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***BENTHAM'S
ECONOMICS
OF LEGISLATION***

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ABSTRACT

Bentham's pioneering contribution in the field of Law & Economics and in the economic analysis of politics has sometimes been stressed by commentators. This paper aims to highlight the economic dimension that was present in Bentham's legal and political writings. Accordingly, the paper examines the different meanings in which Bentham employed the term "economy" in his "science of legislation": "political economy", "public economy" (i.e. public finance and civil administration), "economy of punishment and reward", "economy in legal procedure". In all these fields, Bentham intended to introduce a scientific treatment which was to supersede the idea of "economy" as moral or political virtue and "wisdom of the householder", and replace it with a rigorous and self-consistent analysis based on the notions of efficiency and efficacy. This economic analysis evaluated the consequences of laws and institutions in terms of costs and benefits for the individuals concerned. Political economy, in Bentham's conception, was only one of the branches of this enlarged "economics", which was intended as a "science of the legislator". The paper also examines the structure, methodology and main analytical tools employed in Bentham's "economics of legislation". Some examples of the achievements Bentham reached in the economic analysis of corruption, legal procedure and political agenda are made in the last part of the paper.

Introduction¹

Along past decades, professional economists have shown an increasing propensity to cross the boundaries of their traditional field of inquiry. Since the origins of the "new science" of political economy (Steiner 1998a, 1998b) in the second half of the 18th century, the subject field of this science had been identified with the social reproduction of goods and services through the market or - to mention Jean-Baptiste Say's canonical partition of the subject in the second edition of his *Traité d'économie politique* (1814) - with the phenomena of production, distribution and consumption of wealth. At the beginnings of the 20th century, Elie Halévy's distinction between natural harmonisation and artificial conciliation of interests (1801-4: 25-7) furnished what seemed a definitive rationale of the incommensurability between market relationships and the sphere of legal and political regulation. However, after Lord Robbins's definition of economics as praxeology in his *Essay on the Nature and Significance of Economic Science* (1932: 16), it became increasingly clear that the economic approach could be applied to *any* social phenomenon, and above all to *any* aspect of law and politics.

Thus both heterodox economists - especially those trained in the institutionalist tradition (see Samuels 1994) - and a large number of mainstream economists (see Becker 1968; Buchanan and Tollison 1972; Posner 1986; Kirat 1999) successfully applied the tools of economics to a wide range of phenomena, including contracts, legal procedure, crime and punishment, elections and political trends, corruption, political agenda,

¹ Preliminary draft. English not revised.

constitutional rules, etc. The dominant methodology in the new branches of Law & Economics and the economics of politics has been traditional micro-economic analysis, strengthened by the contribution of game theory. Within the framework of methodological individualism, individuals negotiating goods and rights are assumed - independently of their final goals - as self-interested agents seeking to maximise their benefits and to minimise their costs in an environment characterised by scarcity, conflicting goals, and uncertainty. As always, the analysis takes the parallel pathways of positive explanation and normative evaluation: on the one hand, it answers to the question why individuals find it profitable to fix rules and establish regulatory institutions, while, on the other hand, it studies the efficiency and efficacy of alternative settings. Sometimes this approach is assumed as complementary, more often as alternative to that of legal theory, which focuses on the formal consistency and exactness of laws. It is also alternative to the typical arguments of political philosophy, which economists frequently consider as self-defeating, when judged from the point of view of instrumental rationality.

This ongoing evolution of economics provides the history of economic thought with fresh interrogations and challenges. Historians are encouraged to investigate if canonical history of economics has neglected important pioneering contributions only because they did not focus on what was traditionally ranked among the subjects of this science. Here, a wealth of attitudes are possible, ranging from mere 'precursorism' to an enlarged 'archaeological' perspective (see Foucault 1979), which seeks to highlight the historical and intellectual 'conditions of possibility' of an economic approach to law and politics. Indeed, specialists in Law & Economics and

Public Choice theory often referred to Hobbes, Hume, Bentham, and Condorcet as their forerunners.

