



# THE BENTHAM CLUB

## Presidential Address 2000

*The Rt. Hon. The  
Lord Bingham  
of Cornhill*



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IS PRESENT<sup>1</sup>**

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<sup>1</sup> I gratefully acknowledge the help given to me by Patrick Robinson in the preparation of this paper.

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The son of a prosperous property-dealing attorney, educated at Westminster and Oxford; the author of a Latin ode, commended by Johnson, on the death of King George II and the accession of King George III, who also described King Charles I as “the royal martyr”; a barrister and later bencher of Lincoln’s Inn; the protégé of the Earl of Shelburne, soon to be prime minister, who, as the Earl’s guest at Bowood, played the violin to a harpsichord accompaniment and wrote of his daily life at that great house:

“I do what I please and have what I please, I ride and read with the son, walk with the dog, stroke the leopard, drive little Henry out in his coach, and play at chess and billiards with the ladies”;

the rebuffed suitor of Caroline Fox, niece of Lord Shelburne and Charles James Fox and sister of Lady Holland who, himself remaining single, described sex as “the highest enjoyment that nature has bestowed upon man”;<sup>3</sup> the suppliant for nomination to a rotten borough by which to enter Parliament; the tenant of a stately home, of mediaeval origin, in Somerset, who also in early days entertained “brilliantly” at his London house at Queen Square Place; a man who played fives and shuttlecock and jogged and who, although he lived to be 84, was described by John Stuart Mill as “a boy to the last”;<sup>4</sup> the owner of Milton’s old house at 19 York Street in Westminster, who evicted his tenant Hazlitt for non-payment of rent but who was nonetheless

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<sup>3</sup> J Dinwiddy, *Bentham* (Oxford, 1989), 41

described by Hazlitt, in *The Spirit of the Age*, as “in private life, . . . an amiable and exemplary character”; a man who named his walking-stick, and christened his cat the Reverend Dr John Langborn; a man who considered that his ethical system invested the subject of morals with “a light and pleasant hue”<sup>5</sup>: all this seems a far cry from the humourless, pedantic, materialist ideologue of popular imagination, often portrayed as a rather unattractive cross between Dr Casaubon and a secular Savonarola. It is a timely reminder that “one man in his time plays many parts” and that Bentham, for all his obsessional devotion to certain principles and causes, was a less monochrome character than most. He was not a man whose praise was easily earned, but I hope that the length of my opening sentence might arouse his admiration, even perhaps a touch of envy.

In a lecture otherwise devoted to defending Blackstone against certain of Bentham’s strictures – appropriately enough, in a lecture given at Blackstone’s old undergraduate college – the late Professor Cross described Bentham as a man with a master mind, who changed the way in which people think about important subjects.<sup>6</sup> The Professor modestly suggested that no one who had as yet held a chair of English Law, even Blackstone, could be described as a man with a master mind; and it was even clearer that a capacity to change the modes of thought of mankind was not one of the qualities required of Blackstone in his other role, as judge. So one has to ask: in what way did Bentham change the process of thought on important subjects?

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<sup>4</sup> *Dictionary of National Biography*

<sup>5</sup> J Dinwiddy, n. 2 above, 36

<sup>6</sup> “*Blackstone v Bentham*” (1976) 92 LQR 516

Given the immense volume of Bentham's published works – nearly six million words, of which none but a scholarly minority (not including myself) has sampled more than a minute fraction – it is not altogether easy to put forward a simple answer which is not unduly simplistic. But it may perhaps be said that his influence has been felt in two main ways. The first is in his insistence that every institution, system, procedure or law should be appraised and tested by asking what purpose it serves, what it is for, what use it is. The second is in his insistence that every such institution, system, procedure or law should serve the general interest of the community and, to the extent that it is shown not to do so, should be changed. I deliberately refer to “the general interest of the community” to make plain that I am not intending to take part in the long-running debate on the merits and demerits of Bentham's greatest happiness principle. This evasive summary of his approach is, I hope, enough for me.

