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MACCABEAN LECTURE IN JURISPRUDENCE

READING BENTHAM

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WHEN I was honoured with an invitation to deliver the Maccabean Lecture, it was suggested that it should be on a Benthamite theme. Conscious of the maxim that few Benthamists are Benthamites I offered a Benthamic title. That offer was accepted. I was also conscious that I would be here as a representative of the Bentham Committee which has had a close relationship with the British Academy since the early days of the Bentham Project. In choosing a topic to suit the occasion I decided that it would not be appropriate to render an account of the Project to our most important sponsors. That is best left to annual reports. However, this is an opportunity to make a public acknowledgement of our indebtedness to the Academy for its continuous and vital support for one of the most ambitious enterprises of its kind in the world. Not only has the annual grant provided essential core funding, but through the rigour of its enquiries, the wisdom of its advice and the prestige of its imprimatur, the Academy greatly enhances our capacity to raise funds from other sources, both public and private, in this country and abroad. The Bentham Project still lives a precarious existence in a climate that is unfriendly to long-term research, but we are now more stable, more efficient and more productive than at any stage in our history. There have been times when the whole enterprise was at risk; but we now have the experience, the infrastructure and the momentum for there to be a realistic prospect of completion within a reasonable time; perhaps, with increased support, even by the year 2000. All that is lacking is the funding needed to complete the task. When that happy release comes, the Academy

[1] I am grateful to James Burns, Cyprian Blamires, Stephen Conway, John Dinwiddy, Patrick Gudridge, Stephen Guest, Paul Kelly, Fred Rosen, Philip Schofield and Alex Stein for comments and suggestions. All errors and opinions are my responsibility.

will rightly be able to claim a great deal of the credit for its contribution to an unfashionable, but important, endeavour and for keeping the values of fundamental scholarship alive. Thank you.

An obvious topic for such an occasion would be a general reassessment of Bentham's contemporary significance or a critical stock-taking of the state of Bentham scholarship. Two former chairmen of the Bentham Committee, Professor Herbert Hart in 1962[2] and Lord Robbins in 1964,[3] delivered important lectures of this kind. They are still read today. Since Professor Hart's 'Master-mind' lecture there have been very significant developments in both primary and secondary Bentham studies. Sixteen volumes of the *Collected Works* have been published, two are in the press, and at least ten more are at various stages of preparation. There have also been over twenty specialized monographs devoted wholly or mainly to Bentham and, of course, a mass of shorter writings. There is now an established Bentham 'industry' with a postgraduate course on his legal and political thought, a regular Bentham seminar, research students, and an International Bentham Society. Perhaps the progress of Bentham studies since the lectures by Hart and Robbins can be symbolized by the fact that this year the annual *Bentham Newsletter,* launched in 1978, has been replaced by a biennial journal published by Oxford University Press entitled *Utilitas, A Journal of Utilitarian Studies.* This, one hopes, marks the advent of a new phase in which Bentham scholarship will be more fully integrated into broader intellectual currents.

These extensive developments in Bentham studies include their share of revisionism, criticism and debunking. There is plenty to take stock of. However, I have decided not to attempt this today for two main reasons. First, there have been several such stock-takings recently;[4] there have also been some useful surveys of

[2] H. L. A. Hart, 'Bentham', Lecture on a Master Mind, *Proceedings of the British Academy,* **48** (1962), 297.

[3] Lord Robbins, 'Bentham in the Twentieth Century', Address to the Assembly of Faculties, University College, London, 1964 (Athlone Press, 1965).

[4] E.g. Stephen Conway, 'The Bentham Project and Bentham Studies', unpublished paper, delivered Moscow, April, 1988; Fred Rosen, 'Jeremy Bentham: Recent Interpretations', *Political Studies,* **30** (1982), 575; 'Elie Halevy and Bentham's Authoritarian Liberalism', *Enlightenment and Dissent,* **6** (1987), 59; Michael Freeman, 'Jeremy Bentham: contemporary interpretations', in R. Faucci (ed.), *Gli Italiani E Bentham, Economia Del Benessere,* **7** (Milan, 1982), 19; L. J. Hume, 'Revisionism in Bentham Studies', *The Bentham Newsletter,* **1** (1978), 3; David Lieberman, 'From Bentham to Benthamism', *Hist. Jo.* **28** (1985), 199.

recent literature; I gave my personal answer to the question 'Why Bentham?' as part of the Shearman Lectures in 1983.[5] Furthermore, John Dinwiddy's recent monograph in the *Past Masters* series gives a splendid summary and assessment of current understandings of Bentham.[6] Dr Dinwiddy is both a more learned Benthamist and a more committed Benthamite than I am, but I have no reason to dissent from his succint and cogent answer to the question: why the *Collected Works*? His statement is worth repeating for non-specialists:

> The case for producing a new edition of Bentham's works rests partly on the importance of his thought, and partly on the inadequate and incomplete fashion in which his works were previously published. His writings are remarkable for their range, originality and influence. He was one of the greatest reformers, perhaps the greatest, in the history of English law. He was a legal philosopher of major importance, being one of the founders of the theory of legal positivism. In ethics he provided the classic exposition of the utilitarian theory which has been a major strand in moral philosophy since the eighteenth century. In political thought he was important both as a critic of established doctrines such as that of natural law, and as the originator of one of the main theoretical justifications for democracy. In the fields of public administration and social policy, he arguably had more influence than any other thinker on the process of administrative and social reform in Victorian Britain. In economic thought, his ideas about the measurement and utility lie at the root of modern theories of cost-benefit analysis and welfare economics. He has been recognized, too, as a pioneer in other fields ranging from international law and the birth control movement to motivational psychology and deontioc logic. He has been described by C. K. Ogden as 'the greatest social engineer in history', and by A. J. P. Taylor as 'the most formidable reasoner who ever applied his gifts to the practical questions of administration and politics'.[7]

Another reason for not attempting a magisterial appraisal of the state of Bentham scholarship today involves invoking what Bentham fallaciously treated as a general fallacy; the Procrastinator's Argument.[8] Bentham scholarship is approaching a point when it will be open to some significant new directions. But a substantial number of the manuscripts are still undeciphered and inaccessible. These include some of the most important writings

[5] William Twining, 'Why Bentham?', *The Bentham Newsletter*, **8** (1984), 34.

[6] J. Dinwiddy, *Bentham* (Past Masters, Oxford, 1989).

[7] Bentham Executive Committee, 'The Bentham Project: Past, Present and Future', University College, London (unpublished, 1983).

[8] J. Bentham, *The Book of Fallacies*, *Works*, Vol. 2, p. 432.

on logic and language, religion, economics, politics, law, sex and war. Any of these may contain important clues to unravelling some of the arcana of his thought and the apparent ambiguities of his character. It is significant that all of the leading Bentham scholars of the present generation have drawn back from attempting a full-scale biography or intellectual biography, several of them, like myself, claiming that the time is not yet ripe for a general appraisal. This seems to me to be a valid reason which will no longer apply when the *Collected Works* are complete or nearly complete and reliable texts of all Bentham's writings are available.

Another possibility was to take a theme related to the sponsorship of this lecture. This lecture series was endowed by the Maccabeans, a society of Jewish professional men with a particular interest in law, to mark the tercentenary of the Jewish settlement in England under Cromwell. There is here an important Bentham connection. My own College, the so-called 'Godless institution of Gower Street', was the first university institution in this country to admit non-Anglicans to its courses.[9] Jeremy Bentham was a spiritual rather than a material founder of University College. This crucial first step towards the secularization of higher education was based not on overt materialism, but rather on the principle of religious toleration. It is a strange form of godlessness for an institution to open its doors to Roman Catholics, Quakers, other dissenters, Hindus, Muslims, Jews and, eventually, to women. The Jewish connection with Bentham's College has been a strong one since its foundation and remains so today. Bentham may or may not have been a materialist in a strong sense ... that is one aspect of the fascinating theme of Benthamic ambiguity ... but he was a staunch and unequivocal supporter of religious toleration.

Bentham's concern for the oppressed ... women, homosexuals and animals as well as religious and ethnic minorities ... has been the subject of a valuable study by Lea Campos Boralevi.[10] This topic provides one ground for treating him as a modern thinker. Such claims to 'modernity' will be one of the themes of this lecture, but I propose to consider them from a somewhat different perspective.[11]

[9] N. Harte & J. North, *The World of University College 1828–1978* (1978), pp. 10–15.

[10] Lea Campos Boralevi, *Bentham and The Oppressed,* European University Institute (1984).

[11] E.g. the 'astonishing topicality' of Bentham's jurisprudence is a central theme of P. Gerard *et al., Actualité de la pensee juridique de Jeremy Bentham* (Brussels, 1987).

In telling you what I am not going to talk about, I have, of course, sketched a context for my theme. Proceeding on the optimistic assumption that we are at least within sight of achieving a complete and definitive version of his *Collected Works,* I propose to explore some possible ways forward in Bentham studies during its next phase. One of the main functions of Bentham scholarship is rightly to make his thought more accessible through accurate exposition as well as through the production of reliable texts. In looking beyond this, I shall first consider some different ways of approaching Bentham, and indeed any important thinker, in the light of some recent developments in the history of ideas and in theories of interpretation. In the final section, I shall advance some particular reasons for the view that the time is ripe for Bentham to be restored to his rightful place as the Father of Modern English Jurisprudence.

On Reading Bentham

Bacon wrote:

'Some books are to be tasted, others to be swallowed, and some few to be chewed and digested: that is some books are to be read only in parts; others to be read, but not curiously; and some few to be read wholly and with diligence and attention. Some books also may be read by deputy, and extracts made of them by others; but that would be only in the less important arguments and the meaner sort of books; else distilled books are like common distilled waters, flashy things'.[12]

As one contemplates the prospect of seventy or so substantial volumes in *The Collected Works,* it is natural to wonder how Bacon's wisdom applies to reading Bentham. Most of you will have spotted the not-so-light irony in my title. For, on most interpretations of 'reading', Bentham is thought to be unreadable. The difficulty of deciphering his script; the deficiencies of the Bowring edition; the convolutions of the prose, especially in the later works; and the relentless concern for detail have all been sources of frequent complaint. The splendid volumes of *The Collected Works* do elegantly furnish a room ... as in the Fellows Library of this institution ... but one may ask: what other uses might they have? Many quote with approval the famous statement by Sydney Smith that '(n)either gods, men nor booksellers can doubt the

[12] Francis Bacon, 'Of Studies'.

necessity of a middleman between Mr Bentham and his public... The great mass of readers will rather choose to become acquainted with Mr Bentham through the medium of the reviews ... after the eminent philosopher has been washed, trimmed, shaved and forced into clean linen'.[13]

Strangely, this was written of one of Bentham's most enjoyable texts, *The Book of Fallacies.* Sydney Smith was writing about the general reader. Several commentators have tried with varying degrees of conviction to point to the witty aphorisms and pungent phrases that adorn many of his works, although as Professor Hart admits, they are like daisies among the thorns.[14] In teaching about Bentham, especially at postgraduate level, my impression is that students find him less obscure and no more tedious than most other jurists and philosophers. There are, however, two main obstacles to getting to grips with Bentham texts for the first time. First, it is helpful to distinguish between his 'popular' and his 'arcane' writings.[15] The 'popular' are generally more lucid, but the 'arcane' tend to be more precise and more profound. Thus most students are familiar with his treatment of utility and some of his other basic ideas through *A Fragment on Government* and *An Introduction of The Principles of Morals and Legislation,* two early relatively 'popular' works. One finds much more subtle and thorough treatments of the same topics in the *Deontology,* the *Constitutional Code* and other less inviting writings, some of which have now appeared in *The Collected Works.*[16]

Another obstacle is the sheer vastness of the terrain to be covered. In my own special area of interest, Evidence, the *Rationale of Judicial Evidence* filled 3000 admittedly small pages in the John Stuart Mill edition;[17] this represents less than a half of his extant writings, published and unpublished, on this subject alone. In order to grasp many of his ideas on particular topics and concepts one has to turn to cognate writings of similar extent.

[13] Sydney Smith, 'Bentham's Book of Fallacies' (review) *Edinburgh Review,* **42** (1825), 367.

[14] H. L. A. Hart, *Essays on Bentham* (Oxford 1982), p. 126.

[15] Mary Mack, *Jeremy Bentham: An Odyssey of Ideas 1748–1792* (London, 1962).