Bentham occupies a central position in this historical revision, in that the typical 'consequentialist' and 'welfarist' features embodied in the principle of utility are recognised as the starting points of an analysis of law and politics based on the notions of efficiency and efficacy (Becker 1968; Strowel 1992). Indeed, Bentham's interpretation of human action in terms of pleasure-maximisation and pain-minimisation, with his theory of "dimensions" encompassing probability and fecundity, has attracted the attention of the economists since Jevons (1871). Of course, there is a substantive difference between Bentham's utilitarian approach and economic analysis: the former examines the whole field of legislation in the light of an ethical standard, whereas the latter rejects valuational implications. However, this is not a definitive objection, since the internal history of marginalist economics is characterised by a similar evolution from explicit utilitarian assumptions to a supposed neutrality to values based on Pareto-efficiency and the Kaldor-Hicks 'compensation principle'.

Despite this parallelism, most representations of the novelties brought into legal and political theory by Bentham's utilitarian philosophy keep unchallenged the distinction between law and politics, on the one hand, and economics, on the other hand. This paper aims to suggest that an acknowledged economic dimension did exist in Bentham's legal and political thought (see Guidi, 1997). This dimension was present either in arguments that, in the language of Bentham's times, were considered as 'economic' although not belonging to political economy, or in those political and legal arguments in which the influx of Bentham's political economy

was more evident. Since the 1770s, Bentham elaborated the ambitious project of re-examining the whole field of legislation with a critical eye. This project implied the working out of a '*science* of legislation' encompassing civil and penal law, constitutional law, political economy and finance. According to Bentham, *all* these branches should attain a scientific status, and the rational tools provided by the utilitarian philosophy could serve to this purpose. This scientific reformulation invested also the analysis of the economic implications of legislation. Consistently, and without forcing the author's intentions, the latter can be defined in modern terminology an '*economics* of legislation'.

A study of Bentham's economic analysis of legal and political phenomena would require a lengthy examination of all the branches of the science of legislation to which Bentham devoted his attention during his life. In this paper, I can only attempt a preliminary review of the issues involved in this subject. Section 1 deals with the various meanings of the term 'economy' in Bentham's legal and political philosophy, and with the problem of the scientific transformation of 'economic art'. Section 2 will examine some tools Bentham actually employed in his '*economics* of legislation'. The implications of this study for an improved understanding of Bentham's thought are left to the concluding paragraphs.

1. The scope of economics in Bentham's science of legislation

When reading Bentham's legal writings with the eyes of an economist, one can easily notice, besides the strong resemblance between the analytical tools he employed and those of modern economics, that Bentham himself considered many of the topics he examined as "economic". In his view, a notion of "economy" could indifferently be applied to matters of finance and public administration or to the management of pains and rewards. This notion partially differed from that Bentham himself reserved to *political economy*, intended as a branch of the science of legislation concerned with the 'subordinate ends' of abundance and subsistence². Influenced by Condillac - and through him by the French 'sect' of *économistes* - and more substantially by the reading of Adam Smith's *Wealth of Nations*, Bentham made up his mind during the 1780s to add two distinct sections to his *Pannomion*, respectively devoted to "Political economy" and "Finance"³. In Bentham's view, political economy was more a science than an art of the

² The other 'subordinate ends' of legislation were security and equality. Of course, they were subordinate vis-à-vis the 'chief' end, i. e. the "Greatest Happiness Principle". See U. C. XXXIII, 102; *Principes du code civil*, in Bentham 1820-30: I, 55-86.

³ These sections were part of the *Projet d'un corps de loi complet à l'usage d'un pays quelconque*, to which Bentham worked from 1782 to at least 1787. The *Projet*, written in French, was addressed to the enlightened monarchs of Europe as a guideline to the reform of legislation. The material corresponding to this work is partially conserved in University College, *Bentham's Papers* (U.C.), boxes XXXIII, XCIX. It was largely employed by Etienne Dumont to compose the *Traité de législation civile et pénale* (1802), and *Théorie des peines et des récompenses* (1811). See Hume 1981: 89-90. The 'marginal contentings' of the sections devoted to "Economie" and "Finance" are in U.C. XCIX, 149, 190-91. The essential of them was utilised by Dumont to compose chapters 11 and 13, book IV, of volume II of *Théorie des peines et des récompenses* (Bentham 1829-30: II, 217-9; 225-30). The rest of book IV was drawn from other manuscripts of the years 1795-1801, written in English and published by Stark as *Manual of Political Economy* (Bentham 1952-54: I, 219-73), and *Institute of Political Economy* (*Ibid.*: III, 303-80).

legislator, since its message was that, in questions concerning "industry" - i. e. "agriculture, commerce and manufactures" - "there is more to learn than to do" (Bentham 1829-30: II, 200).

