

UC Berkeley

Boalt Working Papers in Public Law

Title

Economy and Polity in Bentham's Science of Legislation

Permalink

<https://escholarship.org/uc/item/51t802zx>

Author

Lieberman, David

Publication Date

2002-06-01

Economy and Polity in Bentham's Science of Legislation*

David Lieberman

Jurisprudence and Social Policy Program
University of California, Berkeley

[forthcoming in *British Intellectual History 1750-1950*, eds. Stefan Collini, Richard
Whatmore and Brian Young (Cambridge University Press)]

Recent study of British political thought in the decades between the American War of Independence and the Great Reform Act has produced a crowded picture dense with political traditions and doctrinal configurations. If earlier historical scholarship tended to focus on a limited number of famous contests (Burke against the Rights of Man; Whigs vs. Radicals over constitutional reform), we now are as likely to scrutinize High Church ecclesiology and Christian political economy; philosophic history and natural jurisprudence; Paleyite theological utilitarianism and evangelical social thought; shifting configurations of Dissent and Protest, and of Dissent and Patriotism; and finely-shaded and carefully-delineated varieties of Whiggism and Toryism.

In a manner perhaps surprising, this scholarship has left relatively untouched the figure of Jeremy Bentham, whose writings on law and politics had for earlier generations seemed an obvious and critical landmark for this period of British intellectual history. Often this (relative) neglect of Bentham is the intended aim of revisionist interpretation: the product of the well-rehearsed rejection of Leslie Stephen's image of Utilitarianism as the natural heir of *English Thought in the Eighteenth Century* or of A.V. Dicey's depiction of Benthamism as

the definitive blueprint for Victorian legislative reform. But some of this neglect may be considered the less intended by-product of the state of current Bentham scholarship. The great labour of the past generation - as centered on the publication of the new edition of Bentham's *Collected Works* - has been to produce a more accurate version of Bentham's thought itself, freed from the corruptions of Bentham's 19th-century editors, popularizers and critics. Much of the most important recent treatments of Bentham thus have involved a kind of interpretative rescue operation, in which (for example) Bentham's jurisprudence is rescued from the legal positivism of John Austin; his democratic theory is distinguished from the defenses of representative government advanced by James and John Stuart Mill; his moral theory is salvaged from the several "fallacies" in terms of which it standardly stood condemned.¹ For the intellectual historian, the result, somewhat paradoxically, is an ever-widening gap between the "historical Bentham" (meaning the figure known in the 19th century through the vehicles of Dumont's *Traité de Législation civile et pénale* and John Stuart Mill's revisions) and the "authenticity Bentham" (meaning the figure now recovered from the manuscripts and new edition).² These days it often seems easier to place James Mill - the student of Dugald Stuart; the philosophical historian of British India; the polemicist of Philosophical Radicalism - than it does to locate the self-styled "hermit of Queen Square Place".³

This essay is designed to identify some of the places where it would be fruitful to link the newly "rescued" Bentham and the extensively revised intellectual history of 18th and early-19th century Britain. To do so, I pursue some quite basic questions concerning the kinds of ideas about social conduct Bentham presumed in his legislative theory and program; the question (to speak more grandly than my own treatment warrants) of the sociology informing Bentham's jurisprudence. This involves (in the first and second parts) taking up some well-established themes: the nature and extent of Bentham's debts to political

economy, particularly as elaborated by Adam Smith in the *Wealth of Nations*; and the alleged “economic” presuppositions of Bentham’s treatment of human nature. And it involves (in the third part) introducing a more neglected dimension of Bentham’s radical political program: the role of public opinion and print culture in the operation of the democratic society elaborated in the *Constitutional Code*.

i. Bentham and Smith’s Science

According to a standard characterization, the science of political economy supplied Bentham with his theory of society, and exercised a unique and pervasive impact on Bentham’s moral and legal theory. Such an interpretation appears in any number of the accounts of modern political philosophy’s surrender to economics, where Bentham’s writings frequently serve both as an important contributor to and a major index of this celebrated historical declension⁴; and it echoes in those celebrated 20th-century indictments of the cultural and social damage rendered by the Industrial Revolution, which Donald Winch considers in another contribution to these volumes. And much the same characterization figured no less prominently in some of the earliest and most influential of the efforts to take the measure of utilitarianism. Marx thus reported that “political economy” was “the real science” of Bentham’s “theory of utility”; Maine yoked together Bentham’s legislative program and Ricardian economics as the twin and mutually-reinforcing sciences behind the recent thirst for innovative legislation; Dicey lectured that the “disciples” of “Adam Smith” and “the Benthamites formed one school” and that their “dogma of laissez faire” was “practically the most vital part of Bentham’s legislative doctrine”; and Halévy concluded his

magisterial survey of Philosophic Radicalism with the judgment that the moral theory of the utilitarians was “their economic psychology put into the imperative.”⁵

These days it has become easy work to challenge such confident Victorian pronouncements.⁶ Such judgments standardly ran together a number of distinguishable claims: points about shared deductive and individualist methodologies; about shared policy recommendations and favored law reform projects; and about the social classes who embraced these doctrines and policy initiatives. Moreover, we no longer can suppose (with Dicey or Maine) that the disciples of Adam Smith and the Benthamites in any sense exhausted or dominated the public debate over legislative reform, even in those settings where their influence was once so unambiguously discerned. And we would equally question the ease and casualness with which these accounts collapsed the distance between the Smith’s *Inquiry* and Ricardo’s *Principles*. But while these important revisions and corrections would serve to undermine once-routine claims about the affinities and even the identity between classical political economy and Benthamic utilitarianism, they leave in place more general questions concerning the relationship between the two bodies of thought. And here it seems important to keep hold of the most basic insight that political economy, in some significant manner, mattered to Bentham’s legislative science.

Certainly, the science of political economy - the “general theory” considering “everything which concerns the wealth of nations” - was “a branch of the science of legislation” Bentham was eager to embrace.⁷ It was a body of speculation which formed part of the expertise required for the proper administration of the modern state⁸; and it was an area of knowledge in which Bentham sought to establish his own credentials. His best-known contribution to political economy, the 1787 *Defence of Usury*, was one of the few publications that earned for its author any public attention in the period before his reputation was secured through the medium of Dumont’s 1802 redaction, *Traité de Législation civile et*

pénale. And Bentham plainly delighted in the (mistaken) report that his *Defence* had converted no less a figure than Adam Smith.⁹ Smith's assessment of the work was critical: not only was Smith's endorsement of legal restraints on the rate of interest a major target of Bentham's essay; even more important, Smith, for Bentham, was the unrivalled authority in this branch of knowledge. He was "the father of political economy"; his *Wealth of Nations* had "not left much to do" for treating the "causes and mode of [wealth's] production".¹⁰ Or, as Bentham put it in a manuscript of the 1790s:

The parentage of Pluto's Wealth is no secret. He is the child of Earth by Labour
 ... He has Earth for his Mother, ... Labour for his Father, and Adam Smith for
 his head Genealogist.¹¹

Over the past twenty years, Donald Winch has taught us to see in Smith's own "science of a statesman or legislator", and in the political economy to which it contributed, a much more highly integrated and wide-ranging body of social speculation than previously had been recognized. And this reconstruction of Smithian science, in turn, has enabled us to see the variety of ways in which this science was easily distorted and truncated, both in the heat of polemical battle (as in the case of Paine and Burke) and in the later efforts to appropriate his legacy in altered social settings (as in the case of Dugald Stewart and his students).¹² Winch's discussion provides a model for considering Bentham's own handling of Smith's teaching, where again one encounters a remarkably selective, partial and distorting appropriation of the Smithian system.