[16] A. Goldworth (ed.), *Deontology, together with A Table of the Springs of Action and Article on Utilitarianism* (Oxford, 1983); F. Rosen & J. H. Burns (eds), *Constitutional Code* (Oxford, 1983), Vol. 1; P. Schofield (ed.), *First Principles Preparatory to The Constitutional Code* (Oxford, 1989), all in the *Collected Works* (hereafter CW).

[17] J. Bentham, *A Rationale of Judicial Evidence,* ed. J. S. Mill, 5 vols (London) (reprinted *Works,* Vols 6 and 7).

In respect of this basic kind of reading, with due respect to Bacon, I belong to the clean linen school. In order to get to grips with Bentham's general ideas or his treatment of a particular topic one is often well-advised to start with one or more middlemen, when they are available. In his lifetime he was singularly well-served, especially by Dumont, whose *rédactions* so elegantly captured the best of Bentham's style and substance that several were translated into English. Some, such as Dumont's *Treatise on Judicial Evidence* remain to this day the best starting-point for becoming acquainted with Bentham's ideas on a given subject.[18] They do, however, contain pitfalls for the unwary, because Dumont and others not only simplified but also sometimes censored some of the less tactful or acceptable sentiments to be found in the original. Dumont's Bentham, and even more so Bowring's, is too well scrubbed to be reliable for scholarly purposes.

Here, however, let me put in a word in defence of the Bowring edition. It is standard for Benthamists to disparage both the work and the man. And, indeed, there is much to criticize: the small print; the inaccuracies; the omission or bowdlerization of passages or even whole works which might have offended Victorian attitudes in respect of sex, politics or religion.[19] All of these help to provide a justification for a more scholarly and comprehensive edition of the works. Bowring's personal failings are also well-known, although he is now recognized as a figure of sufficient consequence to have been the subject of a recent colloqium. Yet as Bentham's literary executor Bowring succeeded in organizing the publication of the eleven volume edition within twelve years of Bentham's death. For over 150 years this has been by far the most extensive and accessible source of Bentham's writings and in many respects remains so today. One of the most useful features is the analytical index in the eleventh volume. This was the work of John Hill Burton. It fills almost 400 pages and is an indispensable tool for both specialists and non-specialists. There is one good reason why this is especially valuable in respect of Bentham.

[18] The full title of the original was *Traité des Preuves Judiciaries,* ouvrage extrait des Manuscrits de M. Jeremie Bentham, Jurisconsulte Anglais, Par Et. Dumont, 2 vols (Paris, 1823). The translation appeared as *A Treatise on Judicial Evidence,* extracted from the manuscripts of Jeremy Bentham, Esq. by M. Dumont. Translated into English, 1 vol. (London 1825). The translator has not yet been identified.

[19] E.g. Mack, op. cit. n. 15, at p. 21. Some of the omissions were due to financial constraints rather than censorship.

On the one hand, the range of topics on which he wrote is truly extraordinary; on the other hand, the general framework of his thought is remarkably coherent and consistent. So it is relatively easy for the non-specialist to locate Bentham's treatment of even the most specific topic within the general framework of his ideas, the key ingredients of which are his version of utility, the theory of fictions and the pannomion. The Bowring edition is still the nearest approximation we have to a Bentham Encyclopedia. An extension and revision of the Analytical Index to cover all the published and unpublished writings should, in my view, be one of the highest priorities in the next phase of Bentham studies.

Getting acquainted with Bentham's general ideas and particular texts and using the Bowring edition as a work of reference are, of course, only first steps for the student of Bentham. To proceed to the next stage it may be helpful to bear in mind some recent trends in neighbouring disciplines, especially in literary theory and the history of ideas.

Excursus: On Reading and Interpretation in General

Four types of reading

Literary theory is currently in fashion in jurisprudence. James Boyd White has elegantly explored the apparently paradoxical idea of 'the legal imagination' in literary terms;[20] Ronald Dworkin and others have debated analogies between interpretation of legal and literary texts;[21] deconstruction and related French ideas are à la mode in the otherwise extraordinarily insular form of critical legal studies that has established some bases in the United States; and there is, in that country, even said to be a nascent 'Law and Literature Movement', which may be rather more than an inflated way of signalling that some academic lawyers are experimenting with using *Billy Budd,* or *The Trial* or *Crime and Punishment* in their teaching.[22]

[20] J. B. White, *The Legal Imagination* (Boston, 1973); *When Words Lose Their Meaning* (Chicago, 1984); *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, 1985).

[21] E.g. R. Dworkin, *A Matter of Principle* (London, 1985); *Law's Empire* (London, 1986); Stanley Fish, *Doing What Comes Naturally* (Durham, N. Carolina, 1989); David Miers, 'Legal Theory and the Interpretation of Statutes', in William Twining (ed.), *Legal Theory and Common Law* (Oxford, 1986), Chap. 7.

[22] These developments are surveyed in Elizabeth V. Gemmette, 'Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum', *Valparaiso L. Rev.*, **23** (1989), 267..

To the outsider, literary theories seem to fall into three main groups: those that emphasize the text; those that focus on context, whether that be the author's concerns and 'intentions' or the broader historical setting; and those that focus on the reader's experience of reading, reacting to and constructing interpretations of texts. Current modes of reading Bentham, and juristic texts generally, seem (on the surface) to follow a similar pattern: close textual reading; historical or contextual reading; and reading or conversing with the text in relation to present-day issues. In jurisprudence another mode of discourse about texts has been especially prominent: this is the discussion of particular jurists, or so-called schools or isms, without reference to any texts at all: what might be called 'Non-reading'.[23]

A similar, but not identical pattern, is to be found in recent developments in the history of ideas.[24] These are more directly relevant to my present purpose. The central issue in the debates about law and literature is to what extent interpretation of statutes, law reports and other *authoritative* texts is analogous to interpreting novels, poems and other literary artefacts. Intellectual historians, on the other hand, have been concerned mainly with questions about interpreting and using texts by philosophers

[23] It has been suggested to me by Stephen Guest that one cannot draw a sharp distinction between text and context 'because words take much of their meaning from "context"' and 'text' and 'context' are too vague to do much work on their own. I do not disagree. However, I am using 'context' here to refer to matters external to a given written text that may be relevant to answering questions about the text. Such questions could relate to biographical or linguistic or other historical information or to other texts by the same or different authors. Such information could provide extrinsic aids to interpreting the text or illuminate the text in other ways. Some of this information might be gleaned directly or by inference from the text itself, but a great deal of it may not. For present purposes it is sufficient to use 'textual' reading to refer to approaches that concentrate mainly or entirely (so far as that is possible) on single texts as historical products (asking certain kinds of questions *of* the text), whereas contextual reading draws on a wider range of sources (asking questions *about* the text). My terms ('textual', 'contextual', 'conversational') are intended to suggest no more than a rough typology of general strategies for approaching texts (whereas 'non-reading' is freed from the anchorage of particular texts). The terms are inadequate for giving detailed accounts of the extraordinarily complex processes of reading and interpreting particular texts. The difference between the strategies is mainly one of emphasis ... of course, nearly all particular reading is multi-layered and no reading is innocent.

[24] See, for example, R. Rorty, J. B. Schneewind & Q. Skinner (eds), *Philosophy in History* (Cambridge, 1984); James Tully (ed.), *Meaning and Context: Quentin Skinner and his Critics* (Oxford, 1988).

and political theorists, that is to say the kind of texts that Bentham wrote. These debates have barely touched directly on juristic texts as such, but they are hardly different in kind. The central issues concern methods of interpretation without the complicating factor of questions about the validity of analogies between different species of text. There tends to be more at stake politically between rival theories of interpretation of authoritative texts. One can usefully differentiate interpretations which emphasize text, context, conversation and not reading, provided that the distinctions are not drawn too sharply. Against this background let us look briefly at each perspective with reference to some recent writings about Bentham.

Textual reading

It is probably fair to say that in philosophy and political theory the predominant tradition of scholarship emphasized close textual reading of text that belonged to some conventionally prescribed canon of classic works. When exegesis and interpretation spilled over into 'criticism' this was often ahistorical so that it has not always been easy to differentiate criticism that might have been made by an author's contemporaries or on his own terms, such as charges of inconsistency, inaccuracy, ambiguity or fallacious reasoning; criticisms which invoke the wisdom of hindsight of the 'we know better now' variety; and more crudely anachronistic criticisms in which the essence of the charge is that the critic is arguing that the text provides defective answers to 'today's problems', which may or may not have been questions that the original author had addressed or even considered. Of course, all criticism of past thinkers is anachronistic in a weak sense, in that the concerns, vantage points, perspectives and values involved are those of the critic.[25] However, just as historians need to discriminate between different kinds of evaluations and assessments of past events and actions, so do those who talk about ideas need to distinguish between different kinds of criticism.

One of the outstanding examples of recent Bentham scholarship

[25] Cf. Skinner in Tully, op. cit. n. 24, at pp. 286–8. Skinner acknowledges that one role of intellectual history is to provide 'an additional means of reflecting on what we believe ... [However], it is only by refusing the vulgar demand for relevance that we can hope to indicate the serious way in which the study of intellectual history is indeed relevant to the assessment of our present beliefs' (ibid.).

is Gerald Postema's *Bentham and The Common Law Tradition.*[26] While it does not neglect context, it is primarily based on a close reading of the original texts. An important aspect of this excellent work is the thesis that Bentham had a direct utilitarian (in modern parlance act-utilitarian) theory of adjudication according to which judges are not strictly bound by positive law, but should apply the principle of utility to every case.[27] Because the main function of codified law is to provide a basis for settled expectations and 'to define and maintain a framework for social interaction', in nearly every case the strict application of law would promote utility.[28] But, when in a particular case, taking into account all the circumstances, utility requires a departure from the law, the judge should follow utility. This thesis challenges the orthodox view that Bentham, the arch-codifier and opponent of judge-made law, advocated that the role of the judge in respect of substantive law should be to apply codified substantive law strictly and to refer any perceived defects in enacted law for determination by the legislator.[29] His interpretation leads Postema to conclude that there is a deep conflict between Bentham's theory of law and his theory of adjudication.[30]

Postema's interpretation has been challenged on textual grounds and is likely to be the subject of protracted controversy among specialists. It is not possible to pursue the textual niceties here. My own view is that, if Postema's interpretation is correct, far from pointing to a fundamental incoherence in Bentham's thought it helps to reconcile his treatment of substantive and adjective law and his general commitment to direct or act-utilitarianism. Indeed this is a very clear statement of what kind of theory of adjudication is entailed by act-utilitarianism. However, Postema's interpretation is difficult to reconcile with all the texts.[31]

[26] Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford, 1986).

[27] Ibid., esp. Chap. 12.

[28] Ibid., p. 448.

[29] For details, see the discussion of Postema's book by John Dinwiddy in 'Adjudication under Bentham's Pannomion', *Utilitas*, I (1989), 283.

[30] Op. cit., at p. 453.

[31] E.g. Dinwiddy, op. cit. n. 29; Dr Paul Kelly, in a recent review of *Bentham and the Common Law Tradition* (History of Political Thought, 1989, pp. 366–70) takes issue with Postema on two grounds; first he challenges Postema's view that Bentham was a consistent act-utilitarian. Rather, he argues that Bentham was committed to some indirect utilitarian strategies, especially in respect of codification, and the evidence for this is largely the same material that Postema uses in Chapter 5 as evidence of Bentham's commitment to 'security of

expectation as the object and principal consequence of a legal system' (ibid., p. 369). Secondly, Kelly suggests that Postema's argument for the thesis that Bentham intended to allow scope for direct utilitarian reasoning by judges is based almost entirely on the adjective law writings in which Bentham advances a strong anti-nomian thesis. Kelly suggests that Postema fails to establish that Bentham was anti-nomian in respect of substantive law. In short, Kelly implies that Bentham adopted different models of reasoning for questions of fact and questions of law: the purpose of the former is to ascertain the truth, the purpose of the latter is a correct interpretation of positive law, i.e. to implement the will of the legislator. However, Kelly agrees that if Postema's premises are accepted, then Postema is right in arguing that Bentham's position is incoherent, for judicial decisions will inevitably become a basis for expectations, even if they are not intended by the judges to serve as precedents or to make law.