These definitions reveal that Bentham was perfectly aware of the scientific status conferred to political economy by the works of the Physiocrats and Smith (Steiner 1998b). Moreover, he clearly anticipated Jean-Baptiste Say in consciously displacing the objective of this science from commerce to industry and in considering political economy as a science that could be useful both to the entrepreneur ("inventive industrious") and to the sovereign or legislator (U.C., XCIX 149, 162). As the "Introduction" to *Manual of Political Economy* emphasises (Bentham 1952-54: I, 223-5), Bentham thought that Smith had made a substantial progress in transforming political economy into an accomplished science. However, much was still to do for the scientific systematisation of that part of this science that would later be known as 'applied economics', a field in which confusion and partisan views still dominated⁴.

1.1. Political and public economy

⁴ Bentham 1952-54: I, 223 note: "Be the doctrine true or false, this concise sketch will serve at any rate to give a view of the state of the question upon all the topics of political economy that can come under the consideration of the legislature. To this doctrine, the habitual practice of the legislature is in many, I may say in most points, in diametrical opposition".

This specificity of Bentham's contribution to the building of the 'new science' recalls by way of contrast the meaning of political economy that was widespread before the 'scientific revolution' invested this field of thought. Political economy was considered as part of the wisdom of the sovereign in governing a political community. Independently of the theories of the origins of political institutions that different schools of thought embraced, the sovereign was more or less explicitly considered a 'father' who had the moral duty to ensure the wellbeing, the security and the ethical and religious cohesion of the community that was under his (or her) responsibility. In what was once called the 'age of mercantilism', the promotion and supervision of agriculture and, with increasing emphasis, of trade had been considered as objects of the sovereign's care. The latter ought to have in view to the improvement of the subjects' material and spiritual welfare and of the State power (see Raeff 1983; Tribe 1988; Perrot 1992). The qualification of 'political' appended to the word 'economy' indicated that the object to which the economic virtues of the sovereign ought to be applied was the political community. Indeed, as shown by the content of the first work in which the term 'political economy' appeared - Antoine de Monchrestien's *Traicté de l'æconomie politique* (1615) - the list of items in which the sovereign's economic wisdom was to be displayed was originally larger, and not necessarily inclusive of the regulation of internal and external markets. The sovereign ought to behave as a wise householder of his (or her) community in any branch of political and administrative activity, in any decision concerning the defence of the country, the security of the subjects, the organisation of the State, the expenses to meet and the ways of financing them (see Perrot 1992: 64-6). This characterisation of the

sovereign's tasks and prescribed attitudes was in its turn purposely modelled on a more ancient notion of 'economy' as the art of the aristocratic householder in managing his estate and all the people that were under his responsibility - members of the family as well as servants. This art, that the Aristotle considered one of the branches of practical philosophy (Frigo 1985: 20)⁵, had known a revival in modern Europe with the so-called *Hausväterliteratur* or *Economica* (Brunner 1968; Frigo 1985; 1995), before undergoing a rapid decline by the end of the 17th century, in correspondence with the rise of nation States and commercial society.

In the same way as the political economy of the sovereign had replaced the economy of the aristocratic landlord, the 'new science' of political economy, once appeared, had monopolised the field of 'formally rational' economic knowledge, confining other attitudes in the realm of mere art, when not of common-sense language. This "state of the question" was clearly unsatisfactory from Bentham's viewpoint. We have already seen that he considered the science of political economy dangerously unaccomplished so far as it suffered to leave the area of economic policy in the hands of those who entertained partisan and unscientific views. Consistently with his general criticism of natural rights, Bentham went so far as to charge with unscientific attitudes even those who grounded *laissez-faire* on the "fabulous" notion of natural law or natural order⁶. The fact was that Bentham had in mind a more ambitious transformation of the whole art

⁵ "Economy" in this meaning had been canonised by Xenophon's *Oikonomikos* and by the pseudo-Aristotelian treatise traded as *Oikonomikè*.