An obvious place to begin is with two (predictably) uncompleted attempts by Bentham to produce brief synthetic statements of "the art of government in matters of political economy" or "the art of directing the national industry to the purposes to which it may be directed with the greatest advantage."¹³ These are Bentham's *Manual of Political Economy*, composed in the period 1793-95, and the *Institute of Political Economy*, composed

in the period 1801-4.¹⁴ Both works proceed initially in terms of a contrast between the “science” and the “art” of political economy; a distinction which enabled Bentham to offer lavish praise for “Dr. Adam Smith” (“a writer of great and distinguished merit”), while at the same time justifying his own succeeding efforts in this field. Smith’s “object was the science: my object is the art”; “this work,” Bentham further explained, “is to Dr. Smith’s, what a book on the art of medicine is to a book of anatomy or physiology.”¹⁵

Bentham’s distinction between political economy as art and as science, as Winch has explained, figured critically in the struggles over Smith’s legacy in the first decades of the 19th century, and it is tempting to read Bentham in light of these broader currents.¹⁶ As with Dr. Smith’s other professed admirers, Bentham found the *Wealth of Nations* to be methodologically flawed for its failure to keep purely enough to its assigned role in the *science* of political economy; and as with others, Bentham found important gaps in the Smithian science (as in the neglect of population in the *Wealth of Nations*).¹⁷ At the same time, it seems no less important to note the more idiosyncratic elements of Bentham’s reaction. The distinction between science and art was standardly deployed in Bentham’s legislative theory, where, as in the more particular case of political economy, he insisted that “the only use of the science is the serving as a foundation to the art.”¹⁸ The priority on practice over theory followed naturally from Bentham’s utilitarian convictions, but not in a manner that prevented him from pursuing at remarkable length and depth more purely theoretical topics, as in the case of the intricacies of his theory of language and fictions, or the conceptual apparatus of jurisprudence he referred to as “law metaphysics”.¹⁹ What, perhaps, was peculiar about Bentham’s engagement with political economy – at least initially – was the casualness with which he regarded its theoretical achievements, and the readiness with which he let the *Wealth of Nations* supply its authoritative pronouncement.²⁰

In addition, the relationship between science and art in this context requires some elaboration for it is easy to mistake what was involved in Bentham's effort to derive "practical use" from the Smithian science. In some cases, what this involved was specifying entire areas of legal policy where the insights of the science could be directly applied. Thus, in that area of legislative science styled *The Rationale of Reward*, legislative art frequently adopted wholesale the insights of political economy. Under the heading of "reward" Bentham considered the relatively exceptional situations in which the legislator influenced conduct not through the threat of punishment but through the inducement of benefit, most commonly where government secured services by rewarding labor. The guiding principle for how government was to price such labor was that "in all cases in which no particular reason can be given to the contrary, the liberty of competition ought to be admitted upon the largest scale"; and this was a principle definitively established by Smith, whose application "of it to the laws relating to trade has nearly exhausted the subject."²¹

But the relatively straightforward move from economic theory to legislative practice in the case of *Reward* was exceptional. Most often the art of political economy demanded that the legislator accommodate the insights of the science within a legislative program whose structure and objectives only in part concerned "the wealth of nations". As Bentham reported in a work devoted to setting out the basic architecture and relationships among the component parts of a "Complete Code of Laws", although it was easy to identify "a science distinct from every other which is called *political* economy," he could not see "that there can exist a code of laws concerning political economy, distinct and separate from all the other codes." Rather, a collection of economical laws could "only be a mass of imperfect shreds, drawn without distinction from the whole body of laws."²²

The general approach is clarified by reference to Bentham's treatment of the "Principles of the Civil Code"; a discussion which elaborated a system of legal rights and

obligations (including, of course, a system of property rights) and the legislative principles guiding their distribution.²³ Here Bentham differentiated the fundamental object of the legal system - the promotion of happiness - into four subsidiary ends: subsistence, abundance, security and equality; explained how all the functions of civil law could be identified in these subsidiary ends; and how they were to be respectively ordered and co-ordinated as legislative objectives. A large burden of the discussion was directed at establishing the primacy of security (and the prevention of frustrated expectations) in the principles of civil law. Unlike the other “subsidiary ends” of legislation, security functioned not just as a component part, but more as a general pre-requisite and enabling condition for the effective pursuit and cultivation of happiness.²⁴ The capacity “to look forward” in an “expectation of the future” distinguished men from brutes; “expectation” was the “chain which unites our present and our future existence, and passes beyond ourselves to the generations which follow us”; “the principle of security extends to the maintenance of all these expectations.”²⁵ In societal terms, it was again “security” that provided the preconditions of successful co-existence. The preservation of security (and the prevention of frustrated expectations) was both the “principal object of law” and “entirely the work of law” - without the law creating an arena of security, there could be “no abundance, and not even a certainty of subsistence; and the only equality ... is an equality of misery.”²⁶

In addition to establishing the primacy of security, the discussion of these differentiated “subsidiary ends” enabled Bentham to account for the flexibility that necessarily attended the legislator’s application of the general principles of the civil code. What was required by law to promote the goal of subsistence, for example, would rightly vary in conditions of scarcity as compared with conditions of moderate plenty or opulence.²⁷ Where Bentham advanced generic propositions concerning the relationships among these goals - such as the claim that prosperity naturally tended to greater social equality, or that

communal ownership of land naturally retarded social improvements – he drew readily from the science of political economy. But the science of wealth did not itself provide the ordering logic for the civil code. Instead, when Bentham turned to analyze the legislative principles guiding the distribution of portions of wealth, he turned to a set of psychological properties termed the “axioms” of “mental pathology” which specified “the knowledge of the sensations, affections, passions, and of their effects upon happiness”.²⁸ It was this scheme of mental axioms which grounded the case for equality as a legislative goal, and which guided the legislator’s hand “in the creation and distribution of proprietary and other civil rights.”²⁹

The resulting body of legislative principles gave ample scope, where appropriate, to the insights of political economy, but within a legislative structure that ordered rights and obligations on a different basis. Thus, for example, when Bentham went on to consider the leading examples of attacks on security which were committed by government (and which his legislative principles served to condemn), he included policies, such as the “forced reduction of the rate of interest”, which were standardly covered “as a question of political economy” on account of the damage such measures caused “to wealth”. But in the setting of the principles of the civil code, such injurious regulations were regarded “with a more immediate view to security”, and condemned as measures which undermined the expectations of lenders without compensating benefit to borrowers. And given the perspectives of the civil code, such misguided regulations earned inclusion in a discussion equally devoted to measures of little direct relevance to political economy, such as the dissolution of convents and monastic orders.³⁰

These same general principles of legislative science, moreover, guided Bentham’s analysis when he turned more directly to the task of presenting “the art” of political economy for the legislator. Both in the *Manual* and in the *Institute of Political Economy*, he presented modified versions of the subsidiary ends of legislation (subsistence, security, abundance,

equality) to introduce and explicate the “ends or uses of wealth”.³¹ Even more important, by identifying the scope of political economy so emphatically with “the art of directing the national industry to the purposes to which it may be directed with greatest advantage,”³² Bentham tended to associate its instruction chiefly with the legislative goal of abundance; that is, with but one of the lesser three of the four subsidiary ends of law. The consequence was a remarkably narrow art, comprising a remarkably meager set of governing principles. As Donald Winch observed of the related setting in which Bentham appropriated Smith in making his case against colonies, “The discussion is more dogmatic, and many of the subtle distinctions which were so much a feature of Smith’s analysis have disappeared.”³³

In the *Manual of Political Economy*, Bentham presented, “as the groundwork of the whole”, a principle taken from the *Wealth of Nations*: “the limitation of industry by the limitation of capital.”³⁴ And the application of this principle generated a set of arguments in repudiation of the prevailing network commercial bounties, drawbacks and prohibitions. “Its chief conclusion,” Leslie Stephen summarized, “is that almost all legislation is improper.”³⁵ At first glance, Bentham’s art of political economy appears to reveal, as Dicey put it, that “laissez faire ... was practically the most vital part of Bentham’s legislative doctrine.”³⁶ But this is to miss the structuring elements of Bentham’s legislative theory. The art of political economy was so limited because its parent-science (for Bentham) was so focused on wealth. The limitations on what the legislator positively could do to promote abundance were quite distinct from the very substantial tasks the legislator faced in promoting security and subsistence. As Bentham explained in the *Manual of Political Economy* (and later explored further in his 1801 *Defence of a Maximum*), legislation restricting the price and exportation of corn looked quite different from the perspective of “security of subsistence” than it did with regard to the goal of promoting wealth.³⁷ Political economy did not teach Bentham to contemplate areas of social life which operated stably in the absence of law. Rather, it

provided guidance on a social goal which did not rank upper-most in the Benthamic legislative science. The legislator's "great purpose is to preserve the total mass of expectations as far as is possible from all that may interfere with their course," Bentham observed in a voluminous 1801 essay on paper-money. "In comparison with this, encrease of wealth is but a frivolous object."³⁸

Of course, in making his case for the legislative priority and social benefits of security, Bentham recognized and indeed emphasized the manner in which a properly-designed and effectively-enforced legal regime of security of person and possession generally tended to promote the accumulation of wealth. "Security is the seed of opulence," pronounced the *Institute of Political Economy*; and the pronouncement can be readily taken as a Benthamic formulation of a Smithian theme. Where Smith in the *Wealth on Nations* maintained that the "laws and customs so favourable to the [security of tenancy of the] yeomanry have perhaps contributed more to the present grandeur of England than all their boasted regulations of commerce taken together,"³⁹ Bentham in the *Institute of Political Economy* rejoined:

What the legislator and the Minister of the Interior have it in their power to do towards encrease either of wealth or population is an nothing in comparison with what is done of course, and without thinking of it, by the judge, and his assistant, the Minister of Police.⁴⁰