If, to modern ears, both these principles sound unexceptionable, even obvious, that is perhaps the most potent testimony to the pervasiveness of Bentham's influence. For they cannot have seemed at all obvious or unexceptionable at the time. Although Bentham's life-span included two major national traumas – the loss of the American colonies, and the French Revolution (with the long ensuing war against Napoleon) - it was until nearly the end of his life a time when respect for and confidence in our national institutions perhaps stood generally higher than at any time before or since; and fear of revolutionary France strengthened the authorities' intolerance of such criticism as there was. Thus, although Bentham wrote “*Truth v Ashurst*”<sup>7</sup>, a pamphlet criticising Ashurst J's charge to the grand jury of Middlesex, in 1792, he did not think

it prudent to publish the work for 30 years. In 1809 his scathing criticism of the libel law was printed, but Bentham was warned by Romilly (who had read the manuscript) that it would lead to prosecution, with the result that it was not sold openly. Later Bentham was again warned by Romilly that two tracts on religious subjects would lead to certain prosecution and certain conviction. It was not a time when radical questioning of existing institutions was at all well received by the powers that were. Nor was it a time when the general interest of the community at large was uppermost in the minds of the narrow and well-to-do elite who effectively ruled both church and state.

By the time of Bentham's death, in the year of the great Reform Act, the tide had turned, the climate had changed. E L Woodward aptly entitled his history of England from 1815 to 1870 "*The Age of Reform*". Such it was: reform of Parliament, of the church, of the civil service, of the law, of the court system, of the penal system, of public administration, of local government, of the army and the navy. All of these were the subject of critical appraisal to investigate what purpose they existed to serve and whether that advanced the general interest of the community. In the process some of Bentham's most cherished aims were met. One might instance the advance towards adult suffrage, more uniform electoral districts, the secret ballot, the abrogation of the death penalty for dozens of offences, the codification of large tracts of the law, particularly in the criminal field, the substitution of judicial salaries for reward by way of court fees and the statutory reforms of the law of evidence enacted in 1843, 1851 and 1898. There were of course other forces and other influences at

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<sup>7</sup> *Works*, V 233

work, but it would not perhaps have been fanciful for Woodward to entitle his work (with the terminal date extended a little) “*The Age of Bentham*”. We cannot be surprised that some of his aims were not achieved, and the achievement of others would seem problematical, at least in the short term: annual elections, for example, or abolition of a second chamber of Parliament, or exclusion of professional lawyers from the judicial bench.

But it would be wrong to regard Bentham’s influence as spent. For if the broad thrust of his thinking has been correctly characterised, the task of appraising our national institutions, systems, procedures and laws by reference to their utility and effectiveness, and of ensuring so far as possible that they promote the general interest of the community, remains both relevant and necessary. It is not a task which can ever be completed and given up. Mr Bentham is still present.

What are the features of the contemporary scene which now engage the hyperactive critical intelligence of Mr Bentham and cause his word-processor to overheat? I compile my own short-list of four answers to that question. But I am conscious that the list could be much longer, and that others could construct different but equally plausible shortlists.

(1) **Codification** Mr Bentham is gratified by the extent to which the disorderly shreds and patches of the common law have been, in effect if not in name, codified since the date of his death in 1832 – and gratified too that the word “codify”, which he coined, has passed into the language. He notes with satisfaction that a Law

Commission has been established with the express task, among others,<sup>8</sup> of systematically developing and reforming, and in particular codifying, the law, although he regrets that this task should be entrusted to a troupe of professional lawyers. He had earlier noted in his commonplace book

“Barristers are so called (a man of spleen might say) *a Barrando* from barring against reforms the entrances of the law”<sup>9</sup>

and he would wish the process of law reform to be subject much more directly to public opinion, perhaps through the Public Opinion Tribunal if such a body is intended to exist in reality.