I differ with Postema and Kelly on the inevitability of decisions on questions of law being treated as precedents, for these reasons: first, in designing a system it is open to the legislator to declare that decisions on questions of law, no more than on questions of fact, should have no authority beyond the particular case. Secondly, a direct-utilitarian model of reasoning on questions of law is more closely analagous to judicial reasoning on questions of fact than Kelly suggests. In both great emphasis is laid on the specific circumstances of the particular case. The main basis for Bentham's anti-nomian thesis was his view that the best judgments on questions of fact are case-specific and beyond formal regulation by rigid rules; this is also the basis for a direct utilitarian approach to judgments of value. Thirdly, specific decisions by officials on questions of fact can provide some basis for predictions concerning future decisions without thereby becoming authoritative precedents. The same applies to decisions on questions of law and decisions by officials on other questions. For the knowledge that an official will decide consistently in a direct-utilitarian way in all cases, on a given version of utility, can itself be an aid to prediction and hence a basis for expectations. One might add that modern jurists recognize that the lawyers' distinction between questions of fact and questions of law is artificially sharp and that many 'questions of fact involve judgements of value' (e.g. Adrian Zuckerman, 'Law, Fact or Justice?', *Boston U.L. Rev.*, **66** [1986], p. 487), although Bentham did seem to draw a quite sharp line between adjective and substantive law.

I agree with Kelly that the textual evidence for Postema's interpretation is tenuous; I also agree that Bentham adopted some indirect utilitarian strategies in relation to codification, but disagree that this is incompatible with the kind of residual direct/act-utilitarianism that Postema identifies: generally we will follow the code, but all things considered, including long-term consequences, the right action is the one that furthers utility in the circumstances of the particular case. On this view the distinction between direct and indirect utilitarianism collapses in favour of direct utilitarianism. I differ from both Postema and Kelly on their view that an act-utilitarian theory of judicial reasoning is incompatible with giving a very high priority indeed to settled expectations in respect of law. However, 'the non-disappointment principle', in Bentham's thought while commanding a high priority is ultimately a principle subordinate to utility.

In the present context, the interesting question is methodological: what counts as the best interpretation of Bentham? Postema explicitly differentiates between contextual, historical and philosophical perspectives on Bentham and makes it clear that this work is primarily historical, but is conceived of as part of a wider enterprise that is philosophical and critical.[32] These differentiations correspond almost exactly to the distinctions between textual, contextual and conversational readings as they are used here. On my reading of Postema's interpretation, at the very least it tells us what Bentham should have said if his treatment of substantive and adjective law, his theory of adjudication and his act-utilitarianism were all coherent. In so far as there are some texts which seem not to fit Postema's account of Bentham's theory of adjudication, these might be accounted for on one or more grounds for example: (a) that Bentham changed his mind over time; (b) that Bentham contradicted himself or made statements with inconsistent implications; (c) that some texts deal with special situations or exceptions; (d) the seemingly deviant texts are open to alternative, less obvious interpretations; or (e) that the issues raised by the commentator were not central to the author's original concerns.[33]

Without claiming to have made an exhaustive study of all relevant passages, my view is that Postema's interpretation of Bentham's theory of adjudication is difficult to reconcile with at least some texts, but that is hardly surprising given that they were written in different contexts over a long period of time in response to varied, often quite specific, concerns. In short, Bentham was not entirely consistent and Postema's interpretation, while scrupulously honest to the texts (his phrase), goes beyond what Bentham said to construct or reconstruct a more coherent general theory than Bentham in fact articulated. Postema acknowledges as much in the Preface.[34] In this Postema, while being careful to try to avoid anachronism, was aided by consideration of recent debates about act- and rule-utilitarianism and the nature of judicial reasoning. Bentham did not use the term 'theory of adjudication' and constructing one from his texts, however scrupulously, reflects modern American juristic concerns more than Bentham's own.

Where Postema and I differ is that he concludes that he

[32] Preface.
[33] Cf. Skinner in Tully, op. cit. n. 24, at pp. 244–6.
[34] Preface.

has revealed a fundamental conflict within Bentham's thought, whereas I believe that he has achieved the Dworkinian result of making the text 'the best it can be'[35] (at least in respect of internal coherence) even if this involves rather liberal interpretation of some passages.

The immediate relevance of all this is that even the most scrupulous textual interpreter may be drawn into constructing interpretations in the light of subsequent debates. This illustrates how easy it is to move almost imperceptibly from historical to conversational readings.[36]

In recent years structuralists, post-structuralists, deconstructionists, semioticians and even narratologists have invaded jurisprudence. They have not yet made significant incursions into Bentham studies. We have an ambitious attempt at deconstruction of Blackstone's *Commentaries,* but so far nothing comparable on *Of Laws In General* or *The Constitutional Code.*[37] No doubt this will happen in due course. Whatever one thinks of the quality and value of recent attempts to apply the methods of Derrida or Barthes or Ricoueur or Greimas or Lacan to legal texts and ideas, such exercises serve to remind us of the almost infinite possibilities of interpretation and re-interpretation of any past thinker of substance, especially when one acknowledges or assigns a major role to the reader or commentator in constructing the text.

There is one general reason why Bentham is particularly susceptible to varying interpretations and re-interpretations. At one level he is a remarkably straightforward thinker who gives clear and precise answers to sharply posed questions. Some of the answers seem as shocking as they are unequivocal. Are there any non-legal rights? No. Which rules of evidence promote rectitude of decision? None. What is wrong with torture? Its susceptibility to abuse. Is the common law 'law'? No. As one digs deeper one becomes more conscious of what I have called Benthamic ambiguity.[38] This refers to a complex combination of tensions within Bentham's own thought and ambivalences on the part of his readers. At the root of utilitarianism lies an ambiguity as to whether 'pleasure' refers to satisfaction or desire or preference; it is reasonably clear that Bentham's usage is closer to the first, but

[35] R. Dworkin, *A Matter of Principle*, cit. n. 21; cf. *Law's Empire* (1986), Chap. 2.

[36] See further below n. 71.

[37] Duncan Kennedy, 'The Structure of Blackstone's *Commentaries*' *Buffalo L. Rev.*, **28** (1979), 209.

[38] This theme is developed in 'Why Bentham?' cit. n. 5 and in *Michigan L. Rev.*, **86** (1988), pp. 1523, 1536–9.

the last—i.e. preference—is thought by many modern commentators to be the least vulnerable.[39] We have already seen that there is room for doubt as to whether he was a consistent act-utilitarian and whether his treatments of codified substantive law and discretionary adjective law are consistent with each other. Both Fabian socialists and free-market economists claim him as an important ancestor; he was a genuine political radical, yet he placed a very high value on security; his belated conversion to democracy tempered neither his authoritarian and centralist tendencies nor his sensitivity to the potential for abuse of power nor his concern to combat misrule in all its forms. The architect of the seemingly inhuman Panopticon scheme was a life-long opponent of all forms of cruelty; his theory of adjective law transcends conventional distinctions between adversarial and inquisitorial models of procedure; he was deeply ambivalent about both the American and French revolutions; he satirized political fallacies of Left, Right and Centre; he was sexually ambiguous; ambitious, vain and socially diffident; a prolific writer who was notoriously reluctant to publish; and the inventor of schemes that range from the inspired to the nutty, sometimes combining both elements in a single proposal, as in the case of the auto-icon. Given all these seeming contradictions and tensions in his character and thought, it is hardly surprising that much Bentham scholarship at least appears to involve the pursuit of the ambiguous by the ambivalent.[40] I happen to think that quite a few of these seeming inconsistencies can be resolved by detailed attention to the texts. But even if one makes the slightest concession to the idea that the reader constructs the text the floodgates are open for multiple interpretations. I shall return to this in due course.

Contextual reading

So much for readings that place the primary emphasis on the text itself. Let us now turn to those that emphasize the importance of context in interpretation.

The movement to put history back into intellectual history or to develop a history of ideas which is 'a genuinely historical recreation of the past',[41] can be interpreted as a reaction against

[39] E.g. A. J. Ayer, 'The Principle of Utility', in *Philosophical Essays,* London (1963).

[40] This passage is adapted from *Michigan L. Rev.*, **86** at pp. 1536–7 (1988).

[41] Stefan Collini, Donald Winch & John Burrow, *That Noble Science of Politics* (Cambridge, 1983) p. 5; cf. Quentin Skinner, *The Foundations of Modern Political Thought* (1978), Vol. 1, p. xi.

what these new intellectual historians considered to be bad habits in their received tradition:[42] for example, intensive analysis of classic texts out of context; overconcentration on a narrow and arbitrarily selected canon of classics to the neglect of broader sweeps of ideologies and ideas and of lesser figures; the equation of history with the search for origins; or 'writing history backwards', that is anachronistically imputing concerns, questions, and even concepts to people who lived and wrote in a quite different intellectual environment; and a tendency to construct rather artificial 'continuities' and chains of influence. Bentham scholarship is almost entirely free from crude versions of these bad habits. It is standard to set almost any sustained discussion of one of Bentham's works in the context of his immediate concerns and agenda, of his intellectual development and of the general corpus of his ideas. It is also part of the convention to identify, so far as is feasible, the main sources on which Bentham relied or against which he reacted. This is often difficult in practice. Bentham read quite widely, but a great deal of the time he seems to have written largely from his head, drawing on what he had assimilated rather than constantly referring back to original sources. In many of his works, as exemplified by the *Rationale of Judicial Evidence,* citations are very sparse.

In writing a largely expository essay on the *Rationale* I attempted to observe these conventions of what might be termed moderate contextual scholarship.[43] One asked: when was the text written? Why did Bentham concentrate on evidence *then?* What were his central concerns? In particular, what explains the virulence and repetitiousness of his attacks on the legal profession in this work? When did he start to think about adjective law? Did any of his views in this area change significantly over time? What is the relationship between *The Rationale* and his other writings on evidence? How do his ideas on adjective law relate to other aspects of his thought? What was the state of the law of evidence at the time and of secondary writings on the subject? How much of this literature had Bentham studied carefully and how did he use it? and so on.

Such commonplace questions may have been sufficient for the modest task of setting a largely expository study of a major work in its immediate general context. Moreover, in one respect I was

[42] See generally, Tully, op. cit. n. 24.

[43] William Twining, *Theories of Evidence: Bentham and Wigmore* (London and Stanford, 1985).

more ambitious: I explored how far Bentham contributed to and conformed with an ideal type of assumptions about adjudication and proof that I argued were shared by most specialized secondary writings about evidence over a period of nearly 200 years.[44] However, as my work proceeded I became increasingly aware of many specific questions that remain unanswered about the biographical, intellectual, political and linguistic context of the *Rationale* and cognate writings. To give a few examples: the rules of evidence had been going through a phase of relatively rapid development at the time Bentham wrote and similar considerations apply to procedure and what he called judicial organization. While the legal context has been sketched in broad terms there are many specific lines of enquiry that still await the attention of orthodox legal historians. There are also many unanswered questions about the extent to which Bentham was reacting to debates and controversies and particular incidents that took place while he was writing. We need to know much more about such matters before we can make confident judgments about the extent and nature of his originality in this area as well as about the meaning and significance of many specific passages. Similar considerations apply to the intellectual context: for example, thanks to the work of Ian Hacking, Barbara Shapiro and others[45] we have some knowledge of the development of ideas about probability and inference before and after Bentham wrote and it should be relatively easy to locate Bentham's rather undeveloped ideas on probabilities in this story.[46] However, the connection between the seemingly simple empiricism of the *Rationale* and his theory of fictions, which is often presented as being highly original and ahead of its time is more problematic; as is the relationship between Bentham's treatment of reasoning about evidence and John Stuart Mill's *A System of Logic*.[47]

The new intellectual history has by no means been confined to negative criticism; it has produced some splendid scholarship as well as theorizing as is illustrated by the work of J. G. A. Pocock, Quentin Skinner, Stefan Collini and others.[48] Regrettably this

[44] Ibid., Chap. 1. See now W. Twining, *Rethinking Evidence* (Blackwell, 1990), Chap. 3.

[45] Ian Hacking, *The Emergence of Probability* (Cambridge, 1975); Barbara Shapiro, *Probability and Certainty in Seventeenth Century England* (Princeton, 1983).

[46] Op. cit. n. 43, at pp. 56–66.

[47] A few hints are dropped by R. F. McRae in his preface to the Toronto edition of *Mill's System of Logic* (1973).