None the less, as we have seen, the case for legal security was not established on the bases of its contribution to wealth; and given the structure of Bentham's own legislative science, however eloquently Smith in the *Wealth of Nations* made the case for the stability of possession and the virtue of justice, these arguments were not directly within the scope of an art of political economy. (In Bentham's terms, these were parts of Smith's "science of a statesman or legislator" not directly about political economy.) Ironically, the organizing

categories of Bentham's legislative science did as much to cabin as to celebrate the Smithian science. This legislative architecture best explains the notably modest withdrawal of funds from the *Wealth of Nations* Bentham chose to make in first practicing the art of political economy ("the limitation of industry by the limitation of capitol"). And it perhaps also accounts for the apparent ease with which Bentham disregarded those parts of the Smith's theory of law and government which repudiated just that kind of comprehensive, utilitarian reconstruction of public institutions which Bentham's own legislative theory so often promised.⁴¹

One major consequence of this Benthamic approach to political economy was that in treating topics within its scope, his legislative theorizing tended to swallow up the economics. (As even Stark was forced to acknowledge in introducing the final installment of his three-volume edition of *Bentham's Economic Writings*, it was hard to be confident of the seriousness of Bentham's commitment to the field.⁴²) The situation can be illustrated in many of Bentham's "economic writings", but the example which deserves special attention here is the *Defence of Usury* - in part on account of its direct concern with Smith, and in part on account of the prestige it subsequently was accorded in the canon of classical political economy. Bentham's 1787 polemic against usury laws positioned the authority of "Dr. Smith" in a critical manner. The *Wealth of Nations* contained a defense of the laws against usury, and Bentham's counter-case was expressly pursued with the "weapons" Smith had "furnished" and taught his critic "to wield."⁴³ Bentham's insistence "that there are no ways in which these laws can do any good" turned on the demonstration that the same general reasons Smith established against legal restraints on "exchanges in general" equally and fully applied to exchanges of "present money for future."⁴⁴

But although Smith's doctrines were at the center of Bentham's case, what is no less striking is how much of *Defence of Usury* did not engage political economy at all. The

analysis began with reference to Bentham's theory of language, with the argument that "the sound of the word *usury*" was responsible for immediately biasing any careful scrutiny of the nature of bargains for money. The tract continued with a standard stock of claims Bentham deployed in his law reform proposals generally. The perpetuation of this misguided legislation, he explained, was symptomatic of the tendency "in matters of law" for the inertial forces of "authority" and "prejudice" to sustain irrational institutions. The prominence given to Adam Smith in the title-page of *Defence of Usury* in no ways prevented Bentham from devoting one entire section of the work to William Blackstone and his *Commentaries on the Laws of England*; later passages took aim at another favorite target, Aristotle.⁴⁵ Two years following its first publication, Bentham described his *Defence of Usury* as a critical application of his principles of legislative classification, in this instance serving to expose a penal law which lacked the required justification in public utility.⁴⁶ The characterization suited the work at least as well as the more familiar category of "economic writing". And it supplies apt testimony to the more pervasive manner in which Bentham's legislative theory loudly embraced but firmly contained the science Dr. Smith had fathered.

ii. Calculating Natures

Admittedly, those commentators who discerned the unmistakable triumph of economics in Bentham's thought rarely believed that the charge turned on the kind of careful reconstruction of the organizing categories of Bentham's legislative science attempted above. All this, perhaps, is rather beside the point. Bentham's absorption of political economy occurred in a less avowed and more insidious manner, in terms of Bentham's most basic

assumptions about individual behavior and social action. The key construction, it is standardly argued, concerns Bentham's conception of human nature. "With the dryest naivete," Marx maintained, "he assumes that the modern petty bourgeois, especially the English petty bourgeois, is the normal man. Whatever is useful to this peculiar kind of normal man, and to his world, is useful in and of itself."⁴⁷

My aim in this section of the essay is to take up the question of Bentham's treatment of human nature, and the more particular claim that this account presumed and valorized the prudent, appetitive behavior of the marketplace: Halévy's "economic psychology put into the imperative".⁴⁸ Again, my hope is both to exploit and to propose lines of connection between some of the recent reinterpretations of Bentham's writings and the broader revisions in the British intellectual history of Bentham's era. This latter scholarship has been particularly powerful in its scrutiny of the careers of those notorious conceptual constructs, "rational economic man" and "*laissez faire* individualism". Here we have been taught to recognize the range of sources for late-18th and early-19th century individualism which were not the products of Dicey's famous firm of "Smith and Bentham".⁴⁹ In the case of Smith, we have been shown the manner in which Smith account of human prudence and the pursuit of wealth supported (rather than compromised) a moral theory which expressly rejected rival systems of ethics based on selfish and utilitarian accounts of human behavior.⁵⁰ And in charting the debates and doctrines which linked and divided Philosophic Whigs and Philosophic Radicals in the first decades of the 19th century, we have learned not to focus exclusive attention on the "principle of self interest" which Macaulay so brilliantly elevated to pre-eminence in his famed assault on James Mill's political science.⁵¹

Bentham, no less than James Mill, has been taken as the very model of the attempt "to deduce the science" - in this case, of legislation - "from the principles of human nature"⁵²; and interpretative attention continues to be directed both at the content of this

account and at its place within Bentham's theory of ethics. Much of this scholarship has been designed to rescue Bentham from the long-entrenched charges of basic philosophic error in linking hedonism and utilitarianism, and to modify earlier characterizations of his psychological hedonism. The broad thrust of this reinterpretation has been to distance Bentham's use and understanding of human nature from the approach adopted by James Mill in the *Essay on Government*; and to move Bentham closer to more typical, Humean conventions concerning the types of assumptions about human behavior it was prudent to make for the purposes of designing institutions of law and government.⁵³

For the legislator, of course, the great priority concerned the *influencing* of human conduct rather than the refined conceptualization of human nature. Still, legislative science could never proceed without some understanding of the human material upon which law worked; and the success of legislative art plainly depended, in good measure, on the accuracy of this understanding.⁵⁴ In designing laws and institutions, the legislator utilized punishment and reward so as "to make it each man's *interest* to observe on every occasion that conduct which it is his *duty* to observe"; and in so building upon the foundation of "personal interest", the legislator relied on that "principle of action ... most to be depended upon, whose influence is most powerful, most constant, most uniform, most lasting, and most general among mankind."⁵⁵

The claim that the sovereign mastery of pleasure and pain rendered all human conduct intrinsically self-interested appeared repeatedly throughout Bentham's writings (though "self-interest" actually was a term he avoided). The insight that "on every occasion, by interest in some shape or other is the conduct of every man determined"⁵⁶ promptly ruled out a variety of conventional Christian and classically-inspired moral pieties counseling self-denial, self-sacrifice or self-resignation. ("*Summum Bonum*: Consummate Nonsense" began the relevant section of Bentham's *Deontology*.⁵⁷) And it equally ruled out institutional

designs which relied on “disinterestedness” as a qualification for positions of authority and public office.⁵⁸ But, as in the case of most 18th-century moralists, Bentham expressly distinguished the hedonistic psychology and the dynamics of “self-preference” from a doctrine of selfishness or narrow self-love. All individuals readily associated their own pursuits of pleasure with the happiness of at least some others. Although “the only interests which a man at all times and upon all occasions is sure to find *adequate* motives for consulting are his own,” nevertheless “there are no occasions in which a man has not some motives for consulting the happiness of other men.”⁵⁹ As his ethical theorizing developed, Bentham came to place greater weight on the efficacy of benevolence (that is, acts undertaken to promote “the happiness of others”) in social life. And even at the level of institutional design, the legislator sought to mobilize the force of sympathy and what Bentham termed the “moral sanction” in the effort to ensure that the “ruling few” exercised their power in the interests of the entire community.⁶⁰

Ironically, in charting the operations of “self-preference”, Bentham came to voice virtually all the points of methodological difficulty better associated with the critique of Benthamic utilitarianism. Since the “subjection of conduct to interest” applied equally in “the case of the most extensively beneficent, generous, and heroic action that ever was performed” as it did “in the case of the most mischievous or selfish,”⁶¹ serious ambiguities arose over quite what it meant to *explain* human behavior in terms of personal interest. The familiar statement, he warned, that an individual “is never governed by any thing but his own interest” was “indubitably true”, but only in that “large and extensive sense of the word interest (as comprehending all sorts of motives).” At the same time, the claim was “indubitably false in any of the confined senses in which ... the word interest is wont to be made use of.”⁶²

Equally critical difficulties emerged over the difference between real and perceived interests. Individuals successfully navigated their pursuit of pleasure and avoidance of pain “wheresoever they have a clear view of their own interest.”⁶³ But this evidently allowed for various settings in which the requisite “clear view” was noticeably obscured. In his writings on poor relief and indigence, Bentham seemed prepared to acknowledge entire sub-groups of the community who could not be relied upon effectively to pursue their own real interests. Less exceptionally, he recognized that even those who generally succeeded in pursuing their interests would occasionally lapse: “... never probably has any man existed who has not acted against his own interest.”⁶⁴ And finally, in his radical political theory, he emphasized the manner in which well-entrenched networks of “interest-begotten prejudice” systematically served to confuse the “subject-many” as to the extent to which their real interests were regularly sacrificed to the interests of a corrupt “ruling-few”.⁶⁵

Given such complexities, it becomes evident that the legislator, in presuming a stable and predictable universe of individual self-preference, proceeded pragmatically and strategically. The individual was never taken to be an infallible judge or perfect pursuer of his own interests. But the legislator had sufficient insight into the processes of self-preference for the purposes of law. To what extent, then, were such knowledge and presumptions dependent on more specific Benthamic views, implicit or explicit, concerning the nature of economically-orientated conduct?

