

‘Corruptions In the Administration of Justice’: Bentham’s Critique of Civil Procedure, 1806-1811¹

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Introduction

To supply justice to all at least expense² - this is the notion of legal procedure presented by Jeremy Bentham in his work *Scotch Reform*.³ The piece was drafted in response to a Parliamentary debate on the administrative changes proposed for the Scottish system of civil procedure; yet, from the outset Bentham designed his critique to spread beyond Scotland and embrace the whole of English civil procedure.⁴ The aim of this paper is to provide an overview of the themes presented in *Scotch Reform* and to assess the nature of Bentham’s criticisms of English procedure and his suggestions for improvement.

Attention will be focused on the relationship between the procedural system proposed by Bentham and the underlying principle of utility on which it rested. It will be argued that Bentham’s system is consistent with the application of a utilitarian body of substantive law (and Bentham assumes throughout that the legislative enactments of substantive law do actually accord with a utilitarian ideal), and the system of procedure taken on its own has a clear utilitarian principle operating as the foundation of its subordinate aim of reducing pains of delay, vexation and expense.⁵ The primary end of procedure, however, is given as the successful application of the standard of justice embodied in the overarching structure of substantive law. Any

¹ First published in Spanish translation as ‘Jeremy Bentham, Legal Procedure and Utility’ in *Anales de la Catedra Francisco Suarez*, xxxvii. (2003), pp. 287-307.

² Expense meant here in the widest utilitarian sense and incorporating all evils and pains experienced during the process of litigation.

³ *Scotch Reform* was initially printed in 1807: the first published edition appeared in 1808, and a second edition came out in 1811, with additional tables. The piece was included in *The Works of Jeremy Bentham*, ed. J. Bowring, 11 vols., Edinburgh, 1843, v. pp. 1-53, where a version of ‘Letter V’ was incorporated. All references henceforth are to the 1808 edition unless otherwise stated.

⁴ The full title of the 1808 edition being: *Scotch Reform; considered, with reference to the plan, proposed in the late Parliament, for the Regulation of the Courts, and the Administration of Justice, in Scotland; with Illustrations from English Non-Reform: in the Course of which divers imperfections Abuses, and Corruptions, in the Administration of Justice, with their causes, are now, for the first time, Brought to light.*

body of substantive law, utilitarian or otherwise, would be better served, suggests Bentham, by the rationalized system proposed in *Scotch Reform*.⁶

The examination of *Scotch Reform* and the related manuscripts is considered in relation to two broad issues raised in existing studies of Bentham's adjective law writings.⁷ The first concerns the nature and extent of Bentham's anti-nomian thesis for the civil courts, discussed mainly in terms of procedure but inevitably including the procuring of evidence.⁸ On what basis, it is asked, are Bentham's recommendations for the removal of all procedural rules grounded? The version of the question pursued here relates predominantly to Bentham's procedural theory as presented in *Scotch Reform*, and the work has been justifiably regarded as the first public statement of this theory.⁹

The second issue concerns the apparent paradox presented by Bentham when he calls for severe restraints to be imposed on the judicial management and control of civil procedure, whilst, at the same time, suggesting the removal of all adjectival rules of action, and arguing that judges be provided with substantially increased powers of discretion. How, on a utilitarian basis, could such a degree of judicial discretion be said to pursue a reduction in the evils of delay, vexation and expense, that inevitably confront prospective litigants?

Since importance will be placed on the relevance of unpublished manuscript material, especially in regard to the second of these questions, it will be useful, before

⁵ '... the ordinances of the substantive branch of the law (the utility of which must on this occasion be assumed)', *Scotch Reform* in Bowring, v. p. 6.

⁶ He believed existing adjective law was flawed whether '... the Roman, the English, or any other system were resorted to'. *Scotch Reform* in Bowring, v., p. 3.

⁷ For studies of Bentham's adjective law writings see, amongst others, W. Twining, *Theories of Evidence: Bentham and Wigmore*, London and Stanford, 1985, 'Bentham's Writings on Evidence', *The Bentham Newsletter*, x (June 1986), pp. 34-43, and *Rethinking Evidence*, Evanston, 1994; G. Postema, 'The Principle of Utility and the Theory of Procedure: Bentham's Theory of Adjudication', *Georgia Law Review*, xi. (1977), pp. 1393-1424, and *Bentham and the Common Law Tradition*, Oxford, 1986; A.A.S. Zuckerman, 'review of W. Twining, *Theories of Evidence*', in *The Bentham Newsletter*, x. (June 1986), pp. 46-50; A.D.E. Lewis, 'The Background to Bentham on Evidence', *Utilitas*, ii. (1990), pp. 195-219; M.I. Zagday, 'Bentham on Civil Procedure', in *Jeremy Bentham and the Law*, ed. G. Keeton and G. Schwarzenberger, London, 1948, pp. 68-78; and the older but still very useful, E. Halévy, *La formation du Radicalisme Philosophique*, 3 vols., Paris, 1901-4, trans. M. Morris as *The Growth of Philosophic Radicalism*, London, 1928; rept. 1972, pp. 373-432.

⁸ The evidence question regarding the system of free proof is conveniently summarized in Zuckerman's review of Twining, *Theories of Evidence*, p. 46.

⁹ Halévy suggests *Scotch Reform* embodied Bentham's first definitive statement of his procedural theory. See *Philosophic Radicalism*, p. 276. Twining agrees that Bentham worked out the details between 1803-12, but also shows how the outlines of the theory had been established in the 1780s and 90s, with an important statement appearing in J. Bentham, *Draught of a New Plan for the Organization of the Judicial Establishment in France*, London, 1790. See Twining, *Theories of Evidence*, p. 23, and 'Bentham's Writings on Evidence', p. 39 n4.

starting an examination of these central questions, to provide a brief description of the arrangement of the published work and, to indicate how it relates, chronologically and structurally, to the archival material. It will also be useful to remember that the topic of procedure is only a part of Bentham's adjective law writings and that he also has much to say on evidence and adjudication. Whilst these linked topics are obviously of relevance to *Scotch Reform*, indeed it is impossible from Bentham's perspective to separate the constitutive elements of adjective law, nevertheless, *Scotch Reform* can be viewed primarily as a work concerned with the system of judicial procedure under the civil law.¹⁰

A. 'Scotch Reform': The Published Work and Manuscript

The published body of material for *Scotch Reform* is not large - a small book presented as a series of four letters, with six statistical tables attached,¹¹ and addressed to Lord Grenville, the First Lord of the Treasury.¹² Bentham published the work rapidly in response to proposals put forward in Grenville's reform plan of 1806,¹³ which sought to transplant many of the procedural practices found in English courts into the Scottish system.¹⁴ Later, on some accounts, Bentham added a short fifth letter