But the focus of his attention is not the limited codification which has taken place. It is the absence of a comprehensive criminal code, a deficiency which attracts his outspoken criticism. While unwilling to recognise any virtue in the common law, he acknowledges the force of an argument that in some fields, such as the commercial, the absence of a binding statutory code may enable the law to be developed so as to fulfil rather than defeat the expectations of merchants to the advantage of trade and the prosperity of the community. But such an argument can have no force in the criminal field:

“Scarce any man has the means of knowing a twentieth part of the laws he is bound by. Both sorts of law are kept most happily and carefully from the knowledge of the people: statute law by its shape and bulk; common law by its very essence. It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes law for his dog.

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<sup>8</sup> Law Commissions Act 1965, section 3

When your dog does anything you want to break him of, you wait until he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is that he should not do – they won't so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then they hang him for it.”<sup>10</sup>

As an example of dog law, Mr Bentham points to the recent case of *Reg v R*<sup>11</sup>. Mr R was convicted of attempting to rape his wife from whom he was not formally separated. Had he, however improbably, sought advice before making his attempt he would have been told that whatever moral disapprobation his conduct might attract it would expose him to no criminal sanction. He was to learn, to his cost, that the law was no longer what it had been thought to be for over 250 years. Mr Bentham might also point to *Reg v Brown (A) and Others*,<sup>12</sup> the case of the sado-masochists who learned, from a majority decision of the House of Lords, that the inflicting of physical injury by adults on adults was a criminal offence even though the injury was inflicted and suffered with the full consent of all involved. Was that an outcome of which the dog could have been confidently forewarned?

The arguments in favour of a clear, comprehensive and coherent criminal code are so strong, and now so generally accepted, that Mr Bentham asks, in frustrated indignation, what impedes the enactment of such a code. The answer usually given is

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<sup>9</sup> *Works*, X 72

<sup>10</sup> *Works*, V 235

<sup>11</sup> [1992] 1 AC 599

that the criminal law is regarded as a matter properly calling for scrutiny by the House of Commons and that pressure on the parliamentary timetable precludes so time-consuming a legislative exercise. With the first part of this answer Mr Bentham enthusiastically agrees. The definition of what conduct is and is not to attract criminal sanctions is, in his emphatic view, a matter for the elected legislature, answerable as it is to the people, the source of all political power. But with the second part of the answer he has no patience at all. Under his Constitutional Code the legislature was to sit on six days out of seven throughout the year, and on the seventh if urgency was declared; attendance was to be closely monitored, and remuneration forfeited by any member not attending; the Legislator's Inaugural Declaration contained a promise not on any occasion, by plea of sickness or other excuse, to seek to exempt oneself from the obligation of attendance.<sup>13</sup> The object was to ensure that legislation did not fail simply because (as was common at the time) the legislative term was not long enough or there was no quorum on a particular day. If it is still said that the parliamentary timetable cannot accommodate the enactment of a criminal code appropriate for a developed twenty-first century democracy, then Mr Bentham would suggest that it be given priority over other matters – the hunting of foxes is perhaps an example – which currently engage the attention of the legislature.

**(2) The demystification of the law** Mr Bentham approves the steps taken to simplify procedure in the civil courts, avoid unnecessary resort to legal jargon, sweep away unnecessary rules and fictions and make the administration of justice more

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<sup>12</sup> [1994] 1 AC 212

<sup>13</sup> *Constitutional Code*, volume 1, eds. F. Rosen and J. Burns, (Oxford, 1983), 48-50, 144; F. Rosen, *Jeremy Bentham and Representative Democracy* (Oxford, 1983), 134

accessible to the uninstructed. But, having earlier flirted with the notion that every man should be his own lawyer, he continues to accept, reluctantly, the continuing need for professional lawyers. Hence his proposals for the appointment of an eleemosynary advocate to represent those who are incapacitated or too poor to obtain assistance for themselves and for the establishment of an Equal Justice Fund to provide funds for the helpless; hence too his proposal that the legislature instruct judges to impose fines in preference to other forms of punishment, to top up the Equal Justice Fund.<sup>14</sup>