In considering this question, it is worth recalling that Bentham’s legislative program required not only a sufficient stability in social conduct (such that law could harness duty to personal interest), it further required no little sophistication on the part of social agents in planning and adjusting their conduct in the light of anticipated pleasures and pains as these had been positively manipulated through the introduction of legal sanctions. Probably the best known example of this occurs in Bentham’s discussion of the proper level of severity to

be adopted in the penalties of the penal code. Like many penal reformers in the second half of the 18th century, Bentham believed the application of his legislative principles would serve to bring a decisive reduction in penal severity by introducing the requisite proportionality between levels of crime and levels of punishment. Beccaria, in this context, had written of the need to establish “a scale of crimes” which comprehended “all actions contrary to the public good”, placing these “criminal” acts on a gradation between the most pernicious (“those which immediately tend to the dissolution of society”) and the least pernicious (“of the smallest possible injustice done to a private member of that society”), and then assembling “a corresponding scale of punishments, descending from the greatest to the least.”⁶⁶

Bentham’s treatment of the same aspiration drew instead on the terminology of the marketplace. Cases in which sanctions proved ineffective or counter-productively excessive (termed “cases unmeet for punishment”) were “cases where punishment is unprofitable.” On the other hand, in cases “meet for punishment”, sanctions needed to be of a severity (or “value”) “sufficient to outweigh that of the profit of the offence.” And in a concluding summary of a chapter-long survey of the eleven principal “properties to be given to a lot of punishment” (which included “frugality” as number 6), Bentham identified those properties “calculated to augment the *profit* which is to be made by punishment” and those calculated “to diminish the *expense*.”⁶⁷

This treatment of proportionality in punishment was typical of the manner in which Bentham invoked metaphors of trade and accumulation in order to convey his understanding of individual psychology and social action. The discussion of mental pathology in the principles of the civil code (treated above), including the account of the diminishing marginal utility of surplus pleasure, modeled man’s sensibilities to happiness entirely in terms of “portions of wealth”.⁶⁸ In the *Deontology*, he explained the practice of beneficence by

likening “every act of virtuous beneficence” to a contribution “to a sort of fund – a sort of Saving Bank,” whereby the individual established a “General Good Will Fund ... from which draughts in his favour may come to be paid.”⁶⁹ In defending the labored terminology and distinctions which comprised his account of the “value of a lot of pleasure, how to be measured” in *An Introduction to the Principles of Morals and Legislation*, Bentham reassured his reader that his treatment was neither “novel and unwarranted”, nor different than the “settled Practice of mankind”. Such calculating valuations of pleasures and pains occurred routinely, as in the valuing of “an article of property [or] an estate in land.”⁷⁰ And in a later attempt to clarify the intricate calculations required to perceive the difference between the value of present pleasure and the value of an equal amount of certain but future pleasure, he proposed “to form an estimate of this diminution, (to) take the general source, and thence representative, of pleasure, viz. *money*.”⁷¹

Yet even this extensive invocation of property and profit to give content to a generalized account of human behavior did not lack its ambiguities. As Ross Harrison notes, in some early manuscripts of the 1770s Bentham explored the possibility of using money as the universal measure for the calculation and inter-personal comparison of states of happiness. But in his published works, he identified problems inherent in such an approach, expressly denied that all pleasures and pains could be measured in monetary terms, and repudiated the “vulgar error” that only money has value.⁷² A passage from *An Introduction to the Principles of Morals and Legislation* is equally revealing. There Bentham directly took up the challenge that his strategy of guiding social conduct through a regime of proportionate penal deterrence was fundamentally misguided (“so much labour lost”) because criminal acts were the work of passion and “passion does not calculate.” In part, Bentham met the charge by rejecting its claims: “... the proposition that passion does not calculate, this like most of these very general and oracular propositions, is not true.” But, he also went on

to observe that of “all the passions” the one “most given to calculation” was that corresponding “to the motive of pecuniary interest” (that is, the pursuit of wealth). And since the mischiefs produced by this particular motive figured as the leading object of the penal law, criminal deterrence enjoyed “the best chance of being efficacious, where efficacy is of the most importance.”⁷³ Once more, it might seem, Bentham turned to economically-orientated conduct in order to redeem the behaviorist assumptions of his legislative project. But in this case, the logic of economic motivation and pecuniary interest did not supply the clarifying core of *generalized* social conduct. Rather, economic conduct was distinguishable from generalized social conduct by being the “most given to calculation” (though its exceptionality proved an happy advantage to the penal law). In this setting at least, Bentham’s reliance on the experienced calculator of economic benefits and burdens appeared as much the pragmatic construction of legislative science as did his more general utilization of the logic of personal interest.

iii. The Public Opinion Tribunal

Bentham’s social actor, in crucial respects then, functioned in a manner that evinced the calculating discipline of profit-seeking and market-exchange. In this sense, it is hard to imagine Bentham’s legislative science functioning in a community which lacked the practice of truck, barter and exchange. Where the familiar reduction of Benthamic man to “economic man” proves incomplete and misleading is in the failure to notice the extent to which Bentham’s account of human nature was itself the self-conscious construction of legislative art rather than the (putative) neutral statement of descriptive findings. But the emphasis on

Bentham's "economic psychology" is misleading also in another sense: in its tendency to overshadow other, no less critical assumptions about social conduct Bentham made in his legislative program. In this final section I seek to explore one such set of assumptions: those concerning the operation of public opinion in Bentham's program for representative government in the *Constitutional Code*.

One of the important (and long-overdue) accomplishments of the new edition of *Collected Works* has been to break the grip long exercised by *A Fragment on Government* and the first six chapters *An Introduction to the Principles of Morals and Legislation* in the treatment of Bentham's thought. In the case of Bentham's political and constitutional theory, the edition has made available a series of important writings from the final decade of Bentham's career, when much of his legislative science was focused on the elaboration of a radical program of constitutional democracy.⁷⁴ The study of Bentham's legislative science as applied to constitutional law has increasingly come to focus on these materials.

The political debates and polemics over parliamentary reform in the 1820s and 1830s tended to highlight the most immediately controversial of the Philosophical Radical program: the calls for manhood suffrage and for the ballot. (In due course, the arguments advanced in support of these same reforms furnished the site for the observation of yet another "economic" triumph over political philosophy: the "economic theory of democracy".)⁷⁵ In Bentham's own case, his views on the suffrage were notoriously extreme, even by Philosophical Radical standards. As Brougham explained to his fellow legislators in the House of Commons, "Mr. Bentham" would give the vote to any "person of either sex [who] was able to put a pellet into a box, no matter whether he were insane and had one of the keepers of a mad-house to guide him."⁷⁶ Still, recent scholarship has properly emphasized how much of Bentham's plan of democratic government depended on a range of institutional devices that extended well beyond the electoral process.⁷⁷ The "ruling few" needed to

function under legal restraints as well as electoral accountability, while the “subject-many” needed to wield the power of public opinion as much as the democratic franchise.

Bentham summarized his utilitarian program of good government under the formula, “Official Aptitude Maximized, Expense Minimized”. “Official Aptitude” covered several capacities, including appropriate “moral aptitude” which referred to the determination of an individual exercising political power to seek the promotion of “his own happiness by giving increase to the happiness of the greatest number.”⁷⁸ As with the other elements of desired “official aptitude”, the *Constitutional Code* furnished a network of structures and procedures (or “securities against misrule”) for sustaining this commitment to utilitarian goals. In the case of “moral aptitude”, Bentham identified and extolled an institution he termed the “Public Opinion Tribunal”, giving it expansive responsibilities in his program against the “disease” of misrule.⁷⁹

The Public Opinion Tribunal, in the highly technical expression of Bentham’s mature constitutional writing, constituted “a fictitious tribunal” or “imaginary tribunal or judiciary,” which applied “the punishments and rewards” of “the popular or moral sanction.”⁸⁰ As in the case of more conventional judicial bodies, the Public Opinion Tribunal received accusations and allegations of misconduct (here the acts of misrule committed by those exercising government power); heard counter-testimony in defense; weighed and evaluated assembled evidence; formed and publicized its determined conclusions; and finally gave “effect and execution” to its judgment.⁸¹ The punishments it imposed (its exercise of the popular or moral sanction) chiefly comprised the lowered popularity and weakened prestige on the part of those officials it found wanting in desired moral aptitude.⁸²