¹⁰ On the classification of Bentham's adjective law writings see Twining, 'Bentham's Writings on Evidence', pp. 34-43. Bentham's evidence works include *Rationale of Judicial Evidence Specially Applied to English Practice*, ed. John Stuart Mill, London, 1827; *Traité des Preuves Judiciaires*, 2 vols., ed. E. Dumont, Paris, 1823, *An Introductory View of the Rationale of Evidence for the Use of Non-Lawyers as well as Lawyers*, ed. James Mill, London, 1809-11, first published in Bowring, vi. pp. 1-188. *Scotch Reform* and 'Principles of Judicial Procedure', Bowring, ii. pp. 1-188, ed. R. Doane from manuscripts, written mainly between 1820-27, are identified as the main works on procedure. On judicial organisation Bentham produced, 'Summary View of the Plan of a Judicatory, under the Name of the Court of Lords Delegates', Bowring, v. pp. 55-60, and *Equity Dispatch Court Proposal*, London, 1830, and 'Equity Dispatch Court Bill', first published in Bowring, iii. pp. 319-431. On sections relating specifically to evidence in *Scotch Reform*, see 'Letter Four', pp. 61-100 and some points in the arrangements table.

¹¹ Bentham produced the first four letters between 1806-7. Two further sheets, giving ten tables in total, were presented in the 1811 second edition of the work. No other alterations were made except for a new title page, which removed reference to Lord Grenville, and the addition of four more tables of statistics.

¹² William Wyndham, Baron Grenville, 1759-1834, appointed First Lord of the Treasury 11 February 1806, and left office 25 March 1807.

¹³ The majority of the *Scotch Reform* manuscripts in the University College London archive were drawn up between 1806-7. See A. Taylor Milne, *The Catalogue of the Manuscripts of Jeremy Bentham in the Library of University College, London*, London, 1962. See UC lxxxii. 7-350, xci. 1-322, xcii. 1-478, xciii. 1-535, xciv. 1-555, cvi. 85-229, cix. 27-42 and clxviii. 166-213 (Roman numerals refer to boxes in which the papers are placed, arabic numerals to individual folios).

¹⁴ The Scottish legal system had its origins in the sixteenth century with the founding, in 1532, of the College of Justice or Court of Session which was to become the cornerstone of law in Scotland, and to which judges were directly appointed by the king. James VI (reigned, 1567-1625) encouraged the formal reorganisation of the profession and the qualifications and training necessary for a Notary Public were regulated by statute in 1587, the Society of Writers to the Signet appeared in 1594, and the

which commented on Lord Eldon's revised proposals following the change of administration in 1806.¹⁵

Initially, an offer was made by Lord Grenville inviting suggestions for the improvement of the Bill from outside Parliament. Your invitation, says Bentham,

... found me employed in putting... the last hand to a work of a somewhat new complexion on the subject of EVIDENCE; ... the object was - to bring to view the reasons, by which I had been satisfied that whether the Roman, the English, or any other system were resorted to, the established rules of evidence, occupied principally in putting exclusions upon the light of evidence, were almost without exception adverse to the ends of justice.¹⁶

Grenville's bill therefore appeared at a particularly opportune moment, when Bentham had made considerable progress, in fact had finished, in his own words, a 'second edition'¹⁷ of his work on evidence¹⁸ and was now able to apply his recently developed principles to the practical and topical issue of the reform of Scottish civil procedure.¹⁹ Yet Bentham moved far beyond an isolated treatment of the Scottish system and, in *Scotch Reform*, presented a penetrating critique of the English system as well. Bentham attempted to illustrate 'English non-reform' and to identify the many imperfections, abuses and corruptions of the English system.²⁰

Faculty of Advocates emerged as a body in 1619. The Privy Council existed as a superior court concerned particularly with cases of riot. See T.C. Smout, *A History of the Scottish People 1560-1830*, London, 1969, pp, 101 and 108.

¹⁵ Eldon's measures were finally passed on 4 July 1808 as 48. Geo. III. c.151. Eldon's revisions were much commented on by Bentham in MSS and he appears to have published a brief response to Eldon's proposals which can now only be found at Bowring, v. pp. 47-53.

¹⁶ *Scotch Reform* in Bowring, v., p. 3. Bentham had been working on his general theory of evidence since 1803 and had such a large body of relevant material that he believed '... the only feasible course seemed to be to submit to your Lordship, instead of the picture itself, [i.e. his whole work on evidence] a sort of Table of the Contents of it, *ibid.*, p. 5. This suggests that Bentham's recollection of 1823 given by Lewis in 'The Background to Bentham on Evidence', pp. 204-5 is correct, and indicates that Bentham was still working on Evidence in 1806.

¹⁷ On the nature of this second 'edition' see Lewis, 'The Background to Bentham on Evidence', p. 205.

¹⁸ Bentham, *Rationale of Judicial Evidence*, ed. John Stuart Mill, London, 1827.

¹⁹ On the origins of Bentham's work on evidence in the early nineteenth century see Lewis, 'The Background to Bentham on Evidence', p. 204.

²⁰ Bentham gives *Scotch Reform* the subtitle, ... *with illustrations from English Non-Reform: in the course of which divers imperfections, abuses, and corruptions, in the administration of justice, with their causes, are now, for the first time, brought to light*, (1808), title page.

The published work bears few similarities to the surviving manuscript. Whilst the central issues remain essentially the same the extent of the analysis could not be more different. Where the published work contains little more than an hundred pages the manuscript body runs to over 2,900 folios. Not only is the published text brief, but it is also incomplete. The promised plan of the work set out in its early pages is never executed.²¹ In the first published letter, we are given a summarized comparison of the existing system with what Bentham would prefer to see in its place. The second letter addresses the proposed division of the Scottish Court of Session. Two other specific issues, the system of pleading, and the use of juries are given a brief treatment in letters three and four.