⁶ See his *Defence of a Maximum*, in Bentham, 1952-54: III, 257-58: "I have not, nor ever shall have, any horror, sentimental or anarchical, of the hand of government. I leave it to Adam Smith, and the champions of the rights of man [...] to talk of invasions of

of legislator into an accomplished scientific discourse, an "art-and-science" based on utilitarian standards of analysis and evaluation. The critical premises of this effort he had laid down in his *Comment* of Blackstone's *Commentaries on the Laws of England*, and in the *Fragment on Government* (1776), and the *Project* was intended as the first attempt to give a positive systematisation to the 'new' science of legislation. Naturally enough, this critical examination and scientific transformation involved also those parts of the (political) economy 'of the sovereign' that had been dropped out by the science of political economy.

In the latter case, the *pars destruens* of Bentham's attempt can be traced back to various tracts on legal procedure, the first of which was *A Protest against Law Taxes* (1793), and to the twin pamphlets entitled *Defence of Economy against Burke*, and *Defence of Economy against Rose*. Written in 1810 and published for the first time in 1817 in *The Pamphleteer*, the latter were then included in a book significantly entitled *Official Aptitude Maximized, Expense Minimized* (1830). The *pars construens* is virtually dispersed in all Bentham's writings on legislation, although in some of them the work of reconstruction is more systematic. These are the materials on punishment and reward of the 1780s published by Dumont as *Théorie des peines et des récompenses* (1811)⁷, and the

natural liberty, and to give as a special argument against this or that law, an argument the effect of which would be to put a negative upon all laws".

⁷ The material on reward assembled by Dumont was made up of two distinct sets of manuscripts. A first set was written in English in the years 1778-82, and corresponded to a work probably entitled *Essay on Reward*. See U.C. LXXXVII, 147 (U.C. XXVII, 41-43, headed "Prefat (Reward)" contains the introduction to this work). A second set, in French, corresponded to the section "Récompenses" of the *Projet* mentioned above, and probably written between 1786 and 1787. Dumont's *Théorie des récompenses* was retranslated into English by Richard Smith and published in 1825 (*Rationale of Reward*). This edition followed the order of chapters of Dumont's, although Smith's

works on prison reform and pauper management written between 1778 (*A View of the Hard Labour Bill*) and 1802 (the various additions to the *Panopticon Letters*, originally written in 1786 and published in 1791, and *Outline of Pauper Management Improved*, 1797-98)⁸. To them one should add the innovative *Essay on Political Tactics* (1791) Bentham wrote in 1789 for the French National Assembly, although unsuccessfully. But the final outcome of Bentham's reflections on the 'scientific economy' of legislation is represented by a central topic of Bentham's political reflection after his 'conversion' to representative democracy: the discussion of aptitude and security against misrule in *Constitutional Code* (Bentham 1983) and in its preparatory materials (Bentham 1989, 1990). Among the latter, the above-mentioned *Official Aptitude Maximized, Expense Minimized* (Bentham 1993) is outstanding.

The speech Edmund Burke pronounced in Parliament on 11th February 1780, on presenting his plan for the "Economical Reformation of the Civil and Other Establishment", is a good term of comparison to introduce the discussion on Bentham's scientific reformation of what Burke himself called "Public Economy" (Burke 1780: 285)⁹. The descriptive "public" meant that the field of application of "economy" was the "civil establishment" in all its branches, jurisdictions, estates, expenses and sources of finance. Since the

access to the original manuscripts is possibly responsible for the frequent additions and variants in the text. Bentham's manuscripts testify that he took a certain interest in Dumont's editorial work, suggesting the order of chapters and adding some corrections that mirrored his changes of political attitudes at the time the book was being published (see U. C. CXLII, 14-17). Conversely, both the manuscripts and the "Remarks by Mr. Bentham" published at the beginning of the *Rationale* (Bentham, 1838-43: II, 191-2) reveal that the support given to Smith was more scanty.