[48] James Tully, op. cit, n. 24, Chap. 1., has usefully summarized Skinner's

movement has had only a marginal impact on the historiography of legal theory.[49] And Bentham scholarship has to date made

basic approach in the form of five questions: (a) What is or was an author doing in writing a text in relation to other available texts which make up the ideological context? (b) What is or was an author doing in writing a text in relation to available and problematic political action which makes up the practical context? (c) How are ideologies to be identified and their formation, criticism and change between political ideology and political action which best explains the diffusion of certain ideologies and what effect does this have on political behaviour? (e) What forms of political thought and action are involved in disseminating and conventionalizing ideological change? (ibid., 7–8).

These questions can with minor adaptations be applied to Bentham's *Rationale of Judicial Evidence*, viewed as an attempt to bring about a radical transformation in adjective law. The treatment of the *Rationale* in my *Theories of Evidence*, provides general answers to (a) and (b) and a partial answer to (c), in that it identifies and surveys a set of ideological conventions, provides a partial account of its development, but does not explain how and why it changed, and did not change, over time. I could have dealt more fully with (d) and (e). In particular, it would have been illuminating to ask more sharply: What aspects of conventional evidence discourse of the time did Bentham hold firm, while attacking other aspects? (A short answer might be: he confirmed the objective of pursuing 'rectitude of decision' through common-sense reasoning while attacking all technicality and non-utilitarian concerns with procedural fairness.) Why did some of Bentham's proposals become accepted as standard parts of evidence discourse and the Law of Evidence in the common law world, while others failed to become accepted? (The answer to this is probably quite complex and would involve detailed historical enquiries into developments and debates relating to the Law of Evidence and evidence discourse in several countries in the nineteenth century and beyond. So far as England is concerned, one hypothesis is that some of Bentham's proposals did not gain acceptance with ordinary judges and practitioners, who from self-interest or otherwise, managed to retain control over and preserve those aspects of the Law of Evidence that were perceived by reformers as 'lawyers' law' [when did that term come in and why?]. But this explanation is hypothetical and probably incomplete.) My essay did not attempt to deal in detail with particular topics. Again Skinner's approach would suggest some potentially fruitful lines of detailed historical enquiry into the ideological, political and linguistic contexts of a wide variety of topics of which jury nullification, safeguards of the accused, the uses and non-uses of writing in legal proceedings and the adversarial/inquisitorial distinction are obvious examples. One consequence of adopting a Skinnerian approach to Bentham's writings on evidence would be to extend enquiries into 'context' forward as well as backwards in time as part of a larger story about the development of evidentiary ideas and practices.

[49] In a recent symposium on *Philosophy in History: Essays on the Historiography of Philosophy*, ed. R. Rorty, J. B. Schneewind & Q. Skinner (Cambridge, 1984), philosophers of various kinds are joined by specialists in History, Sociology, and the History and Philosophy of Science, but not by a single jurist or legal philosopher. It is a striking fact that neither the Fontana Modern Masters nor the Oxford Past Masters Series had until recently included a work on a thinker

only a few tentative moves in this direction. A notable exception is David Lieberman's recent *The Province of Legislation Determined,* which attempts a fairly broad contextual interpretation of eighteenth-century legal theory in Britain, while remaining close to the texts.[50]

It must be obvious that I have considerable respect for this movement. Not only has it identified and effectively criticized some bad habits in dealing with past thinkers, but it has provided us with a rich range of fresh questions to ask of any text, for example about contemporary conventions and debates, the meaning and use of language, literary forms and functions, contemporary perceptions and assessments of the text and of its author; the pragmatic setting of its creation; and a host of other contextual factors. However, while a more puristic historiography can greatly enrich our study of political and legal theory, a balanced reception of these ideas should take note of three caveats: First, there should be no suggestion that focus on context should replace or dilute careful textual reading. Secondly, contextual reading does not invalidate certain kinds of conversational reading in which one considers the bearing of the text on questions that concern the reader, including public issues of his or her day. Thirdly, contextual, textual and conversational reading are not mutually exclusive genres. Many readings involve all of

who was treated first and foremost as a jurist. The only exception is John Dinwiddy's essay on Bentham (op. cit. n. 6). Legal ideas have been selectively explored by modern historians of ideas, such as John Pocock, Stefan Collini, and James Burns, but, by and large, very little genuinely historical work had been done on the development of Anglo-American jurisprudence until very recently. The publication of substantial monographs on John Austin, Sir Henry Maine, Sir James Stephen and others suggests that the situation is changing. The *Jurists* series was instituted in part to fill this gap. However, few, if any of these works, have been much influenced by the 'new intellectual history'.

The absence of a developed tradition of intellectual history within the discipline of law is not surprising. Law as a set of practices in the world of affairs is mainly concerned with the present and the future (or the immediate past). Legal scholarship is naturally responsive to the demands and expectations of judges, private practitioners, law reformers, contemporary-minded critics and vocationally-oriented students. Legal historiography, thanks to Maitland and his heirs (and more recently to those concerned with the social history of law), is by no means confined to a search for origins or crudely Whiggish interpretations. But legal history has been largely about doctrines and institutions rather than thinkers and theories. Legal theory has responded, often unconsciously and unselfconsciously, to the gravitational pull of 'contemporary significance' (see further below).

[50] D. Lieberman *The Province of Legislation Determined* (Cambridge, 1989).

them and they are related to each other in complex ways. Modern developments in intellectual history have provided us with a battery of new questions to ask of texts. But what questions are appropriate to put to a text depends on one's purposes. And I shall argue that there are occasions on which ahistorical interpretation and even non-reading have their uses.

Conversations, non-reading and 'contemporary significance'.

'What is the use of a book', thought Alice, 'without pictures or conversations?' (*Alice in Wonderland,* Chap. 1).

Contextual reading emphasizes the author and his contemporaries; textual reading focuses on the questions and answers and arguments embodied in the product of a given time and place. Both are oriented to the past and are in that sense historical. But the selection of texts and of ways of reading them is often governed, explicitly or implicitly, by considerations of 'contemporary significance'. The starting-point and the main emphasis shifts from the text and its historical context to the present-day reader. In one way or another the reader uses the text as an aid to pursuing his or her own concerns.

The term 'contemporary significance' tends to be used rather loosely, even by scholars.[51] In a discipline such as law, which is largely concerned with practical problems of the present and future, there is a natural tendency to give 'contemporary significance' priority over '(mere) historical interest'. There is also a tendency to take rather a lot for granted about the criteria of significance. In some contexts what is considered a significant question may be obvious, even self-evident. But sometimes the phrase may conceal questionable assumptions about a supposed consensus regarding the agenda of questions or 'the issues of the day (or age)' or it may represent an *ad hoc* reaction to some specific event or an unreflective response to a current intellectual fashion.

I shall refer to readings that take the reader's concerns as their starting-point as 'conversations'.[52] This may serve as a reminder

[51] *Mea culpa.* See my 'The Contemporary Significance of Bentham's Anarchical Fallacies', *Archiv fur Rechts-und Sozialphilosophie,* **61** (1975), 325, and *Theories of Evidence: Bentham and Wigmore* cit. n. 42, Chap. 4. which is entitled 'The Contemporary Significance of Bentham and Wigmore'. This self-criticism is not directed at attempting to answer questions concerning claims that a particular text or author deserves attention today, but at a lack of clarity about the precise meaning and status of such questions and answers.

[52] The term is borrowed from Richard Rorty, 'The historiography of philosophy: four genres', in Rorty *et al.* (eds), op. cit. n. 24, Chap. 3. My usage in this context is slightly broader than Rorty's.

of some fairly obvious points. First, there are many kinds of conversation which vary, *inter alia,* in the extent to which they are governed by strict or settled conventions. Just as the idea of 'conversation' is broad enough to cover the whole continuum from the formal 'disputatio' to casual, perfunctory exchanges, so too conversational readings are not governed by a single set of conventions. However, if one's purpose is to learn, one may be guided by some working rules of thumb. For example, one tends to learn more if one listens, if one gives due credit to the interlocutor's intelligence, and if one asks pertinent questions. Conversational reading has the advantage over live conversations in that the reader is in control. He or she need not be inhibited by considerations of fairness, courtesy or even historical accuracy. In entering into a dialogue with a text one is free to put the text to the question as sharply, brutally and persistently as one chooses. Yet one is usually likely to gain more if one gives due credit to the author's concerns and intelligence. Thomas Kuhn once wrote:

'When reading the works of (an) important thinker, look first for the apparent absurdities in the text and ask how a sensible person could have written them. When you find an answer, I continue, when those passages make sense, then you may find that more central passages, ones you previously thought you understood, have changed their meaning.'[53]

Kuhn was writing about historical reading. But, in so far as this is also good advice for serious conversational readings, it underscores the point that such conversations need not be ahistorical. Not only may careful attention to text and context illuminate the content of the text, but it may also clarify the reader's own situation and concerns through contrast with those of the author and the text. For example, Bentham's thoughts on torture assumed that its main institutionalized use was in the context of interrogation of a judicial or quasi-judicial kind. For he was writing before the development of institutionalized torture as an instrument of terror, deterrence and repression in which obtaining information often plays a minimal or marginal role.[54]

Not all conversational reading of past thinkers need be unscholarly. Indeed, our heritage of texts is one of our main resources for thinking about present day problems. Of all thinkers Jeremy Bentham, if he still exists, is estopped from complaining that his

[53] Thomas Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change* (1977), p. xii. I am grateful to Alex Stein for this reference.

[54] W. L. Twining & P. E. Twining, 'Bentham on Torture', *N.I.L.Q.* **24** (1973), 305, reprinted in M. James (ed.), *Bentham and Legal Theory* (Belfast, 1974).

works are being used for purposes other than those he intended or that commentators are treating him unfairly. Texts, like bodies, have many possible uses, and before summarily dismissing ahistorical or even atextual uses of Bentham's legacy we should consider each type on the merits. However, effective exploitation of such resources requires a reasonable degree of self-consciousness and discrimination regarding the purposes, methods and pitfalls of such readings.

That conversational reading is compatible with the highest standards of scholarship can be illustrated by considering the contributions of Herbert Hart to Bentham studies. For over thirty years, Hart has devoted almost as much time to studying Bentham as to doing jurisprudence.[55] Apart from editing three central texts, his essays and introductions have been rightly acclaimed as major contributions to Bentham studies. Hart approaches Bentham mainly from the perspective of an analytical jurist. In most of his essays he expounds, analyses and criticizes central concepts of Bentham's Jurisprudence: Law, laws and related concepts, such as commands, sanctions and sovereignty, legal rights, powers, duties and obligation, and of course, utility. Hart also compares some of Bentham's key ideas with those of John Austin, Beccaria, John Stuart Mill and others. The exposition is lucid and meticulously accurate; the analysis is both profound and exact. Much of the criticism exemplifies one form of conversation: Hart brings Bentham into contemporary debates with Dworkin and others and clarifies and develops his own position through dialogue with his predecessors.[56]

Hart first came into prominence largely by subjecting Austin's command theory to what all but a few have regarded as devastating

[55] See especially, H. L. A. Hart (ed.), *Of Laws in General* (CW, London, 1970); J. H. Burns & H. L. A. Hart (eds), *An Introduction to The Principles of Morals and Legislation* (CW, London, 1970), reprinted with a critical introduction by H. L. A. Hart (Methuen, 1982); J. H. Burns & H. L. A. Hart (eds), *Comment on the Commentaries and A Fragment on Government* (London, 1977). H. L. A. Hart, *Essays on Bentham*, cit. n. 14.

[56] Commentators on Hart tend to pay surprisingly little attention to his work on Bentham, given that some of his own ideas are developed in the greatest detail in these 'conversational writings' see, for example, P. Hacker & J. Raz (eds), *Law, Morality and Society* (Oxford, 1977); Ruth Gavison (ed.), *Issues in Contemporary Legal Philosophy: The Influence of H. L. A. Hart* (Oxford, 1987) and, most surprisingly, Robert Moles, *Definition and Rule in Legal Theory* (Oxford, 1987), a critique of Hart's use of Austin, which barely mentions Bentham. An exception is Neil MacCormick, *H. L. A. Hart* (London, 1981), but this was written before the publication of *Essays on Bentham*, Chap. 10, discussed below.

criticism and by advancing an alternative positivisitic conception of law.[57] Yet in his last essay on Bentham Hart finds a core of truth in Bentham's command theory in the notion of 'a content-independent and peremptory reason'.[58] The relevant texts by Bentham and Hart are, of course, susceptible to more than one interpretation. As I read them, Hart's criticisms are secondary to this core of truth. On this view, the leading critic of the command theory and our most eminent positivist has resurrected Bentham's theory of law, duly refined, at the centre of modern legal positivism.