In contrast the archive material can immediately be seen to cover a considerably wider range of topics,²² including: the use of bail, the utility of Scottish appeals, procedural costs, the distrust of and powers appropriate to the Edinburgh Court of Session, the desirability of competition, and the need for appropriate instructions. Bentham continues, however, to devote much time in the manuscripts to a reconsideration of those themes central to the four letters sent to Grenville.²³ The manuscript treatment is generally much fuller and more detailed than in the published work, and certain themes are found discussed in two, and sometimes three, different versions. Yet, despite the volume of remaining material the text of the one hundred published pages is not amongst the surviving body of manuscripts, and we must, therefore, still begin with the printed work when considering Bentham's proposals for

²¹ Bentham originally planned for the work to be composed of three distinct parts:

i) 'Proposita': providing a careful examination of the 17 proposals set before Parliament by Lord Grenville in the Scottish Judicature Reform bill, which was passed for a second reading in the House of Lords on 17 February 1807. This part is closely related to the first four 'Letters' published in 1808.

ii) 'Omissa': presenting items omitted in the proposals tabled for reform. Material headed 'Omissa' is linked in some references with the body of text titled 'Letter V'. This second part was never published although a great deal of text was produced; it appears that at least two, and possibly up to four, versions had been drafted by June 1807.

iii) 'Facienda': the reforms which Bentham thought should be introduced. Again, this part was never published.

See *Scotch Reform in Bowring*, v., p. 30.

²² Forty-nine distinct topics have been identified in the UC archive, most of which were written between 1807-8, and which constitute a substantial extension of Bentham's discussion. For UC box numbers see n. 22 above.

²³ Much of the UC archive material was produced after the printing of *Scotch Reform* in 1807.

procedural reform of the civil courts and the comparison between English and Scottish practice.

B. The Removal of Rules of Procedure

To turn then to the issue of Bentham's anti-nomian thesis, the question we must consider regards how he envisaged his ends of procedure being achieved without any rules of procedure.²⁴

i) The direct and collateral ends of the system of procedure

Bentham provides a clear description of the ends of procedure. The first he terms 'direct' and explains this as,

giving execution and effect to the predictions delivered, to the engagements taken, by the other branch, the main or *substantive* branch of the law: viz. by decisions pronounced in conformity to it.²⁵

The second end he calls the 'collateral', and this is described as 'prevention of delay, vexation and expense, in so far as superfluous or preponderant'.²⁶

To examine, first, the direct end of procedure, it is noticeable that in *Scotch Reform*, in comparison with his other adjective law writings, in addition to the end of procedure being presented as the 'giving execution and effect to the predictions delivered... by the other branch, the main or *substantive* branch of the law: viz. by decisions pronounced in conformity to it', Bentham also pointedly states that the 'Direct ends of justice' are to prevent 'misdecision'.²⁷ This identifies the specifically procedural emphasis present in *Scotch Reform*, for whilst 'rectitude of decision' is equally applicable to evidentiary,²⁸ adjudicative and procedural issues, in *Scotch*

²⁴ A useful outline of the main concerns here can be found in Zuckerman, 'review of W. Twining, *Theories of Evidence*', pp. 46-50.

²⁵ *Scotch Reform* in Bowring, v., p. 5.

²⁶ *Ibid.*, p. 6.

²⁷ *Ibid.*, p. 5-6. 'Misdecision' is defined as 'decision unconformable to the regulations and arrangements belonging to the substantive branch of the law', *ibid.*, p. 6.

²⁸ In *The Rationale of Judicial Evidence* the emphasis is on the nature of proof and the establishment of probabilities in the search for truth, as it should be of course when evidence is specifically under consideration. See Twining's discussion of the direct end as given in *Rationale*, in *Theories of Evidence*, p. 27ff.

Reform the central concern is directed towards the particular avoidance of ‘*failure of justice*’,²⁹ this is a further end in addition to prevention of ‘misdecision’.

There are clearly two issues at stake here. Not only does Bentham want the procedural system to allow rectitude of decision, but he also wants to avoid failure of justice which occurs when no decision is made. The crucial point here is that ‘failure of justice’ can occur, and usually does occur in Bentham’s view, without any evidence-based decision being given. The system fails even to provide the opportunity for the judicial consideration of the evidence. In other words, the suit is thrown out of court on procedural grounds alone, and this forms a clear step prior to any consideration of evidence. In many ways this problem is the central theme of *Scotch Reform* and can be seen repeated in the manuscripts where the idea of ‘failure of justice’ is given particularly careful treatment.³⁰ The problem emphasises Bentham’s recognition of the unique and important position adopted by procedural practice within adjective law theory. Quite separately from the topics of evidence and adjudication the procedural system is crucial to the achievement of justice, and Bentham identifies the power invested in the system of procedure in its role as the link between available evidence and correct decision. Truth (from evidence) cannot be established under misdecision enacted (suit thrown out) because of interest-based judgement (adjudication). Procedure is identified as the necessary and crucial link between disinterested decision makers and the widest available range of relevant, and trustworthy evidence. The successful accomplishment of one element is useless without the successful accomplishment of the other. Without appropriate freedom to include all such evidence, no judge, no matter how disinterested, could provide a correct decision in accordance with the substantive law. Conversely, no quantity of relevant evidence is of any value if the judge has no interest in fulfilling the demands of substantive law. Decision makers are, and only ever can be, interested individuals, and, as will be shown below, the system of procedure must be designed to make it their interest to gather all appropriate evidence *and* to apply it in the enactment of substantive law.

²⁹ *Scotch Reform* in Bowring, v., p. 6.

³⁰ See ‘Reasons. Ends of Justice’, UC lxxxii. 43-63, 65-147, UC xcii. 24v, UC xciv. 198, 220-437 [folios 428-437 are incorrectly numbered], 373, 423-5, 163v and 468v; ‘Reasons. Jurisprudence’, UC xcii. 413-24; ‘Reasons. Principles’, UC xciv. 200-219, UC xciv. 166v-168v; and ‘Judicial Injustice’, UC cvi, 85-198, 225-29, UC clxviii. 166-170.

The second, collateral, aim of Bentham's system is to reduce the burdens incumbent upon both parties to a suit; that is, to reduce the delays, the vexations³¹ and expenses involved in pursuing civil litigation.³² Ostensibly, Grenvilles's attempt to reform the Scottish system of civil procedure was aimed at dealing with the difficulties and delays incorporated in appeals sent from the Edinburgh Courts of Session to the House of Lords in London. This general concern to reduce the delays and inconveniences, financial and otherwise, was the prime objective of the proposed Bill. This was of immediate interest to Bentham and although, on examining Grenville's Bill, he was able to claim that, despite reservations, 'in point of utility, there is enough in it to afford an ample justification to the provisional acceptance your Lordship has been pleased to give it',³³ Bentham was acerbically dismissive of the idea that the proposals would make any substantial difference to the existing burden on litigants. Indeed, whilst claiming that a small benefit may be derived, ultimately he found that the Bill omitted so much that ought to be done in the way of reform that 'it will be found to fall extremely short of the professions, and perhaps expectations, of the learned author'.³⁴ And he went further, stating that the Bill pursued 'the interest of the community... in demonstration only, the opposite interest of the lawyer being carefully protected, and even advanced, in reality and effect'.³⁵

The purpose of Bentham's offerings on the subject of Scotch Reform was therefore to expose the true, dual role of procedure in assuring the correct standard of evidence and adjudication, and of providing a real protection against unnecessary delays, frustrations and expense.

ii) Corruption of the technical system: 'Judge and Co.'

