule in Bentham's democratic theory. He draws extensively on the Constitutional Code and on Fred Rosen's monograph on this work, and he argues in opposition to C.B. Macpherson that Bentham's theory cannot be reduced to the terms of a simply 'protective' model. He also defends Bentham against Hayek's strictures on his majoritarianism, and advances the view that the majority principle is an essentially liberal one because of its inbuilt allowance for reversibility. Other contributors put more emphasis on illiberal traits in Bentham's philosophy. Eric Moens and Pierre-Paul van Gehuchten, in a paper on the relationship between his economic ideas and his jurisprudence, maintain that as his utilitarianism embodied no principle of 'autolimitation' with regard to state action it opened the way to a 'drift' towards statism sanctioned by the appeal to utility. And Philippe Gérard, in a wide-ranging essay on the theme of power in Bentham's constitutional and legal theory, comes to a somewhat similar conclusion about the tendency of his thought to legitimize interventionism.

One further paper that should be noticed - indeed it is one of the most original - is that by François Ost on the themes of codification and 'temporalité'. He rightly maintains that Bentham's approach to law, with its strong emphasis on expectation, was essentially oriented towards the future, but that it stopped well short of being utopian. He notes the scope that Bentham as codifier wished to allow for further amelioration of the law, and he stresses his belief in progressive reform and continuity: his conception of time is described as 'futuriste, gradualiste et continuiste'. What is not, perhaps, accommodated very satisfactorily in this analysis is the sharp discontinuity that would have been involved in substituting a Benthamic Pannomion for any system of case-law or customary law. Finally, it should be mentioned that the volume includes a 65-page bibliography prepared by Gaston Braive. This is less comprehensive in regard to works in English than the bibliography compiled by Donald Jackson which will be familiar to readers of the Newsletter, but it will be useful to them for its listing of publications in other languages. One small correction: it has been pointed out to me by Cyprian Blamires of the Bentham Project that the article by Faith Bowers, which appears here as 'The Benthams of Bloomsbury', Baptist Quarterly (1981), is actually entitled 'The Benhams of Bloomsbury'.

JEREMY WALDRON, ed., NONSENSE UPON STILTS:  
BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN  
London: Methuen, 1987

P.J. Kelly

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This book concentrates on the three most famous and most important critics of the doctrine of the rights of man in the history of political thought. Bentham, Burke and Marx, though apparently differing in almost every aspect of their philosophic outlooks, were all vehement opponents of natural or moral rights, and in particular the 'Declaration of the Rights of Man and the Citizen' (1789).

In this work, Waldron brings together a selection from Bentham's 'Anarchical Fallacies' and Supply Without Burthen, Burke's Reflections on the Revolution in France, and Karl Marx's On the Jewish Question. Each selection is prefaced by an introductory essay in which the editor provides useful information about the historical context of these works along with a brief outline of the arguments. Also useful is the text of the 'Declaration of the Rights of Man and the Citizen'. This provides an important focus for the subsequent criticisms of Bentham, Burke and Marx. An introductory chapter discusses the development of rights theory in the seventeenth and eighteenth centuries, as the historical background to the French 'Declaration' and the subsequent critiques of rights theory. There is a long concluding essay in which Waldron sketches a response to the criticisms of Bentham, Burke and Marx. In this essay he assumes the importance and cogency of their arguments, and where they have strong arguments he attempts to reconcile them with the role of natural and moral rights in contemporary political theory. This last essay is an interesting and significant contribution to current philosophical debates on the role of rights in political discourse. As such this chapter sits a little uneasily with the earlier selections where the editor has provided a basic text for students of law, philosophy, politics and the social sciences, who need a short introduction to the debate on the role and significance of rights theory.

Despite this, Nonsense Upon Stilts is a good book. It shows the different perspectives from which rights theories can be attacked, and the resourcefulness and subtlety of rights theory in the face of what appear to be devastating criticisms. More importantly, it shows how the writings of past thinkers can still be used as important sources of argument, and as interesting contributions to debates which are still continuing. Waldron makes the reader aware of the historical limitations of each author. Nevertheless, he also acknowledges their perennial significance as sources of ideas and arguments which are still part of the common currency of political debates.

Waldron's treatment of Bentham is particularly interesting in this light. He relates Bentham's attack on the language of natural rights as 'nonsense' to the similar attacks of the logical positivists of the Vienna Circle on the propositions of theology and metaphysics in this century. He also points out how Bentham's concern with the themes of 'language, meaning, sense and nonsensicality' connects him with contemporary debate in the Anglo-Saxon world on the significance of language within moral and political theory. However, Waldron's account of Bentham's critique does not replace H.L.A. Hart's 'Natural Rights: Bentham and John Stuart Mill'<sup>1</sup> and W.L. Twining's 'The Contemporary Significance of Bentham's Anarchical Fallacies',<sup>2</sup> as the most significant recent studies. Like Twining, Waldron argues that Bentham's objection to natural and moral rights theories has two distinct aspects, linguistic and political. Firstly, he argues that the language of rights is nonsensical when it is divorced from a legal context. Natural-rights claims are simply assertions that something ought to be the case, they are not truly rights, because rights depend upon the existence of a legislator who can impose the obligations and duties which give rise to rights. In the context of a legal system it is possible to verify rights claims by reference to real obligations and duties. In the absence of this framework of legal

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<sup>1</sup> See H.L.A. Hart, Essays on Bentham, Oxford, 1983.

<sup>2</sup> W.L. Twining, 'The Contemporary Significance of Bentham's Anarchical Fallacies', Archiv für Rechts-und Sozialphilosophie, LXI (1975), 325-56.

obligations, the claim to possess certain inalienable rights is reducible to a claim that certain rights should exist. And the claim that something should exist is not equivalent to the claim that one does possess a right: 'Reasons for wishing there were such things as rights are not rights; a reason for wishing that a certain right were established, is not that right - want is not supply - hunger not bread.'<sup>1</sup> This strand of argument is similar to the emotivist accounts of ethical discourse popularized by the logical positivists of the Vienna Circle. The second strand of argument is that natural-rights claims are pernicious because they open the door to anarchy.

Waldron's description of Bentham's argument is lucid and concise. The one omission from his account, though given the nature of his enterprise this is not a criticism, is any discussion of the possibility of constructing a utilitarian theory of entitlements based on Bentham's concept of 'securities against misrule'. Despite this, Nonsense Upon Stilts illustrates Bentham's contribution to an ongoing philosophical debate, and is a useful and sensible contribution to the vast literature on rights theory.

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<sup>1</sup> The Works of Jeremy Bentham, ed. J. Bowring, 11 vols., Edinburgh, 1843, ii. 501.

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