I happen to have a significantly different conception of the enterprise of jurisprudence from Herbert Hart and a rather different vision of Bentham as jurist.[59] I shall develop this below. But this is more a matter of differences of perspective and concern than fundamental disagreement. And I consider that one of Herbert Hart's most valuable contributions has been to keep the analysis of 'fundamental legal conceptions' on the agenda at a time when a great deal of the attention of our leading legal philosophers has been directed to more abstract questions of normative theory. The most developed aspects of Hart's thought in this respect are to be found in his writings on Bentham.

The writings of Hart and Postema illustrate the point that conversational readings of past thinkers are quite compatible with meticulous scholarship provided that the nature of the enterprise is kept clear. In this I think that they are exceptional among contemporary jurists as I shall try to show below. But first let me make the case for giving priority to conversational reading in the educational context.

Many teachers of jurisprudence justify their courses in terms of helping students to clarify and develop their own views on significant general questions relating to law.[61] For this purpose students should be required to do jurisprudence (to theorize) rather than to learn *about* it and our heritage of texts is a means to this end rather than an object of study for its own sake. In my experience few jurisprudence courses fit this rationale in practice. There are no doubt many reasons for this, but one is a lack of clear distinction between historical and conversational readings

[57] H. L. A. Hart, *The Concept of Law* (Oxford, 1961).

[58] *Essays on Bentham*, cit. n. 14, Chap. 10, esp. pp. 243 and 261.

[59] See below pp. 133 ff.

[60] Above no. 56.

[61] See Neil MacCormick & William Twining, 'Theory in the Law Curriculum', in *Legal Theory and Common Law*, cit. n. 21, Chap. 13.

and a failure to equip students with a basic method for conducting reasonably disciplined conversations.

The paradigm case of an intelligent conversation with a text for the purpose of clarifying one's own views involves something like this: one asks of the text what questions does it address (or raise)? What answers does it offer or suggest? What reasons are advanced in support of the answers? And what might be the implications and applications of such answers and reasons? Then one asks: do I agree with the questions? Do I agree with the answers? Do I agree with the reasons? Do I accept all of the applications and implications? This intellectual procedure can be followed with different degrees of rigour and detail according to one's purposes. Similarly it can involve as much or as little contextual reading as seems appropriate. This general approach can be useful not only in developing one's own position on given questions, but also in determining what questions seem to be worth asking.[62]

There is no settled code of conventions for such readings, but there are a few working rules of thumb. For example, if a text is worth using in this way, generous interpretation usually pays. Treating one's interlocutors as intelligent friends or as worthy opponents tends to raise the level of conversation. Sometimes it pays to be ahistorical in this context. For example, it is one thing to ask: what version of utilitarianism did Bentham adopt in *An Introduction To The Principles of Morals and Legislation*? It is another to ask: what is the least vulnerable interpretation of utilitarianism suggested by a reading of this text?

Conversational reading is different in purpose from rigorous textual and contextual reading. But they are, of course, intimately related. Even the historical purist who seeks, in Skinner's terms, 'to recover intentions, to reconstruct conventions and to restore contexts'[63] is a creature of his or her time. Conversely one is usually not well-placed to judge which is the least vulnerable interpretation of a text before one has paid due attention to text and context. Conversation builds on text and context, but it need not be confined by them.

Thus entering into a dialogue with past texts for the purpose of posing and answering questions of contemporary significance

[62] This is developed in 'Talk about Realism', *N.Y.U.L. Rev.*, **60** (1985), 329 at pp. 336–8.

[63] Quentin Skinner, cited by W. Lepenies in Rorty *et al.*, op. cit. n. 24, at p. 155.

requires a delicate balance between careful textual and contextual reading on the one hand and less inhibited exploitation of the past for present purposes.

So much for scholarly conversations. Let me now deal briskly with some other types that need to be differentiated and seen for what they are. Some of these, I shall suggest, can be interpreted as examples of non-reading.

First, imaginary conversations. An intriguing literary genre is the imaginary conversation or dialogue, often in dramatic form, in which well-known historical figures converse anachronistically either with the author or with others from different eras. Landor's *Imaginary Conversations* and Oliver Wendell Holmes sr's *Breakfast Table* series are well-known, if unfashionable, examples.[64] This summer I came across a rather charming instance in Tanzania.[65] A versatile police officer and political commissar presented the basic ideas of fifteen leading political thinkers from Plato and Aristotle to Nkrumah and Nyerere in the form of a trial in which all of them were called upon to defend themselves against the charge of 'having vague and misleading ideas which have distorted the thinking of other people in the world' and of sowing confusion by disagreeing with each other.[66] As an exercise in popular education I found this engaging and effective. Since Jeremy Bentham was conspicuously absent from the fifteen defendants I spent a pleasant afternoon trying to remedy the omission. This exercise proved to be instructive as well as entertaining. On the one hand this literary form largely frees one from pedantic concern with both historical fact and textual accuracy; on the other hand one has to confront such questions as: How old is this Bentham? How much knowledge about the relevant time and place (e.g. modern Tanzanian conditions) is one to attribute to him? And what kind of character or mood should one give to him? Before one summarily dismisses such exercises as literary frolics that have no place in serious scholarship, one should perhaps bear in mind that Plato was one of the pioneers of the imaginary dialogue. And, one may ask, is not the standard practice of comparing the ideas of thinkers who lived at different times and in different contexts to some extent analogous to this form?

[64] Walter Savage Landor, *Imaginary Conversations*, ed. Havelock Ellis (London); Oliver Wendell Holmes Snr, e.g. *The Professor at the Breakfast Table* (1859).

[65] John Alfonso Nchimbi, *The Struggle of Ideas from Plato to Nyerere*, English translation from Kiswahili (Dar-es-Salaam, 1989).

[66] Ibid., p. 1.

Speculative conversations

Yet another kind of 'conversation' that obviously needs to be treated with caution is the speculative conversation. For example, it can be amusing, possibly even illuminating, to speculate about how Bentham might have reacted to the Lord Chancellor's proposals on the reform of the legal profession or the Civil Justice Review or the Official Secrets Act, 1989, to take three topical subjects on which he expressed strong views in his day.[66] Similarly, when the students in Tiananmen Square proclaimed repeatedly that 'the eyes of the world are upon us' (perhaps echoing American students in Chicago in 1968), one was tempted to interpret this in terms of Bentham's emphasis on publicity as the main safeguard against misrule and to ponder how far the subsequent tragic events might have undermined his faith in the Public Opinion Tribunal.[67] Such speculations can be more or less rigorously grounded in particular texts.[68] Sometimes they may be extensions of recognized forms of 'rational reconstruction'. For example, it is not beyond the realm of possibility that a selection of Bentham texts, or even the whole corpus when it is available, might be made the basis of an 'expert system' which could suggest the implications of Bentham's ideas for any question that was put to it. The point about expert systems is that they have the capacity to deal with new questions on the basis of disciplined extrapolation from a fixed body of knowledge.[69] The rigour, depth and reliability of such a system for Bentham or any other thinker would be a function of the quality and sensitivity of the programming. I am quite happy to leave questions about the feasibility and utility of any such development to a future generation of Bentham scholars. The immediate point is that *all* forms of conversational reading share to some degree a vulnerability to the pitfalls of anachronism, some of which are less obvious than others, and that all forms are to a greater or lesser extent conversational because no reading can be entirely passive.

[66] Ibid., p. 1.

[67] On the Public Opinion Tribunal see F. Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* (Oxford, 1983); see now the important treatment of the subject in Bentham's *First Principles Preparatory to the Constitutional Code*, ed. Philip Schofield (CW, Oxford, 1989).

[68] E.g. W. Twining, 'The way of the Baffled Medic: Prescribe First, Diagnose Later, if at all', *J.S.P.T.L.*, **12** (n.s.) (1973), 348 on reform of criminal evidence in 1972–3 with particular reference to misuses of Bentham's views on silence. See now *Rethinking Evidence*, cit. n. 44, Chap. 10.

[69] See generally, R. Susskind, *Expert Systems and Law* (Oxford, 1987).

One step away from the imaginery and speculative conversation involves postulating a modern disciple rather than a fictionalized historical figure.[70] Substitute for the young Marx, 'a modern Marxist' or for the octogenarian Bentham 'a modern Benthamite' and one is further liberated, by the device of indeterminate attribution,[71] from any concern for textual or factual accuracy at all. The use of isms, ists and schools as devices for designating views different from one's own is one of the most deeply entrenched and commonplace conventions of contemporary academic discourse in, for example, philosophy, political theory and jurisprudence. We thus have the paradox that much contemporary scholarship condones a practice which both in theory and practice is even less scholarly than imaginary conversations. That this practice is both widespread and regarded as respectable can be instanced by reference to John Rawls' treatment of classical utilitarianism in his *Theory of Justice;* Roberto Unger's treatment of 'liberalism' in *Knowledge and Politics;* and Ronald Dworkin's treatment of 'conventionalism' and 'pragmatism' in *Law's Empire.*[72] As this practice is free from almost any concern for textual accuracy one is perhaps justified in referring to it as 'non-reading'.

[70] Kipling admirably explores the vagaries of discipleship, ending:

'But his own Disciple
shall wound him worst of all'.

Rudyard Kipling's Verse (definitive edition, London, 1940), p. 774. An imaginary disciple may have an even more tenuous relationship with the original.

[71] That it is easy for a learned and meticulous scholar to shift unobtrusively from commenting on a particular text to discussing ideas attributed indeterminately to modern disciples is illustrated by an otherwise excellent paper by Gerald Postema, 'In Defence of "French Nonsense": Fundamental Rights in Constitutional Jurisprudence', in Neil MacCormick and Zenon Bankowski (eds), *Enlightenment, Rights and Revolution* Chap. 5. (Aberdeen, 1989). This is an explicitly 'conversational' (in Postema's terms 'philosophical') paper in contrast with the more historical *Bentham and the Common Law Tradition,* cit. n. 25. Postema quietly shifts between taking issue with the original text of *Anarchical Fallacies,* modern interpretations thereof, and (semble, modern) followers of Bentham (e.g. 'Benthamite critics of rights constitutionalism' at p. 109). One may ask: who precisely are these critics or what precise posture is to be attributed to such a disciple in respect of issues in which the context, the issues and the language of rights discourse have all changed significantly? For example, what knowledge and views does one attribute to a 'Benthamite' in the context of current debates about 'emergent rights' and 'third generation rights'? See further n. 85 and n. 100.

[72] John Rawls, *A Theory of Justice* (1972), e.g. Chap. 1.5 on classical utilitarianism; Roberto Unger, *Knowledge and Politics* (1975), p. 8 ('the liberal theory' as an ideal type) discussed in 'Talk about Realism', cit. n. 62, at p. 338 n. 21; Ronald Dworkin, *Law's Empire,* cit. n. 21. *passim.* Rawls, Unger and Dworkin all seek to set up recognizable targets and to avoid crude caricatures.

I have attacked some of the worst habits associated with non-reading on other occasions.[73] I have, for example, tried to show that most generalizations about American Legal Realism to be found in the literature are false or trivial or both; and that a great deal of discourse in contemporary jurisprudence involves false polemics based on a confusion between the idea of disagreement (advancing rival answers to the same question) and difference (answering different questions). While many examples of non-reading are vulnerable to such criticism, it is worth making the point that some kinds of non-reading and non-citation have benefits as well as costs.

One of the main uses of history, said Holmes, is to free us from the incubus of an irrelevant past.[74] Similarly when Herbert Hart took up the Chair of Jurisprudence at Oxford one of his concerns was to show that there was more to jurisprudence than repetitious exposition and criticism of dead thinkers.[75] By addressing questions directly, with relatively sparse references to other jurists, he gave a lead in making a switch from writing about jurists to doing jurisprudence. The uncluttered text came into fashion, especially in Oxford, and this undoubtedly helped to stimulate one of the most lively periods of legal theorizing in our history. That this style of discourse was embraced by followers and successors, some of whom were neither as well-read nor as meticulous as Hart himself, should not detract from his success in stimulating a major revival of theorizing as an activity within the discipline of law—of doing jurisprudence rather than reading or writing about it. Freeing jurisprudence from the incubus of second-rate intellectual history had its price, but few would doubt that overall the benefits have generally outweighed the costs. And Hart himself, especially in his work on Bentham, has shown by example that most of the bad habits associated with the uncluttered text are quite unnecessary.