Bentham opens his assault by stating in quite unequivocal terms that the abuses found in the system of procedure in England as well as Scotland were due to the sinister partnership of judges and lawyers, who had and were continuing to manipulate the system for their own financial benefit.³⁶ Indeed, the assault on the legal profession is quite extraordinary, even for Bentham. He openly declared in a letter to his brother

³¹ In Bentham's terminology an amalgam of the frustrations, distresses and irritations involved in pursuing legal action.

³² *Scotch Reform* in Bowring, v., p. 6.

³³ *Ibid.*, p. 3.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ For examples of the 'corrupt' practices identified by Bentham see *ibid.*, p. 8.

that in *Scotch Reform* he treated lawyers as ‘the scum of the earth’ throughout.³⁷ Even in the published text itself he accuses lawyers and judges of fundamentally self-interested, and frequently self-conscious, abuse of the system, and his accusations are presented in a manner which could hardly have endeared his suggestions to Lord Grenville.³⁸

The attack on the sinister interest of the legal profession is pervasive. In every section of *Scotch Reform*, both published and unpublished, Bentham never tires of stating his absolute disability to conceive of any selflessness in the actions of lawyers. There never was, in Bentham’s view, a social group so completely incapable of acting beyond self-interested motives. The complexities and devices developed in the operation of civil justice in England had just one goal - to encourage the complexity of procedure and correspondingly to increase the fees of lawyers and judges.³⁹ These ‘fee-fed’ professionals not only sought the gratuitous extension of causes, but also encouraged suitors of bad faith (*malâ fides*)⁴⁰ who were themselves seeking self-interested advantage or malicious aggression rather than justice. And most importantly, lawyers made themselves the only masters of the technicalities of the system and hence made themselves indispensable. The corruption he accused the profession of, especially judges, is not corruption in the sense of openly taking bribes; Bentham says he never knew of such a case.⁴¹ But rather that the technical system had been developed over a considerable period with Judge and Co. building-in delay and complexity at every step.⁴² He described civil courts as delay shops where ‘delay sold by the year as broadcloth is sold by the piece’.⁴³

The ‘fee-gathering’ method of paying for legal services presented a fundamental problem for Bentham in terms of the disjunction of duty and interest.⁴⁴

³⁷ See *The Correspondence of Jeremy Bentham*, vol. vii (1802-8), ed. J.R. Dinwiddy (Oxford, 1988), (*The Collected Works of Jeremy Bentham*), p. 425, letter 1923, To Samuel Bentham, 9-10 April 1807 (Hereafter *Correspondence (CW)*). Bentham says here that both Romilly and Dumont had seen the work and ‘both much pleased with it: Romilly more especially: though lawyers are treated throughout as the scum of the earth and the arch enemies of mankind’.

³⁸ Grenville studied law at Lincoln’s Inn.

³⁹ *Scotch Reform* in Bowring, v., pp. 6-9, especially p. 9.

⁴⁰ *Ibid.*, p. 9.

⁴¹ See UC xcii. 136 and 307.

⁴² *Scotch Reform* in Bowring, v., pp. 6-7, and for Bentham’s attack on the factitious nature of ‘Motion Business’ in particular see p. 22, where he states this to be ‘all *made-business*: - business made by and for *Judge and Co.*’ Original emphasis.

⁴³ See UC xcii. 146.

⁴⁴ Thus ‘sharp-sighted artifice’ was the reason for the exclusion of the ‘most instructive and indispensable *sources* of evidence’. Undoubtedly parties were excluded and the system was exceptionally complex, especially in the case of the system of special pleading in wide use under

... the reason why the system was and is so bad... is, that the *power* found itself in company with the *interest*, and consequently the *will*, to produce as bad a system as the people... could in their... state of relative ignorance and helplessness, be brought, by the utmost stretch of artifice, to endure.⁴⁵

Looking at Grenville's bill from such a view Bentham could only conclude that '... the profit and ease of the man of law were as carefully provided for as ever, the interests of the people, in their character of suitors, as completely sacrificed as ever'.⁴⁶

Without the separation of fees from the consequences of judicial processes and decisions there remained a powerful interest-based incentive on the part of the legal profession to extend legislation and to increase the complexity of procedure. A clear utilitarian principle could be established that a system of procedure must not provide the opportunity of benefit for the principal operators or managers of such a system. The solution was obvious, replace fee with salaries, and the interest of 'Judge and Co.' would be directed towards satisfying the demands of the state paymaster - ultimately the Crown in parliament.⁴⁷ This does not necessarily mean that judges will pursue the correct end of seeking the appropriate application of substantive law, but it does remove any obvious judicial motive for manipulating procedures to produce financially beneficial delays and expense.

In addition to this, the replacement of fees with salaries would break the connection of interest between members of the legal profession and *malâ fide* suitors, that is, litigants who pursued suits aware of the injustice of their case or driven by the ulterior motives of malevolence or antipathy. Under Bentham's system the absence of fees would mean judges would have no interest in encouraging such suitors. Again, a clear reference to the junction between interest and duty. With the removal of long-winded procedures such *malâ fide* suits would be dispensed with, or discouraged, at

English procedure. This was part of the 'numerous and complicated system of *devices*, all tending to the same altogether natural (i.e. lawyers pursuing particular interest)'. See *Scotch Reform* in Bowring, v., p. 4. For use of 'fee-gathering system' as a synonym for 'technical system' see p. 9.

⁴⁵ *Ibid.*, p. 4.

⁴⁶ *Ibid.*, pp. 4-5.