⁸ Most of this dating is based on Jackson.

⁹ This speech was discussed by Bentham himself in the above mentioned *Defence of Economy against Burke*.

goal of the "Plan" was reform and "retrenchment" (*Ibid.*: 286), the more frequent synonyms of "economy" in the text were "parsimony" (*Ibid.*: 285) and "frugality" (*Ibid.*: 292), associated with the verb "[to] economize" (*Ibid.*: 292), while the natural antonyms were "prodigality" (*Ibid.*: 285) and "waste". However, these terms were far from exhausting the meanings of "economy" in Burke's discourse. Economy was not only a matter of reduction of expenses and unprofitable offices: it also concerned the ordinary administration of public establishments. Here, the analogy with the 'domestic' economy of the landlord was paradigmatic. The aim of the sovereign must be that of "regulating this household" (*Ibid.*: 292) with wisdom and "providence" (*Ibid.*: 286), distributing offices and responsibilities with a view to the welfare of the subjects. And as in the case of private estates, frugality and economy differed from avarice, so the sovereign must know that "there are many things in the constitution of establishments, which appear of little value on the first view, which in a secondary and oblique manner produce very material advantages" (*Ibid.*: 295).

However, the analogy with 'domestic' economy stopped at this point. It is known that the real goal of Burke's proposal was not wise and 'economic' administration in itself, but the reduction of the "corrupt influence" (*Ibid.*: 285) of the crown over Members of Parliament, through such instruments as the civil pension list and sinecures for royal favourites. Indeed, Burke's "Plan" differed from other attempts in this direction by its more systematic posture. According to him, "[a]n economical constitution is a necessary basis for an economical administration" (*Ibid.*: 289), and this required that the answer to the question "whether we ought to economize by *detail* of by

principle" (*Ibid.*: 292)¹⁰ should be in favour of the latter alternative. A list of seven general principles of retrenchment (*Ibid.*: 288-9) introduced the suggestion to gradually suppress all jurisdictions and "public estates" that "furnish more matter of expense, more temptation to oppression, or more means and instruments of corrupt influence, than advantage to justice or political administration" (*Ibid.*: 288). Nevertheless, in the light of these ends and of the people to which it was addressed (in an age that preceded that of "the economist in Parliament")¹¹, Burke's speech abounded with recommendations of political prudence, and moral considerations concerning corrupt officials and supervisors¹². For these reasons, and compared with Bentham's approach, this speech still belonged to the *genre* of pre-scientific discourse on 'public' economy; and this notwithstanding

¹⁰ A principle Bentham appreciated was the following (Burke 1780: 288): "That it is proper to establish an invariable order in all payments, which will prevent partiality, which will give preference to services, not according to the importunity of the demandant, but the rank and order of their utility and justice". This principle was applied in Burke's Economy Bill to the rule intimating that the treasurers and ministers could pay themselves only after they had paid all the creditors of the State. According to Bentham this law had the advantage of being "self-executing". "[Elle] possède en effet la qualité d'une peine attachée à tout retard dans ces paiements: peine qui commence avec le délit, qui dure autant que lui, qui s'inflige sans procédure, en un mot, qui n'a pas besoin de personnes tierces pour l'ordonner" (*Théorie des Récompenses*, in Bentham 1829-30: II, 136. See *Rationale of Reward*, in Bentham 1838-43: II, 199: "The clause which forbids the ministers and treasurers to pay themselves till all other persons have been paid, possesses in effect the properties of a punishment annexed to any retardation of payments - a punishment which commences with the offence, which lasts as long as the offence, which is inflicted without need of procedure; in a word, a punishment, the imposition of which does not require the intervention of any third person").

¹¹ See Gordon 1976; Fetter 1980.

¹² See Burke 1780: 285-6: "Indeed, the whole class of the severe and restrictive virtues are at a market almost too high for humanity. What is worse, there are very few of those virtues which are not capable of being imitated, and even outdone in many of their most striking effects, by the worst of vices. Malignity and envy will carve much

some very modern hints of analysis on the behaviour of agents in the 'political market'¹³.