Past thinkers, like bodies, have many potential uses. One kind which is both ahistorical and atextual is the symbolic use. This is

[73] E.g. 'The Great Juristic Bazaar', *J.S.P.T.L.*, **14** (n.s.) (1978), 185.

[74] O. W. Holmes Jr., 'The Path of the Law', *Harv. L. Rev.*, **10** (1897), 357.

[75] H. L. A. Hart, 'Analytical Jurisprudence at Mid-twentieth Century: a reply to Professor Bodenheimer', *U. Penn. L. Rev.*, **105** (1957), 953. MacCormick characterizes the situation at the time thus: 'Lawyers had stopped being interested in philosophy, philosophers in law. Jurisprudence in the universities had become a routine reading and re-reading of a canon of texts and text books. Except for a handful of brilliant exceptions the subject was moribund'. *H. L. A. Hart* (London, 1981), p. 19.

more like pictures than conversation, but it should not be condemned out of hand. Let us consider some uses of Bentham in this regard.

As you know, Bentham is unusual among dead thinkers in maintaining a physical presence among us. His auto-icon at University College is more often treated as an object of than as a participant in conversation. But it is entirely consistent with the Benthamite spirit to exploit it for pedagogical purposes.

In teaching, I uninhibitedly exploit the auto-icon as an ambiguous symbol: What is its message? Is this a literal-minded application of utility based on a dubious calculation of the value of bodies as ornaments, material for medical research or objects of veneration? What does it mean for a materialist to set himself up as an icon? Is this to be taken as a joke? Or as an example of extreme vanity? Or as a more subtle attack on taboos and fallacies about bodies and death? Did Bentham care about his reputation after death? If so, was that consistent with his articulated philosophy? Does he in some sense live on? Indeed is this really Bentham?

A different point is illustrated by Marx's treatment of Bentham. In a much-quoted passage in *Capital* Marx referred to him as 'the insipid, pedantic, leather-tongued oracle of the commonplace bourgeois intelligence of the nineteenth century'.[76] It is doubtful that Marx had read much Bentham in the original, no doubt because he would have thought he was wasting his time. He was probably acquainted with the clean linen of some of Dumont's *rédactions*.[77] Almost certainly he did not read those texts in which modern commentators have noted some remarkable affinities—for example, the theme of 'demystification' which is most prominent in Bentham's writings on Evidence, but which more generally underpins his satirical attacks on fallacies ... of left, right and centre ... most of which he saw as grounded in sinister interests of particular groups and classes such as 'Judge and Co', the Church and the aristocracy.[78] There are some remarkable affinities here with Marx's ideas about false consciousness and ideology. More significant still Bentham and Marx could be shown to have similar

[76] Marx, *Das Kapital* (Everyman edn), Vol. 2, p. 671, cf. ibid., p. 164.

[77] Dinwiddy, op. cit. n. 6, at p. 115.

[78] Examples of general comparisons include Hart, *Essays on Bentham*, cit. n. 14, Chap. 1; Mack, op. cit. n. 15, at pp. 85n., 217, 420; Twining, op. cit. n. 43, at pp. 75–9; Bahmueller, op. cit. n. 83, *passim*. See also George Brenfert, 'Marx and Utilitarianism', *The Canadian Journal of Philosophy*, 5 (1975), 421; Graeme Duncan, *Marx and Mill* (Cambridge, 1973).

concerns with conflicting interests and the rhetoric of rights;[79] and, one may ask, was not Marx himself both a materialist and a utilitarian? There are, of course, many significant differences. Indeed, part of the future agenda for Bentham studies is a fuller exploration of the affinities and differences of these two seminal figures.

To return to Marx's statement. If we apply the standard of seeking the least vulnerable interpretation of texts, the famous passage can be seen to serve a function irrespective of its fairness. In this context and elsewhere Bentham is used as a symbol of the limitations of petty bourgeois reformism and radicalism. The symbol is not inappropriate, if it is interpreted to refer to those aspects of Bentham and Benthamism which are quite contrary to the spirit and thrust of Marxian thought: for example, the emphasis on security and the consequent antipathy to all forms of revolution; and a pessimistic and somewhat mechanistic view of human nature. This is not a complete travesty of the historical Bentham, any more than Dickens's Gradgrind and Peacock's Mr MacQuedy were either unfair or worthless caricatures of some of Bentham's followers.[80] However, one suspects that the image projected by Marx has been widely accepted as sufficiently accurate to justify dismissing Bentham's writings as unworthy of detailed attention.

A rather more complex example of Bentham as symbol relates to the Panopticon. Even the most sympathetic Benthamists tend to be embarrassed by this aspect of his endeavours. Janet Semple has shown that the historical Bentham was not as inhumane nor as indifferent to the interests of suspects and criminals as has been suggested by Gertrude Himmelfarb and Michel Foucault.[81] I rather doubt whether Foucault had read even as much Bentham as had Marx.[82] I interpret Foucault as an example of one kind of inspired non-reader. Certainly he did not have access to the wealth of detailed material which has only been recently deciphered, only some of which has yet been published. For Foucault the Panopticon symbolized the murky side of the Enlightenment,

[79] See generally Jeremy Waldron (ed.), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man.* (London, 1987).

[80] Charles Dickens, *Hard Times;* Thomas Love Peacock, *Crotchet Castle.*

[81] Janet Semple, 'Bentham's Haunted House', *The Bentham Newsletter,* **11** (1987), 35, commenting on Gertrude Himmelfarb, *Victorian Minds* (London, 1968).

[82] There is reported to exist a study of Bentham and Foucault in Portuguese by Mari, but I have not had access to it.

a hidden passion for dehumanizing social control that provides the central theme of his *Discipline and Punish.* One wonders how much of that haunting work would have needed to be changed in the light of detailed work that presents Bentham and the Panopticon scheme as more complex and in a rather more sympathetic light. In a sense the answer is to hand: for there has been some debate within Bentham scholarship concerning the forceful attacks by Himmelfarb, Bahmueller and others on this aspect of Bentham's ideas.[83] These discussions have centred on the question: in the light of meticulous examination of the texts and facts, how far do Panopticon, the National Charity Company and Bentham's ideas on related matters provide an appropriate general metaphor for authoritarian social control and seriously undermine his image as a progressive and humane reformer? In my opinion this is just one more aspect of Benthamic ambiguity.

I am conscious that in adopting a tolerant, mildly playful, mock-utilitarian approach to conversational reading and non-reading I may invite charges of fence-sitting pluralism. This might be justified if my argument had been that any kind of use or abuse of texts, however unscholarly, may have a place in Bentham studies provided that it can be justified on the basis of crude cost-benefit analysis. That is not my position. I believe that certain kinds of unscholarly practice and false polemics should be condemned as inimical to the pursuit of truth and understanding, an enterprise which can be justified on both utilitarian and non-utilitarian grounds. Since modern Bentham studies generally provide a model of the highest standards of meticulous scholarship, it is especially important that unscholarly practices should be exposed for what they are. My thesis is rather that in so far as Bentham studies extend beyond careful textual and historical scholarship to make claims or to seek justifications in terms of 'contemporary significance', we need to be self-consciously discriminating about such claims.

It is, however, my view that Bentham studies should tolerate, indeed welcome a plurality of perspectives and approaches, provided that the standards of care and accuracy set by recent

[83] C. Bahmueller, *The National Charity Company:* Jeremy Bentham's Silent Revolution (California, 1981); Himmelfarb, op. cit. n. 81; Semple, op. cit. n. 81; L. J. Hume, 'Revisionism in Bentham Studies', *The Bentham Newsletter,* **2** (1978), 12; Warren Roberts, 'Bentham's Poor Law Proposals', *The Bentham Newsletter,* **3** (1979), 28; Fred Rosen, 'Elie Halevy and Bentham's Authoritarian Liberalism', *Enlightenment and Dissent,* **6** (1987), 59.

Bentham scholarship are maintained. In some contexts the distinctions between textual, contextual and conversational reading, and refinements on these distinctions, have been the subject of protracted, sometimes acrimonious, dispute. Of course, when theories of interpretation are debated, especially in relation to authoritative texts, there is often much more at stake than academic fashion or prestige. Recent American debates about constitutional interpretation, for example, reflect sharp clashes of political interests and ideologies, as was dramatized by the episode of the Bork nomination.[84] Similar considerations apply to many theological and ideological debates. For the forseeable future Bentham scholarship is likely to be able to sustain a more tolerant pluralism than, for example, English literature, for three main reasons. First, Bentham studies are firmly rooted in a tradition of careful textual exegesis and particularistic history that serves to constrain excitable debate. Secondly, Bentham was too subtle a thinker, as is illustrated by the theme of Benthamic ambiguity, to be easily hijacked by doctrinaire extremists. Neither Mrs Thatcher nor a revolutionary of any kind could live comfortably with the label 'Benthamite'. Thirdly, in those areas where convincing claims can be made for Bentham's 'modernity' or 'contemporary significance', such as utility or human rights or legal positivism or the moral sanction or punishment or sexual or religious toleration, Bentham may be stimulating as a starting-point and admirable as a pioneer, but he rarely offers the last word on these topics.[85] He was essentially a product of the late eighteenth-century Enlightenment and since his day the context has changed and discourse and debate have advanced, often building on his contributions.

[84] E.g. R. Dworkin, 'The Book Nomination', *New York Review of Books*, **34**, No. 17, (1987) p. 3.

[85] A good example is human rights. Anarchical fallacies is still an excellent starting-point for critical consideration of contemporary discourse on the subject. However, in respect of particular topics, such as whether it is meaningful or useful to talk of 'a right to food', one is usually well-advised to move fairly briskly from Bentham's general discussion, including his aphorism 'want is not supply ... hunger is not bread' (*Anarchical Fallacies, Works*, Vol. 2, p. 501) and his treatment of the principles of subsistence and security, to more detailed contemporary writings, such as those of Amartya Sen and Onora O'Neill. Compare Peter Singer's simple, but effective, use of Bentham as the starting point for his *Animal Liberation* (London, 1975).

Bentham Redivivus

I wish to conclude by advancing some particular reasons why I consider that the time is ripe for the restoration of Jeremy Bentham to his rightful place as the Father of Modern Jurisprudence in the English-speaking world. I shall base my case on two arguments: first, the characteristics of his legacy that still make him worth reading and, secondly, the ideas of Universal Jurisprudence and the citizen of the world.

The first part of the case has already been made by implication: enough has been said to ground the claim that few, if any, thinkers, let alone jurists rival him in respect of reach, coherence, conceptual acuity, provocativeness, capacity to be puzzled, and the hallmark of a classic, openness to multiple interpretations. One can also add that although claims to 'modernity' need to be treated with caution, a remarkable number of Bentham's concerns and questions are still worth taking seriously today. For these reasons among others Bentham can be held out as England's most substantial jurist.

The second part of my argument brings us back to the themes of 'modernity' and 'contemporary significance'. In discussing 'conversational readings' I have already sounded a note of caution about our usage of such terms in relation to past thinkers. Both terms imply some affinity between the concerns, questions and ideas of a specified past and an unspecified present. There is no consensus or settled agenda concerning issues of the day or significant questions. So in making the case for one claim regarding Bentham's contemporary significance as a jurist it is incumbent on me to state a view about such matters.

Anglo-American legal theory has recently enjoyed a period of exceptional liveliness and richness. Yet I share with some colleagues a sense of dissatisfaction with a tendency to parochialism that runs through much of the work of our leading jurists. To put the matter briefly, in my view our stock of contemporary legal theorizing takes inadequate account of the phenomena of global interdependence[86] and legal pluralism[87]. One key to restoring

[86] See generally, Y. P. Ghai, R. Luckham & F. Snyder (eds), *The Political Economy of Law* (OUP, India, 1988). A very different attempt at global jurisprudence is W. Michael Reisman and Aaron M. Schreiber, *Jurisprudence: Understanding and Shaping Law* (New Haven, 1987). A useful corrective to exaggerated emphasis of global perspectives is Hedley Bull, *The Anarchical Society: A study of order in world politics* (London, 1977).

[87] A useful survey is Sally E. Merry, 'Legal Pluralism', *Law and Society Review,*

the balance is to revive the idea of General or Universal Jurisprudence.