⁴⁷ The question of remuneration for judges was, however, not a part of the system of procedure. Neither salaries nor fees are mentioned in the table comparing systems of natural and technical procedure. See *Scotch Reform* in Bowring, v., pp. 12-26.

the first hearing where the basic decision regarding the 'justness' of a cause could be quickly established. All technical apparatus available for manipulation by malâ fide suitors, such as extended exchanges of documents between judge and lawyers and the frequent transfer of suits between jurisdictions, therefore had to be abolished. The very existence of a technical system was productive of such litigation, and this was encouraged by judicial misdecision.⁴⁸

For the immediate proposal at hand Bentham sought to break the power of the judges over the procedural system which they themselves had made, and which was set opposed to the required goal:⁴⁹

... in Scotland, as in England, and elsewhere, the system of judicial procedure has been, in the main, the work, not of legislators, but of judges: manufactured, chiefly in the form - not of real statutory law - but of jurisprudential law;- imaginary law, consisting of general inferences deduced from particular decisions. By primaeval indigence and inexperience, on the part of the sovereign, judges left without salaries, but left with power to pay themselves by fees. Hence, as will be seen, a constant opposition between the ends of *justice*, and the ends... of *judicature*.⁵⁰

Throughout the work this opposition is given great attention - the idea that judicature, the judicial end of procedure (i.e. fees, self-interest) was entirely distinct from justice. The question of redirecting interest, the interest of judges especially, is a fundamental utilitarian element in Bentham's system.

iii) Benefits of the Natural System

The great benefits of Bentham's own system are that they are, in his own conception, generally negative.⁵¹ 'Logically speaking, the quality of the natural system will be

⁴⁸ Promotion of litigation by judicial encouragement of malâ fide suitors is frequently mentioned in *Scotch Reform*, but see p. 7 especially. See also UC cxii. 115.

⁴⁹ Dinwiddy suggests that this emphasis on interest and duty was later used to recommend the disconnection of the lawyer class from judicial in Bentham's *Constitutional Code* writings, by disallowing lawyers from entering the judiciary. See J. Dinwiddy, *Bentham*, Oxford, 1989, pp. 67-8.

⁵⁰ *Scotch Reform* in Bowring, v., p. 5.

⁵¹ But not entirely so since important elements of the technical system, such as vivâ voce gathering of evidence and cross-examination are retained. *Ibid.*, p. 12, articles 2 & 3.

seen to be chiefly of the negative cast; constituted by the absence of those [devices]⁵² which are such a fundamental part of the technical system. In common with other enlightenment thinkers Bentham sought to remove abuses on a rational and scientific basis.⁵³ Bentham wanted the specific removal of the delays, the confused variety of jurisdictions and the exclusion of virtually everyone who held an interest in a case.⁵⁴ But Bentham did not want to remove all existing practices. On a utilitarian basis oral testimony and cross-examination of witnesses before a judge were central elements for a 'natural' system of procedure.⁵⁵ Nevertheless, Bentham's argument presents a fundamental rejection of some of the central tenets in the conventional English notion which regarded procedural technicalities as guarantors of liberty.⁵⁶ In Bentham's view there was no utilitarian sense, no prospect of assisting aggregate happiness, in maintaining rules that allowed, for instance, the accused the privilege of not giving evidence, of generally excluding hearsay evidence, or of ignoring the benefits presented in the use of summary courts.⁵⁷ The idea that any of these procedural conventions protected the innocent was rejected entirely by Bentham. And even if the innocent did happen to be protected by such devices this was an inappropriate goal for a system of procedure, since the innocence ought to be protected by substantive law correctly framed.

This does not, however, explain why the alternative to the technical system was considered by Bentham as 'natural'. He presented this system as having its model in the family, where a father settles disputes summarily with all available information being drawn from all available sources.⁵⁸ That is, without the need for any artificial rules of procedure.

Such a presentation of 'natural procedure', however, is not immediately appropriate for comparison with the wider socio-legal environment. Even if the domestic situation does not utilize or recognize, rules of procedure (and this is by no

⁵² *Ibid.*, p. 11.

⁵³ In the work of Cesare Beccaria from 1764, for example, obscurity and exclusion in legal procedure are condemned. See *On Crimes and Punishments*, trans. D. Young, Indianapolis, 1986, , pp. 12-13 and 24-5.

⁵⁴ For a discussion see Twining, *Theories of Evidence*, pp. 21-2.

⁵⁵ Apparently since they encouraged speed and accuracy in adjudication.

⁵⁶ See Halévy, *Philosophic Radicalism*, p. 379.

⁵⁷ On the use of summary courts Bentham provided a careful catalogue of the value of existing summary institutions, including in Scotland the small-debt courts, and in England '*in civili*, the courts of requests called *courts of conscience*'. *Scotch Reform* in Bowring, v., p. 10.

means clear), the transference from the domestic environment to the legal requires the introduction of some systems at least that are not needed in the family setting.⁵⁹ Necessary information upon which decisions are based is not available to adjudicators remote from parties to a suit in the same way as it may be to the father of a family; and the attachments of benevolence and sympathy of father to family members must raise fundamental questions as to why Bentham thought the adjudication present in the family environment was comparable with that of the legal.⁶⁰ But the use of such a model certainly emphasises the extent of Bentham's anti-nomian thesis in requiring that *all* rules of procedure conventionally accepted, that is all pre-established rules of procedure, need to be removed.

Of course, this is aimed principally at exclusionary rules, and Bentham clearly allowed the requirements of utility to dictate that evidence can justifiably be excluded if the gain from its admittance is outweighed by disadvantages in terms of delay, vexation and expense subsequently brought with it.⁶¹ The allowance of exclusion in such cases does embody an 'instruction' to the judge, but can this instruction be described as a 'procedural rule' for exclusion. Presumably it cannot, since Bentham's suggestion is that the rule be established at the substantive rather than the adjectival level.⁶²

The rationale presented in *Scotch Reform* for the removal of rules, is therefore connected with Bentham's underlying political philosophy on the secondary level. The prevention of exclusion seeks the fullest possible admittance of relevant evidence with the aim of arriving at a swift, delay-free, judgement. If utility is identified in terms of wider knowledge, if knowledge is the beneficial element, then utility must be satisfied within a system of free proof where the fullest knowledge of the available

⁵⁸ Bentham also terms this the 'Domestic' system. *Scotch Reform* in Bowring, v., p. 9. Bentham also regards the 'domestic tribunal' as an important method of preventing crime. See 'Indirect Means of Preventing Crime', Bowring, i. p. 558. For a discussion see Halévy, *Philosophic Radicalism*, p. 381-2.

⁵⁹ Bentham did not think the lawyer class could be dispensed with altogether, but he certainly demanded that their role be greatly reduced. See H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Oxford, 1982, pp. 30-1.

⁶⁰ Bentham recognised this to a degree in Bowring, i. p. 558.

⁶¹ Regarding the delivery of evidence, for example, all must be presented *vivâ voce* unless 'by reason of distance or otherwise, such confrontation and mutual explanation is, *physically*, or *prudentially*, impracticable; prudentially, *i.e.* without *preponderant* mischief in the shape of delay, vexation and expense'. *Scotch Reform* in Bowring, v., p. 12, article 1.