In the *Projet* material, the parts that more explicitly deal with public economy are those devoted to finance and reward. Even when working to the *Constitutional Code*, Bentham still considered his book on reward as the text on "official economy, and official education", in which "alone will be found discussions, explanations, and reasonings at length", whereas "in the new one [i. e. *Official Aptitude Maximized, Expense Minimized* and beyond it the *Code* itself] [...] little else than results" (Bentham 1838-43: II, 191). Although the size of this paper makes it impossible to account for all the import of the 'revolution' Bentham announced in this text, some general remarks and some examples might suffice to give an idea of the novelties of his approach.

The first step of Bentham's scientific restatement of public economy consisted in separating the matter of this field of knowledge from other moral, legal and political topics. This was obtained by identifying a general category under which systematic analysis could be brought on: that of "reward", or "reward and salaries", as the titles of some of the manuscripts on the subject seem to suggest¹⁴. Bentham was conscious that this choice engendered a new branch of the legislative science, to which even the more

more deeply, and finish much more sharply, in the work of retrenchment, than frugality and providence".

¹³ See Burke 1780: 294, where, combating the gratuity of public service, Burke clearly anticipates the notion of "temporal inconsistency": "And, after all, when an ambitious man had run down his competitors by a fallacious show of disinterestedness, and fixed himself in power by that means, what security is there that he would not change his course, and claim as an indemnity ten times more than he has given up?".

¹⁴ See the tables of contents of 1809-11 in U.C. CXLII, 14-17, where the text to which Dumont was working at that time is headed "Traité des Récompenses. Rationale of the management of Rewards and Salaries".

enlightened political and legal thinkers of the 18th century had paid only occasional attention¹⁵. Thus, after a general analysis of the uses of the "matter of reward" and of the rules for its employment (book I), the second book was devoted to salaries and public management, and a third book dealt with the encouragement of inventive industry and the diffusion

¹⁵ Dumont's "Observations préliminaires" to *Théorie des Récompenses* mention the only work that had preceded Bentham's in a specific overview of the subject, Luigi Dragonetti's (erroneously mentioned as Draghonetti) *Delle Virtù e de' Premj* (Naples 1765), a work that since its title was intended as a complement to Cesare Beccaria's *Dei delitti e delle pene*. The book was translated into French in 1767 (*Traité des Vertus et des Récompenses*, J. Gravier, Paris), and into English two years later (*A Treatise of Virtues and Rewards*, London 1769). In fact, this pioneering work was far from being systematic and independent of moral and political interpolations. See Di Battista 1990; Facchi 1994. It is not clear if Bentham had read this work at the time he wrote the manuscripts on Reward. The only reference I have found in the manuscripts sounds quite mysterious, and up to now I have not been able to identify the work to which Bentham is alluding. See U. C. XXVII, 41-43, headed "Prefat (Reward), c. 1778": "Germany has produced within this year or two a book entitled on Virtues and Reward". I suspect that Bentham was referring to Dragonetti's work, misinterpreting the national origin of its writer. Besides this book, Dumont mentions the short chapter Montesquieu devoted to this subject in his *Esprit des lois* (V.xviii. *Des récompenses que le souverain donne*), and the "rewarding system" outlined by Rousseau in his *Considérations sur la Pologne*. Bentham's manuscripts are more generous with references, although the general conclusion is that nobody before him had recognised the importance of the subject of reward. U. C. XXVII, 41 mentions Montesquieu, Beccaria (for some sparse hints inserted in his book on punishment - see Beccaria 1764: xxxvii, xlv - that Bentham himself discusses in *Théorie des Récompenses*, I.xiii and xiv), and Pufendorf, who, unlike Grotius, had at least acknowledged the topic. CLXII, 20-23, which is part of the set of manuscripts on reward written in English between 1778 and 1780, discusses in details Montesquieu's doctrine of honour, while CXLII, 151 mentions Locke, Pufendorf, and Blackstone, "qui cependant approche le plus près de la vraie raison, semble plaindre les gouvernements d'à présent, que leur pauvreté empêche de se servir exclusivement de cette douce matière" (the French and orthography are Bentham's). Another author discussed in XCIX, 149, who was certainly examined by Bentham in introducing the issues of the sale of offices (*Théorie des Récompenses*, II.ix) and of trust vs. contract management (II.xi), was Condillac. It should also be noted that one of the followers of Bentham on this subject was the Italian economist and statistician Melchiorre Gioia, who published in 1818 a bulky treatise entitled *Del Merito e delle Ricompense*.