Let me illustrate the concern with reference to my own undergraduate teaching. At University College in recent years we have set an exercise to our entering class to be done in the week before they arrive and to be discussed in their very first tutorial. They are asked to read every word in a non-tabloid newspaper published in that week in the light of a number of questions about the extent and treatment of 'legal' and 'non-legal' topics. The exercise has several pedagogical objectives, such as to stimulate interest, to raise some basic questions about the nature of law and to bring home the message that, far from being a new subject for them, their legal education started at birth, or possibly before. The exercise is also designed to make a point about law in today's world. This is that no law student can sensibly confine his or her attention exclusively or even mainly to domestic or municipal law. This point goes much further than making the case for studying European Community Law, Public and Private International Law, Foreign Legal Systems, Transnational Trade and the International Protection of Human Rights. One step beyond this is to show how interpreting yesterday's news from a legal perspective ... about the Hong Kong Treaty, or the Rushdie Affair, or an oil spillage or a hijack or a publishing takeover or even a package holiday that went wrong ... involves knowledge and understandings of much more than English or UK or national laws narrowly conceived. It reminds us that every citizen and every student is the subject of multiple systems of rules and social orderings, many or most of which, without semantic quibbling, could be called legal orders or legal systems. That even the most isolated individual or group or organization does not belong to only one community or society, but is inevitably involved in and affected by a multiplicity of semi-autonomous social fields, as Sally Falk Moore has called them.[88] That even the most localized legal

22 (1988), 869. The phrase 'legal pluralism' is out of favour in some quarters because it may 'carry connotations of equality that misrepresent the asymmetrical power relations that inhere in the coexistence of multiple legal orders. Various legal systems may coexist, as occurs in many colonial and postcolonial states, but the legal orders are hardly equal'. June Starr & Jane F. Collier (eds), *History and Power in the Study of Law* (Ithaca and London, 1989). In the present context the term carries no such connotations of equality.

[88] Sally Falk Moore, *Law as Process: An Anthropological Approach* (London, 1978), Chap. 2.

knowledge[89] in, let us say an industrial city such as Bradford or even a Hampshire village, such as Whitchurch, may include rules and orderings that emanate from Brussels or Strasbourg or Tokyo or Iran, as well as from Westminster, Whitehall, the Parish Council and local custom. And that any theory of law as a phenomenon or as a discipline has to accommodate and explain such facts.

The central messages of global interdependence and of legal pluralism may be truisms. Yet much of our stock of legal theorizing, and to only a slightly lesser extent, political theorizing, fails to accommodate them satisfactorily. Our first year students do not seem to be surprised or daunted by the lessons of the newspaper exercise. Yet when they come to study jurisprudence in their final year there appears to be a disjuncture.

The dominant theories in our contemporary canon of jurisprudence, despite their differences from each other, are largely parochial and monistic in tendency: that is to say they tend to treat the basic unit of law as the domestic legal system of a national state, they treat international law as being concerned primarily with relations between nation-states and they tend to be monistic in their interpretation of the phenomenon of co-existing rule-systems. Thus the theories of Austin and Hart are primarily concerned with municipal legal systems; John Rawls' theory of justice is primarily concerned with distributive justice within a political society that is bounded by the jurisdiction of a nation-state. As several critics have pointed out a major weakness of his book lies in the treatment of international relations: basing himself largely on the 1963 edition of Brierley's *Law of Nations*, Rawls treats both international law and international relations as a matter of relations between states and, strangely, that the basic principle of international law is that *peoples* organized as states have certain fundamental equal rights,[90] surely a questionable view of both international law and the transnational morality of human rights. Even those who, like Michael Walzer,[91] have addressed the problem of spheres of justice more directly, tend to treat independent political societies as the primary unit within which problems of justice can be meaningfully discussed. American jurisprudence, like American culture, has had an in-built tendency to parochialism, fortified by the emphasis placed

[89] Cliford Geertz, *Local Knowledge* (New York, 1983), esp. Chap. 8.

[90] John Rawls, *A Theory of Justice*, p. 378.

[91] Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford, 1983).

on the courts as the focal point of a legal system. Even American Critical Legal scholars, with the exception of Roberto Unger, seem to outsiders to be largely inward-looking and parochial; they tend to interpret the legacy of American Realism as being significant only in respect of 'judicial process', which in my view misses much of its value.[92] One commentator has gone so far as to suggest that Ronald Dworkin's analysis of law as an interpretive concept challenges 'the possibility and value of general jurisprudence'.[93] This may be an overstatement, but it is nevertheless the case that the primary focus of Dworkin's work is common law municipal adjudication looked at from an internal, participatory point of view.[94] There are, of course, some notable exceptions, for example among the heirs of Maine, Marx and Weber, but by and large they are marginalized within our academic legal culture.

The argument that contemporary jurisprudence needs to take more account of the facts of global interdependence and local legal pluralism should not be conflated with idealistic pleas for world government or a general law of mankind. The argument relates more directly to ways of interpreting our situation than to strategies for ordering the world.

This point can be illustrated by recent trends in legal anthropology. The classic works in that field from Malinowski to Gluckman and Gulliver largely focussed on small-scale societies and tended to treat them as isolated and self-contained units. Recently this has been challenged at several levels. For example, at a symposium held in Bellagio in 1985 a general consensus emerged that, while it is in the nature of anthropological research to be both localized (geographically) and particularistic, most local phenomena cannot be adequately described and explained without reference to an ever-broadening circle of contexts: neighbours, the nation-state, regional and international groupings (the British Empire, the Arab world) and the world community. Context is, of course, not solely a matter of geographical space: legal anthropologists have also acknowledged that the classic local studies tended to neglect the dimension of time, and, perhaps surprisingly, by emphasizing the unique characteristics of each people to underplay the diffusion of cultures and belief-systems.

[92] See 'Talk about Realism', cit. n. 62.

[93] Ruth Gavison (ed.), *Issues in Legal Philosophy* (Oxford, 1987), Chap. 1. For Dworkin's response see *Law's Empire*, cit. n. 21, at p. 418 n. 29; cf. S. Burton, 'Ronald Dworkin and Legal Positivism', *Iowa L. Rev.*, **73** (1987), 109.

[94] E.g. Dworkin, *Law's Empire*, pp. 14, 102.

Thus a plea for greater sensitivity to the facts of interdependence does not imply a move to some grandiose or optimistic form of internationalism nor does it necessarily involve replacing detailed microscopic studies by grand macroscopic theorizing. Indeed, this trend in anthropology challenges any sharp distinctions between microscopic and macroscopic perspectives.[95]

The theme of interdependence challenges the assumption that the nation-state, the civil society within its boundaries or the municipal legal system is the only or, in some contexts, even the main arena for legal discourse. They are of course important spheres of justice and of law and of economic and political ordering; but at best they should be seen as semi-autonomous social fields rather than as self-contained units.

The message of legal pluralism is that even within such a field, be it a national or provincial 'legal system', there is likely to be a multiplicity of orderings at work and these orderings often cannot be treated as being neatly subsumed under a single systemic structure, except for certain limited purposes such as adjudication. Local legal knowledge in Bradford, for instance, could not reasonably be confined to English law. Islamic Law, European Community Law, International Human Rights Law, the orderings (or otherwise) of multinational enterprises and the Mafia as well as more localized fields could all have a place in a rounded picture of Bradford's (or Whitchurch's) local legal culture. And it would be a peculiarly unreal kind of legal formalism that claimed that these existed or were to be taken account of only in so far as they are validated by the basic norm or rule of recognition or the sovereign of this nation state.

The Citizen of the World and Universal Jurisprudence

What, you may ask, has this to do with Bentham? I shall argue that by virtue of his standpoint and his conception of his juristic enterprise his work still provides the best starting-point, but not the last word, for resurrecting the concept of General Jurisprudence. I wish further to suggest that the story of Bentham's displacement by Austin and his successors provides one key to understanding the tendency to parochialism that I am questioning.

From his first published work until his death Bentham regularly (but not invariably) purported to adopt the standpoint of a (or the) 'citizen of the world' and to be concerned with humankind as

[95] Starr & Collier, op. cit. n. 87, Introduction.

a whole.[96] On 16 February 1831 the day after his 83rd birthday, he wrote in his Memorandum Book:

'J. B.'s frame of mind.
J. B. the most ambitious of the ambitious. His empire ... the empire he aspires to ... extending to, and comprehending, the whole human race, in all places ... in all habitable places of the earth, at all future time.
J. B. the most philanthropic of the philanthropic; philanthropy the end and instrument of his ambition.
Limits it has no other than those of the earth.'[97]

This standpoint is rooted in Bentham's conception of utility. One of the key dimensions of the felicific calculus is 'extent': whose happiness is in question? Bentham's answer is generally universalistic, indeed sometimes going beyond humankind to include all sentient beings.[98] Clearly his citizen of the world is not just a precursor of today's jet-setting technical expert peddling advice and constitutions to the rulers of nation states. This was indeed a role he presumed to, as when he offered his services or gratuitous advice to Tripoli, America, France, Scotland and Iberia.[99] 'Citizen of the world' means more than that. Bentham was persistently troubled by questions fundamental to any theory of individual ethics as well as legislation. With whose interests should we be concerned in our decisions and actions: members of our own community? All living persons affected by our actions? Humankind in general, including the unborn? All sentient beings? Is each of these really to count as one in all our moral and legislative deliberations? Do bonds of family or local or national or other loyalties or ties of membership not count except in terms of calculated consequences? Who are the proper objects of our benificence as individuals and rulers? Bentham was as concerned with such questions as are some modern philosophers, whether utilitarians, such as Peter Singer, or non-utilitarians, such as Onora O'Neill.[100]

[96] Ross Harrison, *Bentham* (London, 1983) at pp. 276–7.

[97] *Works*, Vol. 11, p. 72..

[98] *Introduction to the Principles of Morals and Legislation*, ed. Hart & Burns, 282–3n.; the passage includes the famous aphorism: 'the question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?'

[99] See John Dinwiddy, 'Bentham and the Early Nineteenth Century', *The Bentham Newsletter*, **8** (1984), 15.

[100] E.g. Peter Singer, *The Expanding Circle* (Oxford, 1983); Onora O'Neill, *Faces of Hunger* (1986); W. Aiken & H. Lafollette (eds), *World Hunger and Moral Obligation* (1977). The philosophical literature is reviewed in David Gosling, 'Obligations to The Third World' in W. Twining (ed.), *Issues of Self-Determination* (forthcoming, Aberdeen, 1990).

Bentham was well aware of the tension between his universalist ethics and his ideas on sovereignty. In many passages he treats the extent of the legislator's concern to be his own community.[101] But he faced up to the problem squarely in writing about international law:

'If a citizen of the world had to prepare an universal international code, what would he propose to himself as his object? It would be the common and equal utility of all nations; this would be his inclination and his duty. Would or would not the duty of a particular legislator, acting for one particular nation, be the same with that of the citizen of the world? That moderation which would be a virtue in an individual acting for his own interests, would it become a vice, or treason, in a public man commissioned by a whole nation? Would it be sufficient for him to pursue in a strict or generous manner their interests as he would pursue his own? ... or would it be proper, that he should pursue their interests as he would pursue his own, or ought he so to regulate his course in this respect as they should regulate theirs, were it possible for them to act with a full knowledge of all circumstances? And in this latter case, would the course he would pursue be unjust or equitable? What ought to be required of him in this respect?'[102]

Such questions need to be addressed today by any theory of law and by any theory of justice. In my view, Bentham's specific answers are less interesting in 1989 than his questions. This also applies to his puzzles over sovereignty. In contrast with Austin he has at least struggled with questions of illimitability and divisibility of sovereignty and with how to erect securities against misrule by the sovereign and his subordinates.[103] Whatever one thinks of the answers, the questions, including conceptual questions, ought to be firmly on the agenda of contemporary legal theory. The context has changed, but the basic theoretical problems are more pressing than ever.

Much the same can be said of Bentham's treatment of non-legal rights. Debates about the meaning, scope and basis of discourses about rights are one arena in which claims about his 'modernity' are recognized to be well-grounded, if what is meant by this is that his concerns and questions are, or should be, shared by many of

[101] E.g. *Principles of International Law, Works,* Vol. 2, p. 561. This was unpublished in his lifetime. The Bowring edition contains a selection from manuscripts dated 1786–9.