As an institution of constitutional democracy, Bentham’s Public Opinion Tribunal was even more democratic than the electorate. It would frequently function in the form of “sub-committees”, containing members of the community who turned their attention to

particular issues or particular government actions; and such sub-committees might on occasion become dominated by an “aristocratical section” opposed to the “democratical” interests of the full Public Opinion Tribunal.⁸³ Nonetheless, there were no rules of qualification or requirements for joining; membership in the Public Opinion Tribunal was determined entirely by the individual choosing to participate in its operations. As a result, the Tribunal included in its ranks several of the subgroups standardly disqualified from political life – foreigners and children, no less than unpropertied males and women. To the extent that the extra-legal processes of the Public Opinion Tribunal were modeled on more formal political bodies, its decisions constituted a uniquely popular vehicle of power. “Public opinion may be considered as a system of law, emanating from the body of the people,” declared the *Constitutional Code*.⁸⁴ And Bentham repeatedly stressed the efficacy of its sanctions:

[The English King] may kill any person he pleases, violate any woman he pleases; take to himself or destroy any thing he pleases. Every person who resists him while in any such way occupied, is, by law, killable, and every person who so much as tells of it, is punishable. Yet, without the form of an act of parliament, he does nothing of all this. Why? Because by the power of the Public Opinion Tribunal, though he could not be either punished or effectively resisted, he might be, and would be, more or less annoyed.⁸⁵

Although the Public Opinion Tribunal constituted a “fictitious tribunal”, Bentham clarified its institutional forms and functions by discussing two of its existing and leading “sub-committees”: the common law jury and the newspaper press.⁸⁶ The jury evinced several of the institution’s features: its similarities to a judiciary and its capacity to impede the abuse of political power. While newspapers, in contrast, bespoke the public, flexible and self-determining character of the tribunal’s membership and range of reference. Bentham’s

confidence in the power of newspapers to combat political misrule was remarkably displayed in a work he composed in 1822 addressed to the Islamic state of Tripoli. The essay presumed the continuation of arbitrary rule in Tripoli, and therefore turned to “publicity” and “Public Opinion” as the principal available “check ... to the power of the government”.⁸⁷ In this setting, Bentham celebrated the newspaper as “the only effectual instrument” for mobilizing and guiding such public opinion, further maintaining that in the preferable form of “Representative Democracy” only the “Prime Minister” exercised a more important function than “this one sort of written instrument.”⁸⁸ Given this analysis, Bentham in the essay went on to develop a set of guidelines for best initiating and maintaining a newspaper press under Tripolitan conditions.

That Bentham should have been so attentive to these vehicles of public opinion may be thought unsurprising. As early as the 1776 *Fragment on Government*, he identified “*liberty of the press*” and “*liberty of public association*” as among the defining attributes of a “*free government*”.⁸⁹ Well before his final conversion to democratic politics, Bentham in a variety of settings advocated the mechanisms of publicity and public inspection as vital resources against the abuse of power.⁹⁰ And, of course, freedom of the press and freedom of opinion, like manhood suffrage and the ballot, was a basic part of the wider Philosophic Radical program. “... [W]ithout the liberty of the press,” James Mill argued in his paper devoted to the subject, “it is doubtful whether a power in the people of choosing their own rulers ... would be an advantage.”⁹¹

But these important lines of continuity should not obscure the more idiosyncratic and radical dimensions of Bentham’s constitutional project. Unlike other contemporary radical political reformers, Bentham never presumed that representative government in itself eliminated the vices of political corruption and the abuse of power. Rather, representative government presented the opportunity for introducing those devices which might effectively

hinder the processes of misrule.⁹² Among these, the organization and circulation of public opinion was fundamental. Here the Public Opinion Tribunal did not function simply in support of the electoral system, furnishing the citizenry with the information it needed to make an informed judgment at the ballot box. Rather, public opinion was an on-going force in a democratic society, serving to encourage the utilitarian commitments of the “ruling-few” and to discipline political power outside the formal institutions of law and the state. Moreover, it was not enough for the constitution of the democratic state simply to allow or even encourage the public scrutiny and discussion of its rule. The structures and procedures of politics needed to be articulated in a way that forced the governors to disclose their decisions and the interests they promoted before the public. Thus, the *Constitutional Code*’s elaborate bureaucratic structure which promoted efficiency and expertise at the same time served the goals of administrative transparency and rigorous accountability. “The military functionary is paid for being shot at,” Bentham explained, “the civil functionary is paid for being spoken and written at ... Better he be defamed, though it be ever so unjustly, than that, by a breach of official duty, any sinister profit sought should be reaped.”⁹³

While the Public Opinion Tribunal has been properly highlighted on some of the most recent scholarship on Bentham’s political theory, much less has been done to place it in context or to consider Bentham’s approach in terms of the kind of “trajectory of opinions of ‘opinion’” charted by John Burrow in his 1985 Carlyle lectures.⁹⁴ Certainly there were clear echoes of the tropes of the more popular Painite versions of English radicalism in Bentham’s juxtaposing public opinion to the showy but contentless pretensions of monarchic and aristocratic virtue. Likewise, the emphasis on public opinion’s power and authority recalled the increasingly commonplace, at times conservative and even complacent later-18th century rendering of Hume’s famous dictum that “it is ... on opinion only that government is founded.”⁹⁵ What was more characteristically and distinctively Benthamic was the

conceptualization of public opinion in expressly juridical terms (public opinion as an “imaginary tribunal or judiciary”), and the effort to identify an institutional form (albeit a “fictitious” one) for harnessing its power systematically.

The Public Opinion Tribunal could only achieve the goals the *Constitutional Code* assigned it because of the eagerness of the democratic community not only to pay attention to the information about the conduct of politics that was presented to it, but to utilize this information actively and routinely for the critical evaluation of the conduct of political life. What, for Bentham, needed to be organized were the institutional forms for the coordination and dissemination of public opinion. But the citizen’s capacity and disposition to exploit and maintain these institutions could be presumed. In these respects, the strategy for public opinion in the *Constitutional Code* seemed to take for granted quite specific and particular features of contemporary Anglophone political life, whose novelty and varied impacts have been frequently emphasized in recent work on Hanoverian public life.⁹⁶

Most obvious for the purposes of Bentham’s constitutional designs was the dramatic and much-noted proliferation through the 18th century of newspapers, periodicals, along with sundry items of political ephemera, including prints, cartoons, pamphlets, tokens and medals.⁹⁷ The rise of the newspaper press was itself but one element in the more general elaboration of the institutions associated with an increasingly vibrant and dense print culture, with its networks of London and provincial printers and booksellers, coffee houses and reviews, and commercial “subscription libraries”. But the press and printed news-sheets proved particularly significant in their relation to the political practices of the kingdom. In the first half of the century, particularly in the great journalistic campaigns attending the “rage of party” during the reign of Queen Anne and the “patriot” attacks on Walpolean “oligarchy”, the periodic press was itself directed and sustained largely as an extension of Parliamentary politics and ministerial rivalries. But by mid-century, such instruments of

political information helped to create and support the political culture of those excluded from direct Parliamentary participation, including - as in the case of the Wilkite agitation of the 1760s - the publication and increasingly extensive distribution of more radical critiques of established government structures. Later still, extra-Parliamentary bodies - such as of the Committee for the Abolition of the Slave Trade and its 1788 and 1792 petition campaigns - proved adept in forcing issues upon Parliamentary politics through the effective mobilization of public opinion and the varied media of print and publication.⁹⁸

While much of this process was dependent on changes in commerce and economy, not least upon the enlarging consumer markets of “middling” and provincial society, print and news were no less implicated in changes of law and political value. The lapse of the Licensing Act in 1695 brought to a final end to the system of pre-publication censorship and guild monopoly through which publishing in England had previously been regulated. In its place, there gradually emerged a new, more porous legal regime centered on the law of copyright and libel.⁹⁹ “The liberty of the press” joined the settled canon of rights “essential to the nature of a free state”, even among those commentators no less alarmed by “the licentiousness” of the press and the dissemination of radical political doctrines.¹⁰⁰ In 1771, Parliament abandoned its privilege against the direct reporting of its own proceedings, and Parliamentary debates and votes quickly became the political staple of London and provincial newspapers. British politicians now came of age in the knowledge that their deliberations and speeches would be as much *read* by an informed and interested public as *heard* by a select Parliamentary audience. None of this, of course, approximated the patterns of dissemination secured by the mass-circulation press of the modern era. None the less, the circulation of political information had plainly become a most striking feature of 18th-century public culture. In his classic statement of the *Principles of Moral and Political Philosophy* of 1785, William Paley maintained that for himself - as “with most men who are

arrived at the middle age and occupy the middle classes of life” - it was difficult to conceive any “amusement and diversion” which brought “greater pleasure” than that received “from expecting, hearing, and relating public news; reading parliamentary debates and proceedings; canvassing the political arguments, projects, predictions, and intelligence, which are conveyed, by various channels, to every corner of the kingdom.”¹⁰¹

For Bentham’s constitutional designs, as important as the increased publicity attending political practice were the varied kinds of information generated by the routine operations of Parliamentary government. The British state in the 18th century emerged as the major collector and, by the late 1760s, printer of information about government practices, economy and society.¹⁰² The development was most dramatically evident in the detailed statistics concerning the state’s expenditures and tax revenues which accompanied the annual fiscal legislation introduced to the House of Commons; and which itself featured centrally in the political effort by Parliament to control the executive and accurately monitor the ever-burgeoning National Debt. The revenue system of excise and customs, and the political machinations over tax policy, led to the amassing of accounts concerning trades and commerce; public information on current social conditions followed in the wake of more fitful Parliamentary legislative efforts in such areas as poor law reform and policing in the metropolis. The largely local and particularistic character of Parliament’s legislative activity, in turn, encouraged the development of channels of communication through which “lobbies” and interest groups supplied the legislature with advantageous information and kept abreast of potentially damaging legislative proposals.