of useful knowledge (the fourth book on political economy, as explained above, was added in a second time).

A second step, by far more obvious for Bentham, was that of finding a general principle for the critical examination of this subject, the "greatest happiness principle". This of course implied that an ethical element was introduced in the discussion. Bentham thought this step inevitable, since the theory of reward was in the last resort of a normative kind. However, the utilitarian ethics, with its 'consequentialist' and 'welfarist' standards of evaluation, had the advantage of allowing an analysis of the internal functioning of the remuneratory mechanisms that left aside considerations concerning virtues and vices, or the political constitution of governments. The route was open for an analysis of the issues at stake that concentrated on the efficiency and efficacy of offices, encouragements and expenses *vis-à-vis* the purposes for which they were intended. Some subsidiary rules could help the scientist of legislation in examining these questions. One of them was a 'test' that consisted in comparing the benefit of expenditure with the cost or "burthen" of the worst tax imposed. If the well being of the community was better promoted by the suppression of this tax, the expense was superfluous (*Théorie des Récompenses*, in Bentham 1829-30: II, 139)¹⁶. Other "rules of proportion" based on the balance of costs and benefits were suggested in Ch. I.x¹⁷.

¹⁶ Bentham suggests a similar test in matters of taxation. See *A Protest against Law Taxes*, in Bentham 1838-43: II, 573: "he who reprobates a tax ought to have a better in his hand".

¹⁷ It should be observed that these criteria do not necessary displaced the traditional assumptions of 'domestic' and 'political' economy, when they were consistent with the rules of efficiency. This is the case of the notion of 'economy' as a *via media* between prodigality and avarice. See for example *Théorie des récompenses*, in Bentham 1829-30, II: 140: "C'est ainsi que l'économie peut faire le procès à la libéralité. Mais

A third and final step - that was common to other parts of Bentham's science of legislation, and notably his theory of punishment - consisted in assuming that ordinary people, with a common degree of prudence, react to encouragements and prohibitions evaluating their individual costs and benefits and the opportunity cost of evading them. Bentham went so far as to prefigure a notion of 'shadow price', affirming that pleasures and pains deriving from sources that are not exchangeable with money can be compared, at an individual level, with those for which people reveal their 'disposition to pay' in the marketplace (see Baumgardt 1952: 560)¹⁸. This implied that the efficacy of reward and punishment depended *caeteris paribus* on the comparative profits of the alternative choices available to the

l'économie se tromperait en n'embrassant dans son calcul qu'un instant de durée et qu'un fait individuel". There is no exact translation of this passage in the English version. However it is remarkable that, in the corresponding passage, Richard Smith omits the term 'economy'. See *Rationale of Reward*, in Bentham 1838-43: II, 203. The quoted passage clearly shows that the notion that allows the retranslating of this rule in utilitarian terms is that of 'fecundity', one of the 'dimensions' of the felicific calculus.

¹⁸ The manuscripts transcribed by Baumgardt are U. C. XXVII, 29-40. Douglas Long (1995) has demonstrated that they belong to an early unpublished work on "Critical Jurisprudence". See also *Rationale of Judicial Evidence*, in Bentham 1838-43: VII, 567-9, in chapter X.ii "Of interest in general, considered as a ground of untrustworthiness in testimony". Here Bentham explains that two kinds of interest can be more easily measured than others: "pecuniary interest, and the aversion to labour" (*Ibid.*: 568). However, the latter is too variable according to different persons. So only money is a good measure of individual interest. Other types of interest can be compared to pecuniary interest "by means of the principle of commercial or commutative exchange" (*Ibid.*). The intensity of the pleasure of "honour or power" can be measured in monetary terms when an office is sold through auction (Bentham was favourable to venality of charges. See Guidi 1997). The desire of revenge has a measure in the expenses of legal proceedings: "Here, then, not indeed the exact force of that interest, but the minimum of it, is given, and expressed in money" (*Ibid.*: 569). Lastly, an individual who aims to cultivate his interest in astronomy must buy a telescope, and another who is passionate of aesthetic must buy "Macpherson's Ossian, or Thomson's Seasons, or Burke on the sublime and Beautiful" (*Ibid.*: 568). So, the price of these objects can be considered as a 'proxy' for the intensity of their interest in those subjects.