⁶² An obvious confusion is presented by Bentham's early desire to establish a Code of Procedure. He first attached such a code to each of Constitutional, Civil, and Penal Codes, and eventually developed a single, independent Procedure Code which was applicable to the other three. This Code must be interpreted as substantive enactive legislation to avoid theoretical conflict with Bentham's rules free system of procedure.

information is allowed. On the primary level, however, in terms of the substantive law being correctly implemented, this could be achieved without any reference to utility, indeed, as the next section will show, it is not suggested that any consideration of general aggregate utility ought to be devolved upon the judge in Bentham's scheme.

C. Judicial Discretion and the Promotion of Aggregate Utility

We now turn to the apparent paradox presented by Bentham's call for the removal of judges' ability to control and construct the system of procedure, whilst, at the same time suggesting that judges be provided with substantially increased powers of discretion. The question to be answered is, how, on a utilitarian basis, will a system which provides the type of discretionary judicial freedom advocated in *Scotch Reform* really work to promote an increase in aggregate happiness? A subsequent, and by no means subordinate question, also presents itself: assuming that judges may act in the interest of general social welfare perceived in terms of aggregate utility, as instructed by substantive law, what prevents them from referring in a direct way to the principle of utility in the consideration of particular cases? In other words, why is this not a theory for the exercise of direct act utility on the part of the judge?⁶³

These questions may be answered by dividing Bentham's response into negative and positive aspects to identify those procedures which Bentham sought to prevent, and those which he sought to preserve or introduce. The interpretation of the negative aspects, that is, what the Judge ought to be prevented from doing is relatively unproblematic so long as one keeps in mind Bentham's constant assumption of the existence of an ideal body of utilitarian substantive law.⁶⁴ Only with such an assumption is it safe, from Bentham's view, to contemplate the release of the judge (and lawyers) from the restraints provided by technical rules of procedure.

Here, then, on the negative side, we can again emphasise Bentham's demands discussed above, to abolish fees, to prevent the promotion of *malâ fide* litigation and

⁶³ The argument that direct act utility is implied by Bentham's procedural theory is presented in G. Postema, 'The Principle of Utility and the Theory of Procedure', pp. 1393-1424. Postema concentrates his attention on the 'Principles of Judicial Procedure', written between 1820-7 and first published in Bowring, ii. pp. 1-188.

⁶⁴ Postema rejects this requirement for control by substantive law and believes Bentham can be read, in 'Principles of Judicial Procedure', such that adjective law is intelligible without reference to substantive law. See 'The Principle of Utility and the Theory of Procedure', p. 1400. This is not the case in *Scotch Reform* where the dominance and required existence of substantive law is assumed throughout. This apparent distinction adds weight to Halévy's suggestion that Bentham's later complications of his procedural system damaged the coherence of his theory.

the manipulation of the system, and ultimately to break the connection between lawyers and judges.⁶⁵ Such measures sought radically to control those judge-made systems weighted in favour of judges and lawyers at the expense of litigants, and these negative elements form a central component in Bentham's envisaged removal of procedural power from the judiciary. Yet of more substantial importance, especially in the identification of the exercise of legal procedure as an overtly political process, are those positive elements suggested by Bentham in his deliberations on the role of the judge. Bentham's proposals can be regarded as positive from two perspectives; from above - those concerning the place of the judiciary within the constitution, and those from below - which are directed towards individual users of the system, the litigants themselves.

i) Legislative control of the procedural process

As mentioned above, the assumption throughout *Scotch Reform* is that the rule of action provided by substantive law has a correct utilitarian foundation.⁶⁶ With judicial action opened up, by the removal of rules of procedure and the requirement that judges' procedural actions are directly referred to substantive law, a new degree of judicial responsibility becomes feasible. This by no means implies that controls from the judge are removed. The opposite is, in fact, the case. The judge is open to the full impact of substantive law and is thus controlled to a greater extent than if a technical system of procedure remained interposed between the demands of substantive law and the actions of judges. One ought not, then, to regard Bentham's proposal as the enlargement of discretion in terms of the aims of substantive law. Such discretion is only applicable to the specific sphere of adjective law. The judge must apply all relevant parts of substantive law and cannot avoid doing so by the use of technical, procedural devices; and he must publicize the grounds and reasons for such

⁶⁵ The appeals to utility provided by these practical suggestions were, of course, directed to Lord Grenville and the legislative body, who would invoke such utilitarian considerations in revising the regulations governing civil procedure. In 'The Principle of Utility and the Theory of Procedure', p. 1404, Postema makes the valid point that in 'The Rationale of Judicial Procedure' Bentham often talks as if he is addressing judges who have the authority to make procedural law. This marks a significant distinction between the two works - in *Scotch Reform* Bentham seeks Grenville's support *against* judicial corruption.

⁶⁶ Such law may be jurisprudential (i.e. common law) but by preference would be statutory. Indeed, the manuscripts argue that only once the rule of action is transferred 'into statutory law' can the utility of substantive law be a possibility. See UC xcii. 110.

decisions.⁶⁷ The judge has discretion to accept any evidence, and from any source, so long as it assists in the ascertainment of factual knowledge appropriate to fulfilling the tenor of substantive law.⁶⁸

This however, does not suppose that the primary end of the natural system of procedure is, in itself, utilitarian. If the substantive law were non-utilitarian (or utilitarian law incorrectly drafted) then this would be equally well reflected through Bentham's natural system, despite any flaws it may possess. It is important to remember that the ends of the system of procedure was to prevent both misdecision and failure of justice and success in achieving these ends could only be gauged by reference to the nature of the substantive law; it appears that Bentham's natural system would work as well with a deontological as with a utilitarian body of substantive law.

There can be no question that Bentham was promoting the extension of legislative control over judicial action. In this sense his theory can be seen as a direct assault on those conventional English notions of the separation of constitutional powers, and protection for the citizen body provided by a thoroughly independent judiciary. The role of the judiciary was to implement legislation defined by legislators, there was no other. Implementation is the key word, not interpretation. Conformity with the rule of substantive law is sought throughout; anything else amounts to judicial misdecision or failure of justice, and again the primary objective of the procedural system will not have been fulfilled.