Despite his condemnation of lawyers' jargon and jargonisation, which he regarded as a superior form of thieves' cant hiding the defects of the law,<sup>15</sup> I doubt whether Bentham thought that all technicality could or should be avoided when lawyers are speaking to each other. If so, he set a bad example. I put on one side his use of the expression "antejantacular circumgyration" to mean a walk before breakfast<sup>16</sup>: that was a joke, of a kind to which the learned are sometimes unhappily prone. But to describe the electorate as "the constitutive authority" or courts as "judicatories" did not obviously contribute to ready understanding; and there would be those who would understand the meaning of natural history, astronomy and knowledge of the earth but would fail to recognise them described as physiurgic somatology, uranoscopic physiurgics and epigeoscopic physiurgics.<sup>17</sup> It is obviously desirable that lawyers, when speaking to non-lawyers, should use language which is clear, intelligible and so far as possible untechnical. But it would be futile and self-

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<sup>14</sup> Rosen, n. 12, above, 153-4.

<sup>15</sup> H. L. A. Hart, *Essays on Bentham*, (Oxford: 1982), 2

<sup>16</sup> J. Dinwiddy, n. 2 above, 18

defeating to ask them, when speaking to each other, to avoid references (meaningless to the uninstructed) such as Calderbank letter or Bullock order, as it would be to ask doctors in professional conversation with each other to avoid reference to Dupuytren's contracture, McBurney's point or Koplik's spots.

Writing in 1982, the late Professor Hart drew attention to two legal fields in which the demystification favoured by Bentham had further progress to make. Mr Bentham strongly endorses both points. The first concerns court dress and ceremonial, and I cannot (I think) do better than quote what Professor Hart said, long though the quotation is:

“Consider first Bentham's condemnation as an instrument of ‘delusion’, of the fancy dress of authority, or as he calls it disparagingly, its factitious ‘lustre and splendour’: its apparatus of pomp, pageantry, and ceremony, wigs and gowns and antique formal modes of address. Of course, there are old arguments for traditional rituals: it is often urged that society needs ceremonials to bind it together and that their emphasis on a nation's past is among the unifying forces of society, giving it not only colour but also solidity. Of course it may well be that our traditional legal forms have hitherto maintained respect for the law or at least instilled fear, perhaps healthy fear. But surely, in the light of a changed general attitude, not only to ceremonies and forms but to authority of all kinds, we should reconsider the question whether our legal rituals help us now or obstruct us. Do not our inherited forms instead of inspiring irrational or undeserved respect (as

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<sup>17</sup> *Ibid*, 47-8

Bentham chiefly feared) make the law appear anachronistic, out of touch because out of date, or, as one critic has illuminatingly put it, do they not make the law and lawyers appear like ‘some contemporary remnants of a society dominated by the upper classes’, marked off from the rest by a special style of dress and diction? Would not dropping these forms, dimming the lustre and the splendour, do something to lessen the risks of dissociation between law and the rest of the community, which is surely among the great dangers of our time? Would it not be better to let judge and lawyer appear, as Bentham wished, merely as life-sized contemporary figures, so that in entering a lawcourt the plain man would no longer feel that he is entering a strange world of half-intimidating and half-comic historical pantomime? We do not when we go to a doctor find ourselves confronted with someone in the guise of a seventeenth century apothecary, complete with ruff and doublet and sword, and if we did we might feel even more uncomfortable than we do about swallowing his, that is, our, medicine. At a time when authority of all kinds is under the most irrational forms of attack why make authority more difficult to accept by dressing it up as a ghost from the past?’<sup>18</sup>

The second field seen by Professor Hart as ripe for further demystification along Benthamite lines is that of evidence.<sup>19</sup> Why should any court be precluded from considering (and according such weight as may be thought appropriate) any evidence relevant to its decision? Why, in short, should there be any evidential rule other than a requirement of relevance? In a modern civil trial conducted by a judge sitting alone,

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<sup>18</sup> N. 12, 33

who in any event makes all decisions on the admissibility of evidence, the case for admitting all relevant evidence and leaving the judge to assess its weight is overwhelming. If the judge cannot be trusted to perform that task he is unfitted for his office.