In his own radical political polemics, Bentham showed himself a skilled consumer of this mass of conveniently compiled and easily-acquired political “intelligence”. In 1830, he accompanied the publication of the first volume of the *Constitutional Code* with a collection of essays composed over the previous twenty years and assembled under the title, *Official*

Aptitude Maximized; Expense Minimized. Two of the longest items in the volume were a pair of “Defences of Economy” composed in critique of the Whig program of economical reform associated with Edmund Burke’s Parliamentary initiative of 1780 and in critique of the Tory administrative reform program elaborated by George Rose in a pamphlet of 1810. The two critiques sought to expose the manifold defects and corruptions on offer in these establishment schemes of retrenchment. In so doing, Bentham drew extensively on information concerning late-18th and early-19th century government expenditures (especially the system of “pensions, sinecures, reversions”) which was made available in such printed sources as the *House of Commons Sessional Papers* and the thirteen Reports of the Common’s Committee on Public Expenditure (1807-12). These essays were later followed by another voluminous and complimentary polemic, *Indications Respecting Lord Eldon*, which denounced legislation of the 1820s covering judicial salaries and court fees at the central courts of Westminster Hall; and which, again, relied on information assembled in the Reports of Parliamentary subcommittees and published in the *Commons Sessional Papers*. The collection’s penultimate item, the uncharacteristically brief essay “On Public Accounting,” responded critically to a recent report of a special Commission on the practice of keeping public accounts, initiated by the Commons Committee on Public Income and Expenditure and published in the 1828 *Commons Sessional Papers*.¹⁰³

Bentham’s more developed and positive strategy for the organization and publication of political knowledge was contained in the elaborate articles of the *Constitutional Code* setting out the state’s “statistic function”, “registration” and “publication” systems. These provisions were designed to ensure the proper and efficient flow of information across the several distinct departments of government, and between government functionaries and the constituents of the Public Opinion Tribunal. As we have seen, the ultimate efficacy of such measures depended on the readiness of the democratic populace to absorb and utilize the

information with which the provisions of *Constitutional Code* required it to be supplied. Such a politically-orientated, inquisitive and critical populace might well be understood as the cumulative product of the specific practices of politics in 18th- and early-19th century Britain. And, on occasion, Bentham acknowledged the more parochial dimensions of this specific political sensibility. “For an English Minister to neglect the Newspapers,” he noted in a manuscript comment of the 1770s, “is for a Roman Consul to neglect the Forum.”¹⁰⁴ But most often, these dispositions and capacities appeared as more generic and naturally-occurring features of all political association. Human nature, as citizen, came to society already politically alert, eager for information, and determinedly vocal.

In this context, Bentham’s writings addressed to Tripoli once more prove particularly revealing. In these essays, Bentham devoted unsurprising attention to the special circumstances and challenges created by Tripoli’s arbitrary government and Islamic institutions. But in his treatment of the mobilization of public opinion in Tripoli, there was little indication of any special task to cultivate the kind of political orientations and interests needed to sustain the Public Opinion Tribunal. Rather, most of his specific suggestions for the successful inauguration of newspapers in Tripoli involved quite practical devices - such as the regularity of publication and the variety of news content - designed to attract and maintain the largest possible readership.¹⁰⁵ What Tripolitan society chiefly required was the technology of public opinion, the printing press and the newspaper. Once these were introduced, the audience to consume the information newly provided would readily appear and exert its critical power.

Whatever else Bentham may have presupposed about human nature and social action in his legislative science, in his mature constitutional program he presumed social actors fully disposed to constitute themselves members of the Public Opinion Tribunal. In his 1817 *Plan of Parliamentary Reform*, which became notorious for its endorsement of “virtual

universality of suffrage”, one of the few groups Bentham excluded from the franchise was “non-readers”. But he emphasized that this was a purposefully “temporary” exclusion; indeed, that the exclusion would create new incentives to literacy.¹⁰⁶ The *Constitutional Code* made clear why literacy and printed information was so Bentham’s vital understanding of the dynamics of democratic government and the attributes of political man. It is an aspect of his thought that deserves far greater prominence in the treatment of his social assumptions. Hitherto we have been so devoted to finding behind Bentham’s legislative theory a nation of shopkeepers, that we have neglected his commitments to a nation of newspaper readers.

April 1999

-
- * I am pleased to record my gratitude and many debts to Donald Winch, Lindsay Farmer, Philip Schofield, and to the editors of these volumes, for their generous and much-needed comments and guidance on an earlier version of this essay.
- ¹ See the important reconsiderations of Bentham's jurisprudence by H.L.A. Hart, *Essays on Bentham* (Oxford, 1982) and Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford, 1986); of his democratic theory by L.J. Hume, *Bentham and Bureaucracy* (Cambridge, 1981) and Frederick Rosen, *Jeremy Bentham and Representative Democracy* (Oxford, 1983); and of his moral theory by David Lyons, *In the Interests of the Governed* (Oxford, 1973) and Ross Harrison, *Bentham* (London, 1983).
- ² The complexities are illuminated by J.R. Dinwiddy in "Bentham in the Early Nineteenth Century", in his *Radicalism and Reform in Britain 1780-1850* (London and Rio Grande, Ohio, 1992), pp.291-313. See also the suggestive comments by John Robson, "Which Was Mill's Bentham?", *Bentham Newsletter*, vii (1983) 15-26; R.D. Collinson Black, "Bentham and the Political Economists of the 19th Century", *Bentham Newsletter*, xii (1988) 24-36; and William Twining, "Reading Bentham", *Proceedings of the British Academy*, lxxv (1989) 97-141.
- ³ For the historical placement of James Mill, see Stefan Collini, Donald Winch and John Burrow, *That Noble Science of Politics* (Cambridge, 1983), chapter 3. Bentham's self-description appears often in his correspondence; see, for example, *Correspondence of Jeremy Bentham: Volume 7*, ed. J.R. Dinwiddy (Oxford, 1988), p. 466.
- ⁴ For a characteristic rendering of this theme, see, C.B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford, 1977), chapter 2.
- ⁵ See Karl Marx, *German Ideology, Part One* (1845), in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford, 1977), p.185; Henry Sumner Maine, *Popular Government* (1885) (Indianapolis, Ind., 1976), p.155; A.V. Dicey, *Law and Public Opinion in England* (1905; second edition, London, 1914), pp.126 and n., 147; Elie Halévy, *Growth of Philosophic Radicalism* (1901-4), trans. Mary Morris (London, 1972), p.478.
- ⁶ See Collini, *That Noble Science of Politics*, pp.281-2.

-
- ⁷ Jeremy Bentham, *General View of a Complete Code of Laws*, in *Works of Jeremy Bentham*, published under the supervision of ... John Bowring, 11 volumes (Edinburgh, 1838-43), iii, p.203. (*Works of Jeremy Bentham* hereafter cited as *Bowring*). See also the definitions Bentham supplied in his *Manual of Political Economy* (1793-95), in *Jeremy Bentham's Economic Writings*, ed. W. Stark, 3 volumes (London, 1952-54), i., pp.223-4.
- ⁸ See Jeremy Bentham, *Constitutional Code: Volume 1* (1830), eds. F. Rosen and J.H. Burns (Oxford, 1983), pp.314-5.
- ⁹ See Bentham's comments at the time of the 1790 publication of the second edition of his *Defence of Usury*, *Correspondence of Jeremy Bentham: Volume 4*, ed. Alexander Taylor Milne (London, 1981), pp.132-4, 208-9; and also the discussion of the work's reception by Stark in *Bentham's Economic Writings*, i, pp.26-33.
- ¹⁰ See Bentham, *The Rationale of Reward* (London, 1825), p.70n, and *Institute of Political Economy* (1801-4), *Bentham's Economic Writings*, iii, pp.321-2.
- ¹¹ Jeremy Bentham Manuscripts, University College London: UC.cliiia.107, cited in Douglas Long, "Bentham on Property", in Anthony Parel and Thomas Flanagan (eds.), *Theories of Property: Aristotle to the Present* (Waterloo, Ont., 1979), p.241.
- ¹² See Donald Winch, *Riches and Poverty* (Cambridge, 1996), chapters 5-8; and *That Noble Science of Politics*, chapter 1.
- ¹³ *Institute of Political Economy*, *Bentham's Economic Writings*, iii, p.307; and *Manual of Political Economy*, *Bentham's Economic Writings*, i, p.223.
- ¹⁴ The two works, as published in volumes 1 and 3 of *Bentham's Economic Writings*, need to be distinguished from the material appearing under the title, "Manual of Political Economy" in volume 3 of *Bowring*, which is an unreliable compilation of the two separate works; see *Bentham's Economic Writings*, i, pp.49-50.
- ¹⁵ *Manual*, *Bentham's Economic Writings*, i, pp.223-4; and see *Institute*, iii, pp.308, 318-22.
- ¹⁶ See *That Noble Science*, pp.49-54, 67-89.
- ¹⁷ See *Manual*, *Bentham's Economic Writings*, i, pp.224-5, and *Institute*, *Bentham's Economic Writings*, iii, p.361n.
- ¹⁸ *Manual*, *Bentham's Economic Writings*, i, 224.
- ¹⁹ See the treatment in my *Province of Legislation Determined: legal theory in eighteenth-century Britain* (Cambridge, 1989), chapter 13.