[102] Ibid., at 537.

[103] See generally, Hart, *Essays on Bentham* (1982), esp. Chap. 9; J. H. Burns, 'Bentham on Sovereignty: An Exploration', in M. James (ed.), *Bentham on Legal Theory* (1973).

our contemporaries.[104] In my view, Bentham's most important contributions here are conceptual. Those who are concerned to promote human rights need to develop a vocabulary that clearly differentiates between discourses that belong to the spheres of political rhetoric, ethics, legislative recommendation, international relations and positivized international law. Bentham challenges the first two and makes constructive contributions in respect of the others. The charge of criterionlessness; the charge that talk of absolute rights tends to be self-contradictory; the charge that talk of claim rights without assigned correlative duties is meaningless; and the less convincing charge that all talk of non-legal rights is anarchical in tendency—all present challenges to modern rights theories. I have argued elsewhere that the draftsman of any modern declaration or convention or other statement that has more than a rhetorical function has to take account of these charges, but that this is not an impossible task.[105] However, a great deal of rights talk is vulnerable to Bentham's strictures. This applies especially to talk of 'emergent rights' such as the 'right to development' or 'the right to food' which can be interpreted as attempts to promote values to which Bentham also gave a high priority, while treating the mode of discourse as mischievous nonsense.[106]

The standpoint of the citizen of the world is fundamental to Bentham's conception of jurisprudence. The starting-point of modern legal positivism is often attributed to the passage in *A Fragment On Government* where Bentham distinguished between Censorial and Expository Jurisprudence:

'There are two characters, one or other of which every man who finds anything to say on the subject of law, may be said to take upon: that of the *Expositor* and that of the *Censor*. To the province of the *Expositor* it belongs to explain to us what, as he supposes, the law IS: to that of the *Censor*, to observe what it ought to be.'[107]

[104] E.g. Waldron, op. cit. n. 79; Hart, *Essays on Bentham*, Chap. 4; Postema, op. cit. n. 71.

[105] 'The Contemporary Significance of Bentham's *Anarchical Fallacies*', (1975) cit. n. 50; see the reply by Melvin Dalgarno in *Archiv fur Rechts-und Sozialphilosophie*, **61** (1975), 359, which offers a more sympathetic interpretation of Bentham's arguments than mine.

[106] The *locus classicus* is *Anarchical Fallacies*, but the theme is repeated in several other works, which are discussed in the writings cited in notes 104 and 105 above. For a recent defence of a 'right to development', see Philip Alston, 'Making Space for New Human Rights: The Case for a Right to Development', *Harvard Human Rights Yearbook*, **1** (1980), 3.

[107] *A Fragment on Government* ed. Burns & Hart (CW, 1977), at p. 397.

It has sometimes been overlooked that in the same passage Bentham continues:

'That which *is* Law, is, in different countries widely different: while that which ought to be, is in all countries to a great degree the same. The *Expositor,* therefore, is always the citizen of this or that particular country: the *Censor* is, or ought to be the citizen of the world.'[108]

In time Bentham devoted some attention to the influence of time and place on legislation. He made it clear from the start that his main concern was with censorial jurisprudence. This passage contains the basis of the distinction between General and Particular Jurisprudence which was later elaborated by Austin in the following terms:

'I mean, then, by General Jurisprudence, the science concerned with the exposition of the principles, notions and distinctions which are common to systems of law, the ampler and maturer systems which by reason of their amplitude and maturity, are pre-eminently pregnant with instruction.
Of the principles, notions and distinctions which are the subject of general jurisprudence some may be esteemed necessary.'[109]

Bentham's conception of the main part of jurisprudence was general, scientific and censorial. In his version of positivism the ought was anterior to the is. His concern with conceptual clarification, which later came to be called 'analytical jurisprudence', was part of his censorial jurisprudence, the main object being to construct a precise 'legislative dictionary'.[110] Strangely over time, analytical jurisprudence became expository rather than censorial, particular rather than general, and not very systematic. In the canon of English positivism the is was treated as anterior to the ought and, tragically, Austin supplanted Bentham as the Father of English Jurisprudence for nearly a century.[111] Today much juristic discourse hovers uncertainly between particular and general jurisprudence, on the one hand abstracted from technical detail of particular fields of law and, on the other hand, rather parochially concerned with localized debates in political philosophy. Even more strangely,

[108] Ibid., pp. 397–8.
[109] John Austin, 'The uses of the study of Jurisprudence', in H. L. A. Hart (ed.), *The Province of Jurisprudence Determined* (London, 1954), at p. 367.
[110] Mary Mack, op. cit. n. 15, esp. Chap. 4.
[111] This theme is developed in my 'Maine and Legal Education: A comment', in J. Lyons (ed.). [forthcoming] and '1836 and all that: Laws in the University of London 1836–1986', *Current Legal Problems,* (1987), pp. 261, 266–74.

positivism is both criticized and defended in terms that seem to be quite contrary to the spirit and substance of Bentham's concerns. Bentham was dethroned not merely in name, but also in spirit.

The Displacement of Bentham

The story of the displacement of Bentham by Austin as the Father of English Jurisprudence has often been sketched, but the puzzle remains: Why this extraordinary misjudgment? In particular, why instead of outright rejection was a close disciple, who was also a positivist, a utilitarian, and a systematic thinker, but who was clearly a lesser and derivative figure, embraced or set up in his stead?

Recently there has been a minor Austin revival, marked by the publication of no less than four books about him (and, in part, his rather more remarkable wife).[112] While these bring out some significant differences between Austin and Bentham and show that the former has in some respects been underrated in recent years, none makes the case for treating Austin as being a thinker of comparable stature in respect of originality, penetration, breadth or even readability. The most that could be said for him is that he took analysis of fundamental legal conceptions a bit further, he was more sympathetic to the common law than Bentham, and his simplemindedness was more congenial to practitioners, law students and critics than his more formidable mentor.

In a forthcoming article Philip Schofield gives a more plausible account.[113] In tracing the story of the eclipse of Bentham and the canonization of Austin within taught jurisprudence and legal scholarship in the late nineteenth century Schofield identifies a number of additional factors. First, Austin's conservative 'theological' utilitarianism was more congenial both to the legal establishment and the first generation of scholar-teachers of law than Bentham's secular, radical 'scientific' utilitarianism. Secondly, Austin's differentiation between expository jurisprudence and the science of legislation corresponded on the surface

[112] W. Morison, *John Austin* (London, 1982); W. E. Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform and the British Constitution* (London, 1985); L. & J. Hamburger, *Troubled Lives, John and Sarah Austin* (Toronto, 1985); and Robert Moles, op. cit. n. 56.

[113] Philip Schofield, 'Jeremy Bentham and nineteenth century English Jurisprudence', in W. Schrader & U. Guhde (eds), *Der Klassische Utilitarianismus: Einflusse—Entwicklungen—Folgen* (forthcoming).

to Bentham's distinction between expository and censorial jurisprudence. But whereas Bentham emphasized censorial jurisprudence as the basis of expository jurisprudence—for all of his thought was founded on utility—Austin's expository/analytical jurisprudence was treated as standing on its own and as being the foundation of the scientific study of law. '[Thus] law as a science was seen to be independent of any ethical basis. The censor disappeared entirely.'[114] Thirdly, Austin's successors interpreted him narrowly and used him selectively and it is this fact that gives some justification to the Austin revival. One might add that Bentham's attacks on the legal profession and the common law hardly endeared him to the bar and, its satellite, the nascent academic profession and that Austin's epistemology was more in tune with the 'commonsense' ideas of practitioners.

Austin radically narrowed down Bentham by concentrating on the law as it is, but he had nevertheless claimed to be doing general jurisprudence as part of a scientific approach to law. The first generation of full-time law teachers found in Austin a convenient text for the teaching of jurisprudence in the modest space allowed for it. This helped to certify their academic respectability. But in order to establish their credentials with the legal profession they concentrated on the exposition of English law and fairly rapidly Austinian analytical jurisprudence also became more particular than general, concerned with the interpretation of the basic concepts of the common law. This movement away from the conception of a general science of law was almost as significant as the sanitization of exposition from criticism and the freeing of positivism from utilitarianism.

It might be asked: What is the connection between my argument for a tolerant, but discriminating, pluralism in the next stage of Bentham studies and my plea for the restoration of Bentham as the Father of Modern English Jurisprudence? And, is not my account of his displacement an example of a Whiggish approach to the writing of history baccwards of just the kind that the new intellectual historians are concerned to attack?

A short answer to the first question is as follows: while a high proportion of current Bentham scholarship is understandably textual and historical in orientation, there is a natural tendency in the culture of academic law to be concerned with 'contemporary significance' and hence with conversational readings. The work of two leading Bentham scholars who are also legal philosophers,

[114] Ibid., text at n. 35–6.

Hart and Postema, illustrates this tendency. It also shows how conversational readings are compatible with, indeed gain from, textual accuracy and historical sensitivity. Hart combines conversational reading with intimate knowledge of the texts. Postema's *Bentham and the Common Law Tradition* is part of a broader enterprise which is explicitly 'critical and philosophical'.[115] The argument for the reinstatement of Bentham is a plea for giving his work, including some of the less well-known aspects, a more central place (some would say a privileged status) in the canon of texts that command attention both in taught jurisprudence and contemporary juristic debate. The idea of general jurisprudence is just one example of the many topics on which Bentham's concerns and questions are quite close to those of some modern jurists, including myself, who share an unease about certain tendencies in contemporary legal theorizing. The story of Bentham's displacement by John Austin and his successors helps to explain how such concerns and questions became marginalized within twentieth century Anglo-American jurisprudence. Far from being Whiggish, this argument is quite consistent with an historically sensitive approach to the interpretation and use of classic texts, including even the puristic approach of Quentin Skinner. Skinner's interests are focused on the history and historiography of political thought; but his arguments have important implications for contemporary juristic scholarship and debate, which has suffered from some of the bad habits that he and his colleagues have so effectively criticized.

Conclusions

1. Although less than a quarter of the texts of Bentham's *Collected Works* have been published, sufficient groundwork has been done and sufficient momentum has been built up that the end is in sight, provided that sufficient money can be raised to make it possible to complete the task within a reasonable time. It is right that this work should be done to the highest standards because Bentham, as a major international figure, deserves no less and because, unless the edition is accepted as definitive, scholars will insist on doing it again, as happened with the Bowring edition and the Economic Writings. The completion of the *Collected Works* must continue to have the highest priority for Bentham Studies.

2. In recent years a high proportion of Bentham scholarship

[115] Postema, op. cit. n. 25, Preface, p. viii.

has been textual and exegetical. Given the extent, the complexity and the difficulties of deciphering and editing the originals, such work too has rightly been given a high priority. Middlemen as well as editors have an important role to play in Bentham Studies.

3. It would be quite wrong to say that recent exegetical work has tended to be ahistorical or insensitive to context. However, it has tended to be rather specialized and cautious, concentrating on careful analysis of particulars rather than broader sweeps or fundamental criticism. In the next phase of Bentham Studies there will be more scope both for the detailed study of the contexts of particular works in the manner of modern intellectual historians and for more wide-ranging interpretations and re-interpretations that locate Bentham and his ideas and successors in broader historical contexts. There is also much work still to be done on the reception (and rejection) of Bentham's ideas in different parts of the world.

4. Strong claims can and will be made for the continuing vitality and 'contemporary significance' of some of Bentham's works. Bentham texts clearly have some potential for survival because of the 'modernity' of some of his concerns and ideas, his qualities of mind and his radicalism. However, it is clearly important not only to be discriminating about such claims, but also to distinguish between different ways of using and conversing with particular texts. In considering just a few kinds of 'conversation' I have not been arguing for a single kind of reading, but rather for a greater self-consciousness, especially in regard to conversational and critical approaches to such texts.

5. Bentham also has some particularly strong claims to be fully reinstated as the Father of Modern English Jurisprudence, a position regrettably held by John Austin for over a century, and to have a place in the canon of significant Anglo-American jurists who are read and critically discussed in the original. Apart from his historical importance as a jurist, and the reasons mentioned above, there are several reasons for this in respect of law. The most important is that at a time of increasing need to develop a global jurisprudence that is both genuinely interdisciplinary and international no other modern jurist has as strong a claim to fill the role of a classic forerunner many of whose works provide a suitable starting-point, though not the last word, for considering issues that are or should be of current concern in jurisprudence and beyond.