The argument is scarcely weaker when applied to jury trial. The premise upon which public and professional confidence in juries rests is that a randomly selected body of 12 men and women can be relied on to reach a collective decision which is fair, perceptive and responsible. Such is that confidence that decisions of momentous significance to individual citizens are entrusted to juries. Yet these same jurors, relied on to exercise a fair, perceptive and responsible collective judgment on issues of great moment, are at the same time thought to be so fallible, so liable to be improperly swayed by shreds of insubstantial evidence, that information which many would think relevant – notably, the details of a defendant’s previous criminal record and of other offences – are concealed from them, sometimes to the point of distorting the trial itself. Mr Bentham is not an *aficionado* of the trial jury in its present form, but makes a simple point: either the jury is to be trusted or it is not; if it is, it should have access to all relevant evidence, to evaluate as best it can; if it is not, it should make way for a tribunal which can be trusted.

(3) **Penal policy** Bentham followed the Italian philosopher Beccaria in, unusually, regarding penal policy as a matter calling for sustained and serious thought. Their approach had much in common. As Professor Hart put it:

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<sup>19</sup> *Ibid.*, 34

“Both insist on the uselessness of the traditional savageries of penal law: both insist that the punishment to be used should be the least which is sufficient to counterbalance the advantage men hope to derive from their crimes and both draw the same convincing picture of the ways in which excessively severe punishment may actually increase crime. It may do so by hardening men to the spectacle of cruelty when they see it employed by the state; it may do so by making it impossible to arrange scales of proportionate penalties which will induce men to commit lesser rather than greater crimes and it may do so by providing men with an incentive to commit fresh crimes rather than be caught and tortured for those that they have committed.”<sup>20</sup>

It was on this subject that Bentham pronounced one of his best-known aphorisms:

“But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted so far as it promises to exclude some greater evil.”<sup>21</sup>

Bentham’s was, then as now, a minority view in England, but he was not a lone voice. Samuel Johnson wrote that

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<sup>20</sup> *Ibid.*, 46

<sup>21</sup> *Principles of Morals and Legislation*, Works I, 83

“the natural justice of punishment, as of every other act of man to man, must depend solely on its utility, and . . . its only lawful end is some good more than equivalent to the evil which it necessarily produces”.<sup>22</sup>

Johnson also pointed to the dangers of undue severity:

“To equal robbery with murder is to reduce murder to robbery, to confound in common minds the gradations of iniquity, and incite the commission of a greater crime to prevent the detection of a less. If only murder were punished with death, very few robbers would stain their hands in blood; but when by the last act of cruelty no new danger is incurred, and greater security may be obtained, upon what principle shall we bid them forbear?”<sup>23</sup>

Goldsmith, perhaps influenced by Johnson, wrote in similar vein:

“And it were highly to be wished, that legislative power would thus direct the law rather to reformation than severity. That it would seem convinced that the work of eradicating crimes is not by making punishments familiar, but formidable. Then instead of our present prisons, which find or make men guilty, which enclose wretches for the commission of one crime, and return them, if returned alive, fitted for the perpetration of thousands; we should see, as in other parts of Europe, places of penitence and solitude, where the

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<sup>22</sup> *Vinerian Lectures on the English Law*, Part II, Lecture I, delivered by Robert Chambers but attributed to Johnson.

<sup>23</sup> Rambler No. 114, *Capital Punishment*

accused might be attended by such as could give them repentance if guilty, or new motives to virtue if innocent. And this, but not the increasing punishments, is the way to mend a state; nor can I avoid even questioning the validity of that right which social combinations have assumed of capitally punishing offences of a slight nature . . .<sup>24</sup>

So Bentham did not speak alone. But he spoke loudest, longest and most effectively.

Surveying the penal policy of this country today, Mr Bentham observes with satisfaction not only that death has ceased to be the penalty for numerous disparate offences but that it has ceased to be a penalty for any. And, although Bentham in his search for alternatives to the death penalty had suggested some fairly gruesome punishments,<sup>25</sup> he does not regret the disappearance of the more inhumane penalties once inflicted by the state. But he finds much to cause him dismay, in particular the absence of profound thought by the legislature on the object and effect of punishment, the failure (as he sees it) to relate the imposition of punishment to the general interest of the community which such punishment is intended to promote.