-
- ²⁰ See, for example, *Manual, Bentham's Economic Writings*, i, p.223n: "Be the doctrine [of Smith] true or false, this concise sketch will serve at any rate to give a view of the state of the question upon all the topics of political economy that can come under the consideration of the legislature ... If the doctrine be erroneous, exhibited as it is here, it will not be difficult to correct the error."
- ²¹ *Rationale of Reward*, pp.110, 118.
- ²² *General View of a Complete Code of Laws*, Bowring, iii, p.203.
- ²³ Bentham treated civil law and the civil code at several stages of his career. The account developed here draws most heavily on his *Theory of Legislation*, which is the English translation of Etienne Dumont's redaction, *Traité de législation civile et pénale ... Par M. Jérémie Bentham, jurisconsulte anglois*, 3 volumes (Paris, 1802). For a full examination of this branch of Bentham's jurisprudence, see P.J. Kelly, *Utilitarianism and Distributive Justice* (Oxford, 1990).
- ²⁴ The importance of security in Bentham's moral and legal theory is stressed in two recent (and divergent) accounts of his utilitarianism and jurisprudence; see Postema, *Bentham and the Common Law Tradition*, chapters 5 and 12; and Kelly, *Utilitarianism and Distributive Justice*.
- ²⁵ *Theory of Legislation*, edited by C.K. Ogden (London, 1931), p.111. See also Bentham's further discussion of the difference between security and the three other subsidiary ends, in *Correspondence: Volume 7*, pp.47-9; and in *Pannomion Fragments*, Bowring, iii, p.225, where he emphasizes how security, unlike the other ends, is not limited to "matters of wealth".
- ²⁶ *Theory of Legislation*, p.109.
- ²⁷ See *Theory of Legislation*, pp.128-33; and see also *Institute, Bentham's Economic Writings*, iii, p.322n, and *Defence of a Maximum* (1801), *Bentham's Economic Writings*, iii, pp.247-302, especially p.255.
- ²⁸ *Theory of Legislation*, p.102. By the time of the 1789 publication of *An Introduction to the Principles of Morals and Legislation*, Bentham had come to regard the elaboration of these axioms as a major pillar of his legislative theory; see *An Introduction to the Principles of Morals and Legislation*, eds. J.H. Burns and H.L.A. Hart (London, 1970), p.3n.
- ²⁹ *Morals and Legislation*, p.3; and see *Theory of Legislation*, pp.103-9.

-
- ³⁰ *Theory of Legislation.*, pp.141-3.
- ³¹ See *Manual, Bentham's Economic Writings*, i, p.226 and n; and *Institute, Bentham's Economic Writings*, iii, pp.308-12.
- ³² *Manual, Bentham's Economic Writings*, i, p.223.
- ³³ Winch, *Classical Political Economy and Colonies* (Cambridge, Mass., 1965), p.29.
- ³⁴ *Manual, Bentham's Economic Writings*, i, p.225.
- ³⁵ Leslie Stephen, *The English Utilitarians*, 3 volumes (London, 1900), i, p.309.
- ³⁶ *Law and Public Opinion*, p.147.
- ³⁷ *Manual, Bentham's Economic Writings* i, pp.265-7; and *Defence of Maximum, Bentham's Economic Writings*, iii, pp.284-90.
- ³⁸ *The True Alarm* (1801), *Bentham's Economic Writings*, iii, p.198.
- ³⁹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), eds. R.H. Campbell, A.S. Skinner, and W.B. Todd, 2 volumes (Oxford, 1976), i, p.392.
- ⁴⁰ *Institute, Bentham's Economic Writings*, iii, p.323. See also *General View of a Complete Code of Laws*, Bowring, iii, p.203: "The most powerful means of augmenting national wealth are those which maintain the security of properties, and which gently favour their equalization. Such are the objects of the civil and penal law. Those arrangements which tend to increase the national wealth by other means than security and equality (if there be any such,) may be considered as belonging to the class of economical laws."
- ⁴¹ Smith's own legislative doctrines are treated, most recently, by Winch in *Riches and Poverty*, chapters 4, 6-7; see also Knud Haakonssen *Science of a Legislator* (Cambridge, 1981). Bentham's relationship to the jurisprudence of the Scottish Enlightenment is illuminated by J.H. Burns in, "Scottish Philosophy and the science of legislation", *Royal Society of Edinburgh Occasional Papers*, No. 3 (1985) 11-29.]
- ⁴² See *Bentham's Economic Writings*, iii, p.47. My emphasis on these limits to Bentham's "economic writings" is not to deny the increasing intricacy and ambition of these writings themselves, especially in the area of banking and monetary policy. The fullest review of these materials remains Stark's own introductions to his edition of *Bentham's Economic Writings*. For a contrasting treatment of the relationship between Bentham's political economy and his jurisprudence, see P.J. Kelly,

-
- “Utilitarianism and Distributive Justice: The Civil Law and the Foundations of Bentham’s Economic Thought”, *Utilitas*, i (1989) 62-81.
- ⁴³ *Defence of Usury*, *Bentham’s Economic Writings*, i, p.167.
- ⁴⁴ *ibid.*, pp.142, 132.
- ⁴⁵ *ibid.*, pp.130, 157, 153-6, 158-9.
- ⁴⁶ See *Morals and Legislation*, pp.4-5.
- ⁴⁷ Karl Marx, *Capital: Volume 1* (1867), trans. Ben Fowkes (Harmondsworth, 1976), p.759n.
- ⁴⁸ See the discussion above, at n.5.
- ⁴⁹ See especially the contribution of Boyd Hilton in *The Age of Atonement* (Oxford, 1988).
- ⁵⁰ See Winch, *Riches and Poverty*, pp.103-9.
- ⁵¹ See Winch, *That Noble Science of Politics*, pp.110-26.
- ⁵² See Thomas Babington Macaulay, review of James Mill’s *Essay on Government* (1829), in Jack Lively and John Rees (eds.), *Utilitarian Logic and Politics* (Oxford, 1978), p.124.
- ⁵³ Much of this work has been developed in response to accounts of Bentham’s alleged “naturalist fallacy” and to Halévy’s interpretation in *Growth of Philosophic Radicalism* of Bentham’s strategy for the harmonization of individual and collective interests. In what follows, I am especially indebted to the discussion in Harrison, *Bentham*, chapters 5-6.
- ⁵⁴ See Bentham’s defense of the methodology adopted in developing his account of “mental pathology” in *Theory of Legislation*, p.103.
- ⁵⁵ *Pauper Management Improved* (1797), *Bowring*, viii, pp.380-1.
- ⁵⁶ *Deontology* (1834), in Jeremy Bentham, *Deontology ...A Table of the Springs of Action and Article on Utilitarianism*, ed. Amnon Goldworth (Oxford, 1983), p.128.
- ⁵⁷ *ibid.*, p.134.
- ⁵⁸ See, among many examples, *Pauper Management Improved*, *Bowring*, viii, p.381.
- ⁵⁹ *Morals and Legislation*, p.284. See also the later formulation of 1822, “... though self-regard, the desire in man to feel himself happy, is in every situation the predominant desire and propensity in human nature, neither is social regard, sympathetic regard, the desire to see others happy, less extensively inherent in it”; Jeremy Bentham, *First*