With this perspective in mind - with the desire to enforce conformity on the part of the judge with the overriding substantive law - we see the limits placed on judicial action. In this sense it cannot be appropriate for a judge to make any direct appeal to utility when confronted with a range of circumstances not envisaged by substantive law, and to which the correct application of substantive law would produce net disutility. The judge can only use discretion in judging the best action in terms of the successful application of the substantive law, and not in terms of the best utilitarian outcome. Thus, in the establishment of proof, evidence should be accepted from any source if, and only if, it has a relevant bearing on the application of the substantive law in question. If the judge discovers flaws in the construction or tenor of the

⁶⁷ On the importance of the control gained by public explanation see UC xcii. 309.

⁶⁸ 'N.B. Reference thus made to the tenor of the law, supposes the rule of action to exist in the shape of *real*, not of *sham*, law'. See *Scotch Reform* in *Bowring, v.*, p. 21, article 11.

substantive law, then suggestions can be made that the law be amended, or rescinded. But there is no implication, in Bentham's discussion of procedure in *Scotch Reform*, that any direct appeal to utility is justified on the part of the judge. Bentham is quite clear; the judge cannot make law under the guise of employing procedure.

The rule embodied in substantive law is therefore the judges' only guide to correct procedure. The important point to note is that under the natural system the responsibility now placed on the judge to ensure court procedure accords with the aims of substantive law is much clearer than under technical procedure. The focus of responsibility is directed towards the individual judge, not deflected by the overall system.⁶⁹

To make this responsibility more pointedly effective another obvious solution presented itself to Bentham; this was 'single-seated judicature'.⁷⁰ This is conceived as a procedural system allowing a single judge to take evidence, hear witnesses, and arrive at decisions on all the relevant evidence available. A judge, that is, who refers to the guiding principles embodied in the substantive law appropriate to the case in hand, and who publishes his decisions at the conclusion of the case without reference to any other court. With the removal of formal, technical rules, which encouraged the transfer of cases from court to court, and frequently entailed evidence being heard by one judge but decision being given by another, an important screen behind which judges took refuge would be abolished.⁷¹ Decisions taken had to be the responsibility of individual judges,⁷² and no formulaic barriers ought to be interposed to break the junction of duty and interest. Procedural formulas had allowed the illicit transfer of responsibility from Judge to the system of instituted procedure in general. A tradition had been established whereby authority had become invested in the system -this authority was undermined by Bentham in his overt appeal to the lego-political authority of parliament.

An effective system of procedure requires political control in Bentham's view. Power is removed from the conventional, archaic system of procedure, and detached from both the political and economic influence of 'Judge and Co'. Judicial authority is

⁶⁹ On the importance of individual responsibility and its weakening in proportion to the multitude of judges, see UC xcii 306 in particular.

⁷⁰ *Scotch Reform* in Bowring, v., p. 16, article 7.

⁷¹ 'A Board, my Lord, is a screen... wrong is covered by it with a presumption of right'. *Scotch Reform* in Bowring, v., p. 34. Original emphasis.

⁷² 'single-seated judicature, and with it... comes... a still more important benefit; viz. individual responsibility'. *Ibid.*

brought to rest, in a quite considerable way, upon legislative authority. Indeed, with the emphasis on judges enacting the requirements of substantive law, and being disqualified from engaging in direct appeals to utility, the constitutional power of judges appears to be fundamentally reduced under Bentham's natural system.

Throughout his procedural writings Bentham is clearly interested in raising the status of the legislative authority. An important section of the *Scotch Reform* manuscript deals with what are termed in the Scottish system 'interlocutory judgments',⁷³ that is, intermediate judgments which lie before some final procedural stage of adjudication. One of the main requirements of Grenville's Bill was that such interlocutory judgments ought to be unappealable; in other words, dissatisfied suitors could not ask a higher court to re-examine the interlocutory judgement.⁷⁴ Bentham saw in this a threat not only to the supremacy of Parliament, in that the House of Lords was, and ought to remain, the highest court of appeal within the three kingdoms of England, Scotland and Ireland, but also as a threat to the continued well-being of the Union of these three kingdoms itself. The correct, the natural, system of procedure not only represented the superiority of justice over judicature,⁷⁵ but of political stability over political division. To protect the Union, and to provide security - the main political aim - the substantive law of the Union had to control the process of civil litigation.

ii) Opening of the system to public observation, recognition, certainty and understanding

One of Bentham's fundamental objections to the existing system was that it produced great uncertainty. There was no effective way of assessing, from the position of a prospective litigant, whether the substantive law would be appropriately applied in their case were they to proceed with legal action. The technical system was indeed unpredictable and inconsistent, and there were many critics who attacked it on such grounds besides Bentham;⁷⁶ but any unpredictability that really existed was

⁷³ See UC xcii. 283-303, 398-405.

⁷⁴ On the importance of Scottish judicature reform for the constitution, i.e. appeal from the Court of Session in Edinburgh to the House of Lords, see 'No appeals against interlocutors - bad', UC xcii. 289-405. On the role of the House of Lords see UC xcii. 292.

⁷⁵ The aim of judicature was to provide profit for judges and lawyers.

⁷⁶ On criticism from within the English legal profession see Twining, *Theories of Evidence*, p. 23. For another contemporary tract examining Grenville's proposals see James Ferguson's *Observations upon the proposed reform in the Administration of Civil Justice in Scotland*, Edinburgh, 1807.

compounded many times over for Bentham, specifically because members of the general public had no opportunity of gaining an understanding of the complex rules.⁷⁷

Such uncertainty was of concern since it embodied a major collateral evil faced by those contemplating using the law and is frequently mentioned in the manuscripts, often as an evil placed ahead of delay, vexation and expense.⁷⁸ Indeed, this is a good example of the instances in which the manuscripts are particularly valuable in not only providing an elucidation of the published work, but in presenting sustained considerations of important issues omitted from the material published.

The answer to general public uncertainty was publicity. Not only publicity in terms of publishing the judicial reasons for decisions,⁷⁹ but also in the wider sense of opening up the operation of the entire system to general inspection and common understanding. As has long since been established Bentham's answer was unequivocal on the course legislator's should take at this point when considering reform: 'here... the rule of utility is the rule of simplicity', that is, simplicity of common sense.⁸⁰

In line with this pursuit of simplicity Bentham believed there to be no need, in the majority of instances, for court cases to last any more than one day. On the first hearing the judge, in the presence of both parties, could consider the 'budget' of evidence,⁸¹ and arrive at a decision immediately.⁸² If either the judge or any one of the parties were not satisfied that all evidence was available then the suit could proceed to the next, more complex, and time and money consuming stage. But in the great majority of cases, Bentham suggests, sufficient evidence would be available for the judge to pronounce a final decision.⁸³

A notable feature of the natural system is this absence of any automatic procedural progression to jury hearings. Bentham was not against jury trial *per se*, as

⁷⁷ The system was unpredictable because the rules were unknown, too complex, or inconsistently applied. See UC xcii. 092-110.