His first criticism is directed to the mandatory life sentence for murder. He objects to this as a legislative fiction, since a judge sentencing a defendant to imprisonment for life in such a case knows, and the defendant knows, and the public know, that save in a tiny minority of cases the defendant will not be imprisoned for life. Moreover the real sentence will be imposed not, as Mr Bentham would wish, in

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<sup>24</sup> O. Goldsmith, *The Vicar of Wakefield*, chap. 8

open court in the face of the public, but by a member of the executive behind closed doors. What public purpose, he asks, is served by this procedure? If it is intended to mark the public's abhorrence of taking life, such opinion is mocked by resort to a transparent pretence. If it is intended to deter, then evidence is needed that those who commit murder (or a significant number of them) are deterred by a nominal sentence of life but would not be deterred by a term of years appropriate for the particular crime, which might in grave cases be for life. If it is an expression of vengeance on behalf of the bereaved, then the answer is that public justice should be a substitute for private vengeance not an expression of it.

Mr Bentham turns next to automatic life sentences introduced in 1997 and required to be imposed on second conviction of a serious offence, save in exceptional circumstances. In this instance, he acknowledges, little attempt is made to maintain the fiction that the defendant will be imprisoned for life, and the punitive term is announced publicly by the judge. But it is a grave step to order that a defendant's freedom for the rest of his life be forfeit, even potentially, to the state, unless the crime requires so severe a penalty; and how can the court resolve whether the crime does or does not require so severe a penalty if the sentence is to be imposed automatically? Can any public interest be served by imposition of a penalty more severe than a crime requires?<sup>26</sup>

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<sup>25</sup> See Hart, n. 12 above, 47.

<sup>26</sup> Mr Bentham approves the effect of the Court of Appeal decision in *R v Offer and Others*, *The Times*, 10 December 2000 modifying this provision; but does not approve the modification by a court of what Parliament has enacted. Nor is he approving of the court's reliance on a bill of rights.

His perplexity does not end there. He notes that a person found to have acted “in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself” may be made subject to an anti-social behaviour order.<sup>27</sup> So far, so good. Mr Bentham deprecates anti-social behaviour. But he notes with surprise that a breach of the order may be punished by up to five years’ imprisonment. Now a breach may itself involve the commission of a criminal offence: if it does, the delinquent will no doubt be prosecuted and punished for that offence. But the breach may involve no criminal offence. Even in that situation the legislature has envisaged a five-year term as possibly appropriate. Mr Bentham finds himself, uncharacteristically, lost for words.

Only with some difficulty can Mr Bentham be restrained from dilating at some length on the state of the prisons. He is disappointed that his (or, more properly, his younger brother’s)<sup>28</sup> panopticon scheme has not been adopted in prisons, although found to work satisfactorily in hospitals. He regrets that the privatisation of some prison managements has been on lines quite different from those he recommended.<sup>29</sup> But most vehemently of all Mr Bentham castigates the practice of incarcerating more and more defendants for longer and longer periods when the value of imprisonment decreases in inverse proportion to the increase in the number of those imprisoned. Do the idle, the work-shy and the unskilled acquire habits of industry, experience the rewards of productive labour and learn occupational skills exercisable on release?

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<sup>27</sup> Crime and Disorder Act 1998, s.1.

<sup>28</sup> N. 3 above

<sup>29</sup> J. Dinwiddy, n. 2, 92

Are the illiterate taught to read and write, the computer-illiterate to learn basic computing skills? Are the drug-addicted detoxified? Is the defendant on leaving prison a less anti-social man or woman than on entering it? If the answers to these questions are negative, as Mr Bentham suggests they plainly are, then he asks what public purpose is served by the existing practice and whether it yields any public benefit commensurate with the public resources expended on maintaining it. Mr Bentham of course has his own very detailed response to these questions. But since he is keen to address the fourth and last item on my shortlist he accepts that his response must be deferred to another year.