-
- Principles Preparatory to Constitutional Code*, ed. Philip Schofield (Oxford, 1989), p.14.
- ⁶⁰ Bentham's institutional strategy for the mobilization of the moral sanction remains in dispute among recent commentators; see the contrasting approaches of Postema, *Bentham and the Common Law Tradition*, pp.383-402, and Philip Schofield, "Bentham on the Identification of Interests", *Utilitas*, viii (1996) 223-34.
- ⁶¹ *Deontology*, p.128.
- ⁶² Jeremy Bentham, *Of laws in General* (1782), ed. H.L.A. Hart (London, 1970), p.70n; and see the further discussion in Harrison, *Bentham*, pp.142-7.
- ⁶³ *Morals and Legislation*, p.40.
- ⁶⁴ *Deontology*, p.129; and see the further discussion in Harrison, *Bentham*, pp.162-5.
- ⁶⁵ See the valuable survey of this dimension of Bentham's political program in Hume, *Bentham and Bureaucracy*, pp.186-95.
- ⁶⁶ Cesare Beccaria, *An Essay on Crime and Punishments* (1767), 3rd edition (London, 1770) pp.22-3.
- ⁶⁷ *Morals and Legislation*, pp.163-4, 166, 186.
- ⁶⁸ See *Theory of Legislation*, pp.102-9.
- ⁶⁹ *Deontology*, pp.184-6.
- ⁷⁰ *Morals and Legislation*, p.40.
- ⁷¹ *Codification Proposal, Addressed ... To All Nations Professing Liberal Opinions* (1822), in Jeremy Bentham, *'Legislator of the World': Writings on Codification, Law and Education*, eds. Philip Schofield and Jonathan Harris (Oxford, 1998), p.251. (I am indebted to Philip Schofield for alerting me to this passage.)
- ⁷² See the valuable analysis of these contrasting positions in Harrison, *Bentham*, pp.155-62.
- ⁷³ *Morals and Legislation*, pp.173-4.
- ⁷⁴ These writings, as published in the new *Collected Works* edition, include: *Colonies, Commerce, and Constitutional Law: Rid Yourselves of Ultramarina and Other Writings on Spain and Spanish America* (1820-22), ed. Philip Schofield (Oxford, 1995); *First Principles preparatory to Constitutional Code* (1822); *Securities Against Misrule and Other Constitutional Writings for Tripoli and Greece* (1822-3), ed. Philip Schofield (Oxford, 1990); *Constitutional Code: Volume 1* (1830); *Official Aptitude Maximized, Expense Minimized* (1830), ed. Philip Schofield (Oxford, 1993).

-
- ⁷⁵ See Alan Ryan, “Two Concepts of Politics and Democracy: James and John Stuart Mill”, in Martin Fleisher (ed.), *Machiavelli and the Nature of Political Thought* (New York, 1972), and Terence Ball, *Transforming Political Discourse* (Oxford, 1988), chapter 6.
- ⁷⁶ Speech to the House of Commons, June 1818; quoted in Bentham, *Codification Proposal, Legislator of the World*, p.303.
- ⁷⁷ See especially the treatments of the *Constitutional Code* in Rosen, *Bentham and Representative Government* and Hume, *Bentham and Bureaucracy*, chapters 6-8.
- ⁷⁸ *First Principles*, p.14.
- ⁷⁹ Bentham deployed the terminology of “remedy” and “disease” routinely in this context; see, for example, his “preliminary explanations” to *Securities Against Misrule*, p.25.
- ⁸⁰ *First Principles*, p.283; and see *Constitutional Code*, pp.35-9.
- ⁸¹ See *Securities Against Misrule*, pp.60-4.
- ⁸² See *Constitutional Code*, p.134n: “Under the sort of law established and enforced by the power of the moral sanction, - the penalty ... is forfeiture of a correspondent degree of popularity.”
- ⁸³ See *First Principles*, pp.70-6.
- ⁸⁴ *Constitutional Code*, p.36. (The passage continues, with the clarification: “If there be no individually assignable form of words in and by which it stands expressed, it is but upon a par in this particular with that rule of action which ... is in England designated by the appellation of *Common Law*.”)
- ⁸⁵ *ibid.*, p.25.
- ⁸⁶ On the latter institutional form, see the helpful survey by Philip Schofield, “Bentham on Public Opinion and the Press”, in Dimity Kingsford-Smith and Dawn Oliver (eds.), *Economical with the Truth: The Law and Media in Democratic Society* (Oxford, 1990), pp.95-108.
- ⁸⁷ *Securities Against Misrule*, p.125.
- ⁸⁸ *ibid.*, pp.44-5; see also *Constitutional Code*, p.54: “by the healing hand of Public Opinion, the rigour of Despotism may be softened.”
- ⁸⁹ See *A Fragment on Government* (1776), in *A Comment on the Commentaries and A Fragment on Government*, eds. J.H. Burns and H.L.A. Hart (London, 1977), p.485.
- ⁹⁰ Bentham’s concern to identify techniques to ensure proper administrative aptitude and accountability through publicity, record-keeping and inspection first developed in

connection with his proposed institutional projects of the 1790s, such as the panopticon prison and the pauper panopticons. On these materials, see the important discussions in Hume, *Bentham and Bureaucracy*, especially pp.139-64, and Janet Semple, *Bentham's Prison: A Study of the Panopticon Penitentiary* (Oxford, 1993), especially pp.134-47, 268-70, 319-21.

- ⁹¹ James Mill, "Freedom of the Press" (1823), in *James Mill: Political Writings*, ed. Terence Ball (Cambridge 1992), p.117.
- ⁹² See *First Principles*, pp.25-6.
- ⁹³ *Constitutional Code*, p.40.
- ⁹⁴ J.W. Burrow, *Whigs and Liberals* (Oxford, 1988), p.66. See also the important explorations of the increasing appeal to public opinion in 18th-century political speculation in J.A.W. Gunn, *Beyond Liberty and Property* (Kingston and Montreal, 1983), chapter 7, and Keith Michael Baker, *Inventing the French Revolution* (Cambridge, 1990), chapter 8.
- ⁹⁵ Hume, "Of the First Principles of Government" (1742), in *Hume: Political Essays*, ed. Knud Haakonssen (Cambridge, 1994), p.16; and see Burrow, *Whigs and Liberals*, pp.53-6, 60-5.
- ⁹⁶ Much of this discussion has been inspired by the frame developed in Habermas' *Structural Transformation of the Public Sphere*; the scale of this scholarship is now considerable. In what follows here, I am especially indebted to two recent, synthetic considerations of the cultural impacts of print media: J. Paul Hunter, *Before Novels* (New York, 1990), and John Brewer, *The Pleasures of the Imagination* (New York, 1997), chapters 3-4.
- ⁹⁷ On newspapers and politics, see the recent survey by Bob Harris, *Politics and the Rise of the Press* (London, 1996) . On the importance of the press and print-trade to the processes of extra-Parliamentary and provincial politics, see John Brewer, *Party Ideology and Popular Politics at the Accession of George III* (Cambridge, 1976), chapter 8, and Kathleen Wilson, *The Sense of the People* (Cambridge, 1995).
- ⁹⁸ See, for example, J.R. Oldfield, *Popular Politics and British Anti-Slavery* (Manchester, 1995).
- ⁹⁹ On these legal developments, see Philip Hamburger, "Development of the Law of Seditious Libel and the Control of the Press", *Stanford Law Review*, xxxvii (1985)

661-765, and Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Mass., 1993).

- ¹⁰⁰ See William Blackstone, *Commentaries on the Laws of England*, 4 vols. (1765-69), Facsimile reprint of the first edition (Chicago, 1979), iv, pp.151, 153. By “liberty of the press” Blackstone referred to absence of censorship prior to publication. The relative novelty of “freedom of press” in discussions of English rights is emphasized by Lois G. Schworer in “Liberty of the Press and Public Opinion: 1660-95”, in J.R. Jones (ed.), *Liberty Secured? Britain Before and After 1688* (Stanford, 1992), pp.199-231; the later Hanoverian debate over the contribution of the press to English liberty is examined by Eckhart Hellmuth, “The palladium of all other English liberties”, in Eckhart Hellmuth (ed.), *The Transformation of Political Culture* (Oxford, 1990), pp.467-501.
- ¹⁰¹ William Paley, *Principles of Moral and Political Philosophy* (1785), 9th American edition (Boston, 1818), p.298.
- ¹⁰² The government practices and structures which encouraged the demands for political intelligence are considered in John Brewer, *Sinews of Power* (New York, 1989), pp.130-4, 221-49, and Paul Langford, *Public Life and the Propertied Englishman* (Oxford, 1991), chapters 3-4.
- ¹⁰³ For such instances of Bentham’s utilization of Parliamentary publications concerning government expenditures and record-keeping, see *Official Aptitude Maximized, Expense Minimized*, pp. 58-65, 112-5, 212-9, 293-301. The relationship between the *Constitutional Code* and *Official Aptitude Maximized, Expense Minimized* is summarized in the editorial introduction of the latter work; see pp.xv-xvii.
- ¹⁰⁴ Jeremy Bentham Manuscripts, University College London: cxlix.7; cited in Semple, *Bentham’s Prison*, p.57.
- ¹⁰⁵ See *Securities Against Misrule*, pp.46-50.
- ¹⁰⁶ *Plan of Parliamentary Reform, in the Form of a Catechism* (1817), Bowring iii, p.464.