⁷⁸ This is worked up in manuscripts at xcii. 110-115, where substantial discussion is provided that is not to be found in the printed work.

⁷⁹ Publicising judicial decision was a major part in process, however. See UC xcii. 110 and 308.

⁸⁰ Halévy, *Philosophic Radicalism*, p. 379. This notion of 'common sense' requires further investigation. Bentham says that 'the light of common sense' is neither impracticable nor dangerous. See *Scotch Reform* in Bowring, v., p. 11.

⁸¹ Halévy, *Philosophic Radicalism*, p. 382. See *Scotch Reform* in Bowring, v., p. 71.

⁸² *Scotch Reform* in Bowring, v., p. 15, article 5.

⁸³ There is no sense in *Scotch Reform* of Bentham's interest in reconciliation which can be found in other works on procedure. See Postema, *Bentham and the Common Law Tradition*, p. 355 n.31, and Twining, *Theories of Evidence*, p. 95.

has been suggested,⁸⁴ but wanted, rather, to reduce its use only to those occasions when it is really necessary.⁸⁵ Flexibility is sought at the outset. Individual choice is provided to the judge (to decide in favour of jury trial) and to the parties (who can force the transfer of the case to a second judicial hearing in the presence of a jury).⁸⁶

Again, the utility of such flexibility is plain to Bentham. What would be the purpose, he asks, of procedurally progressing to presentation before a jury if all available evidence had already been laid before the judge at the first hearing. All that would be provided, he suggests, ‘to parties, to witnesses, to Juries, to Judge, to everybody’, is, ‘double trouble: useless and factitious *delay, vexation, and expense*’,⁸⁷ to all except fee-fed lawyers. The ‘real use’,⁸⁸ and here he means the real utilitarian value, of a jury is when it is postponed to use after an initial hearing, in the ‘second instance’, and entered upon when ‘prudentially... practicable to more advantage, than in the 1st instance, whether in the way of saving of *delay, vexation, and expense*, or in the way of security against *misdecision*’.⁸⁹ In this light, with the suggested importation of jury trial into the Scottish system Bentham concludes, in the published ‘Letter Four’, that Grenville’s proposals were ‘not likely to abridge Delay, Vexation and Expense’.⁹⁰ It is the simple utilitarian conception of preventing unnecessary evils that underlies Bentham’s apparent disdain for jury hearings in civil cases.

D. Conclusion: The Promotion of Individual Responsibility in the Exercise of Procedural Authority

Bentham believed that the benefits of the natural system, its effectiveness in achieving the collateral ends of procedure, of minimizing the evils of uncertainty, delay, vexation and expense would be easily determined. The stress here is on a continual testing of the system. It is an obvious point perhaps, but Bentham’s method consisted

⁸⁴ e.g. Halévy, *Philosophic Radicalism*, p. 383, where Bentham’s apparent anti-jury stance has been used to accuse him of illiberalism. And Halévy goes so far as to say that ‘in Bentham it [the jury] inspired nothing but ... disdain’. See *ibid.*, p. 400.

⁸⁵ That is, when required by the complexity of the case or when desired by one or more of the parties involved.

⁸⁶ See *Scotch Reform* in Bowring, v., ‘Letter IV’, pp. 61-100, for the details of jury trial. Although it is well recognised, of course, that Bentham had substantial problems with the way in which juries were constituted, and at just this period Bentham wrote *Elements of the Art of Packing as Applied to Special Juries*, London, 1821, though written in 1808. For a discussion of this work in the contemporary context see D. Hay, ‘The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century’ in *Twelve Good Men an True*, ed. J.S. Cockburn and T.A. Green, Princeton, 1988, p. 319.

⁸⁷ *Scotch Reform* in Bowring, v., p. 71.

⁸⁸ *Ibid.*, p. 72.

⁸⁹ *Ibid.*, p. 65.

from top to bottom in the empirical gathering of information, primarily in tables,⁹¹ covering all relevant details from the number of cases embarked upon, to time taken in hearings and judgements, and the degree of movement of cases between courts in cases of appeal. Statistical comparisons between system and system, court and court and ultimately, between judge and judge, would provide the basis for a thoroughly empirical analysis and critique of the procedures developed.

Being provided with such information individual litigants could measure the progress of their own suits, or predict the course of prospective suits, and in a very practical way observe the effectiveness, or ineffectiveness, of the system of procedure in relation to their own circumstances. The aim of such knowledge clearly creates a very personal power which works directly from the fundamental principle of utility; that on the basis of self-interest tied to duty, individuals would be empowered to recognise stages in the procedural process and be qualified to assess the degree to which it achieves its prescribed goals.⁹² In a collective sense this becomes closely connected with the idea of public opinion playing a role in assuring the system's effectiveness.⁹³

We see, therefore, that Bentham's appeal to abolish all rules of procedure aims to open the procedural system to common understanding. An understanding based on wider knowledge. Knowledge to the judge in the form of greater probative and investigative power, knowledge to the suitors in a greater understanding and certainty of the processes involved. An attempt is made to provide a new transparency for the system appropriate to 'natural common sense'.⁹⁴

Bentham's edifice is imbued with the principle of utility, which not only allows for utilitarian influence from above - via legislative (assumed utilitarian) control of judges who are assigned a recognisable, individual responsibility to apply the dictates of substantive law - but is open to utilitarian control from below by providing for publicity, certainty and the influence of individuals, both in their own right as litigants in civil actions and as a part of public opinion. Utility provides the justification for the

⁹⁰ *Ibid.*, pp. 90-5.

⁹¹ The only addition to the second, 1811, edition of *Scotch Reform*, other than title page changes, was four more tables identifying complications and delays.

⁹² Ultimately Bentham provided them with the constitutional power of appeal to the Justice Minister. See *Constitutional Code*, vol. i, ed. F. Rosen and J.H. Burns, Oxford, 1983 (CW), Ch.IX §20, Arts.20-21, p. 388-9.

⁹³ Again, an indication is provided of elements later found in the *Constitutional Code* as the role of public opinion conceived as a form of tribunal is developed.

⁹⁴ 'Common sense' apparently indicating accessibility to the non-lawyer.

system, whether or not the system is used to apply utilitarian substantive law. The benefits provided by a responsible decision making process, which pursues the ends of justice, are balanced against a gathering of evidence that provokes the least quantity of suffering in the form of delay, vexation and expense.



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