**(4) The House of Lords** Mr Bentham remains strongly in favour of a unicameral legislature. His argument, assuming the first chamber to be democratically elected to represent the will of the people, is simple: if the second chamber also is democratically elected, it duplicates the first, without conferring additional benefit on the public; if the second chamber is not democratically elected, then it should not thwart the will of the chamber which is. Bentham's otherwise wholehearted approval (in his later days) of the Anglo-American United States, as he called it,<sup>30</sup> was qualified only by his regret that it should have adopted the common law and established a senate.<sup>31</sup> He points, in practical support of his argument, to countries which operate unicameral systems (Portugal, China, New Zealand, Denmark, Sweden, Turkey, Hungary), and to subordinate entities in federal systems which do the same (Nebraska, Queensland, the German Länder, the provinces of Canada).<sup>32</sup> He is

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<sup>30</sup> See Hart, n. 12, 73

<sup>31</sup> *Ibid.*, 73

<sup>32</sup> Russell, *Reforming the House of Lords*, (2000), 23-4

heartened that in several countries with bicameral systems the upper house is the subject of continual calls for reform (Canada, France, Ireland, Italy, Spain).<sup>33</sup>

And, of course, the United Kingdom. Mr Bentham is modestly heartened by the severe restriction in the representation of hereditary peers effected by the House of Lords Act 1999, leaving only one country in the world where heredity forms the primary basis for upper house membership: that is Lesotho (it is not however recorded that any of the members of that upper house purchased their chieftaincies from Lloyd George).

But even if the existence of an upper house is accepted – a very big if in Mr Bentham’s mind – and despite the modest advance effected by the 1999 Act, he finds much to castigate in the current process of reform. To criticise and destroy without a clear conception of what is to follow is to him the mark of the anarchical spirit.<sup>34</sup> He finds it extraordinary that a government should embark on the first stage of reforming the House of Lords without first researching, publicising and consulting on detailed plans for any second or subsequent stage of reform. In its transitional form the composition of the House is subject to obvious anomalies: the continued membership of 75 hereditary peers elected by their colleagues under the Weatherill amendment to the 1999 Act is readily defensible as a fair and beneficial compromise, giving those elected an element of legitimacy; but unless further reforms, as yet unagreed, are adopted within about 18 months from now a curious situation will exist. Vacancies in the ranks of hereditary peers elected by their hereditary colleagues to sit in the House

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<sup>33</sup> *Ibid*, 24

will, on death (and even hereditary peers are mortal), be filled by an election in which the electorate is the surviving colleagues of the deceased peer. Since there are only two elected hereditary Labour peers, the death of one will enable the survivor, on his own, to nominate a successor.

If the existence of a second chamber be again assumed, against Mr Bentham's wishes, the exercise of judicial functions should in his view be no part of its work. An appeal should in his view lie from the decision of a single judge, but to a single judge.<sup>35</sup> Mr Bentham recognises the delay and expense inherent in protracted appeals:

“If courts of appeal were any thing less than necessary, the institution would, it is evident, be far from eligible. Expense to the public is woven into the establishment: expense and delay to the suitor, and thence frequently a failure of justice, is inseparable from the proceedings. Institute more ranks than one, the measure of these inconveniences is increased in a great degree, though not absolutely doubled, at each rank.”<sup>36</sup>

In criticising the judicial role of the House of Lords, Bentham started at the top, with the Lord Chancellor, employing his customary understatement:

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<sup>34</sup> See Hart, n. 12 above, 7.

<sup>35</sup> *Draft of a Code for the Organization of the Judicial Establishment in France, Works IV* 289; F. Rosen, n. 10 above, 149.

<sup>36</sup> *Bentham's Draft for the Organization of Judicial Establishments, Works IV* 342

“But it is to the Chancery-bench you must look, if you would behold a monster, in comparison of which the chimera of the poets was an ordinary beast, their triple-bodied Geryon an ordinary man:-

1. A single judge, controuling in civil matters the several jurisdictions of the twelve great judges.
2. A necessary member of the cabinet, the chief and most constant adviser of the king in all matters of law.
3. The perpetual president of the highest of the two houses of legislature.
4. The absolute proprietor of a prodigious mass of ecclesiastical patronage.
5. The competitor of the minister for almost the whole patronage of the law.
6. The keeper of the great seal; a transcendent, multifarious, and indefinable office.
7. The possessor of a multitude of heterogeneous scraps of power, too various to be enumerated.

All these discordant bodies you see inclosed in one robe, that every one may corrupt another, if it be possible, and that the due discharge of the functions of any one of them may be impossible. Such is the care and providence of chaos.”<sup>37</sup>

But Bentham did not stop with the Lord Chancellor. He was emphatic that

“The judges have no share in legislative power.”<sup>38</sup>

Judges should have no calls on their time other than for the performance of judicial business, and

“If judges in general have any considerable part of their time to spare for other business, it is a sign that the judicial territories are too small, that they are more numerous than they need be, and the whole establishment more expensive.”<sup>39</sup>

He warmed to this theme:

“Exceptions were taken when a horse was consul; there could be none against his being a lord. It is beyond comparison better that a horse should have a voice in that house than that a judge should.”<sup>40</sup>

This equine theme was developed at some length, and he continued:

“By degrees it is settled into a rule, that not only the chancellor shall have a peerage, but that the same feather shall be stuck into the caps of the two chiefs in the courts of King’s Bench and Common Pleas. Ere long it will go

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<sup>37</sup> *Bentham’s Draft, Works IV* 381

<sup>38</sup> *Ibid.*, 310

<sup>39</sup> *Ibid.*, 380

down to the Exchequer, that Westminster-hall may not contain a single bench undefiled by politics. When you have put your judge into the house, the greatest eulogium you can bestow upon him is, that he might as well be anywhere else, for anything that he does there. You plunge him head over ears into temptation, and your hope is, that he will not be soiled by it. If this be wisdom, put your daughter to board in Drury-Lane to teach her chastity.”<sup>41</sup>

Mr Bentham adheres to those opinions, despite the changes which have occurred since 1832 (notably, the ending of the role of lay peers in deciding appeals and the appointment of paid, full-time Lords of Appeal in Ordinary under the Appellate Jurisdiction Act 1876), of which changes – so far as they go – he approves. But he is disappointed by the Royal Commission on the Reform of the House of Lords in its conclusion that

“There is no reason why the second chamber should not continue to exercise the judicial functions of the present House of Lords”<sup>42</sup>

and its recommendation that

“The Lords of Appeal in Ordinary should continue to be *ex officio* members of the reformed second chamber and carry out its judicial functions.”<sup>43</sup>

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<sup>40</sup> *Ibid.*, 380-1

<sup>41</sup> *Ibid.*, 381

<sup>42</sup> *A House for the Future* (London, 2000), Cm 4534, 93

<sup>43</sup> *Ibid.*, 94

No other second chamber in the world, Mr Bentham points out, exercises such functions,<sup>44</sup> and if it is accepted (as it is) that the exercise of judicial authority should be separated from the exercise of executive and legislative authority, then the institutions through which judicial authority is exercised – all of them – should reflect that separation. He finds, without surprise, that he is supported by a growing body of opinion.<sup>45</sup>

It is not to be expected that the arguments I attribute to Mr Bentham will command general assent. He was, after all, generous in offering advice to figures as disparate as Simon Bolivar, the Tsar Alexander I, Daniel O’Connell, the Duke of Wellington, President Madison and Mahomed Ali, but none was impelled into immediate action, and Madison took four and a half years to reply. I would not myself subscribe to by any means all these arguments. But there is none, I suggest, which can be dismissed out of hand as lacking any basis of rational principle, none which does not cause us to think and ask ourselves sometimes uncomfortable questions. Mr Bentham is still present. Never, we may be sure, will his continuing presence cease to enrich, enliven and focus the course of public debate.

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<sup>44</sup> Russell, n. 29 above, 185, 281

<sup>45</sup> N. 39 above, para. 9.1; Russell, n. 29 above, 281, fn.24