individuals for which these were intended. Reward was superfluous where "natural" incentives were provided either by the market or by public opinion (*Théorie des Récompenses*, I.ix, in Bentham 1829-30: II, 147), while in other cases it could even become "obnoxious", encouraging initiatives that were opposed to those aimed at by the legislator (*Ibid.* I.viii, pp. 144-45). This was the case with fixed salaries that Bentham examined at length in Book II of *Traité des récompenses*. Adam Smith had already intimated in Book V of *Wealth of Nations* that the best remuneration was that proportioned to the work accomplished (Smith 1776: V.i.b, f; see Guidi 1999). Bentham's analysis of the motives of action confirmed this conclusion, stating that the most powerful motive of effort and emulation was the expectation of future pleasures, combined with the threat of punishment (dismissal, fines, lower salaries) in case of inefficient performance (see Guidi, 1997). This led Bentham to focus on the problem "of the union of interest with duty, and of self-executing laws" (as the title of Ch. I.iv of *Théorie des récompenses* sounds). Badly arranged laws could instigate to corrupted behaviour even persons of ordinary "self-regarding prudence"¹⁹. While an heroic sense of duty and civic virtue should be considered rare both for moral reasons²⁰ and because - as in the case of purely disinterested inventors - it would require the support of personal

¹⁹ See also Bentham 1995: 34. Self-interest is "consistent with the dictates of human prudence", because in its absence "it would, on consideration, be found that the species could not, for any length of time, continue in existence".

²⁰ See *Théorie des Récompenses*, in Bentham 1829-30: II, 144: "Pour lui [i. e. to temptations] résister, il faudrait se singulariser, se montrer meilleur que les autres, faire la satire de ses collègues ou de ses devanciers, et avoir le courage de mettre sa probité en spectacle. Cette magnanimité n'est pas sans exemple: mais ce n'est pas sur les prodiges qu'il faut compter".

"fortune" (*Manual of Political Economy*, in Bentham 1952-54: I, 262)²¹, it was equally unnecessary to postulate a special 'propensity to crime' in order to explain corruption in public affairs:

"il n'est pas besoin de supposer dans les hommes un degré de corruption extraordinaire. La prudence et la probité commune suffisent pour résister aux tentations qui ont le caractère du délit, et se refuser à tout ce qui blesse l'honneur. Mais la prudence et la probité commune ne résistent point à à un intérêt qui agit avec une force continue, et dont les suggestions ne sont combattues ni

²¹ The distance between these considerations and the 'neo-Machiavellian' paradigm (Pocock 1975) is striking. Bentham's social ideal was one in which moral and political probity and independence was more the result of industry and emulation than of patrimony and leisure. In this he followed Smith, who thought that the success of people of the inferior and middling ranks "almost always depends upon the favour and good opinion of their neighbours and equals; and without a tolerably regular conduct these can very seldom be obtained. The good old proverb, therefore, That honesty is the best policy, holds, in such situations, almost always perfectly true" (Smith 1790: 63). Moreover, it is not necessary to wait for Bentham's 'conversion' to representative democracy to find in his writings a strong aversion towards aristocracy and landed property. See, e. g., *Théorie des Récompenses*, in Bentham 1829-30: II, 138: "Heureux Américains, heureux à tant de titres, si, pour avoir le bonheur, il suffisait de posséder tout ce qui le constitue! [...] Respectez la simplicité de vos mœurs; gardez-vous d'admettre jamais une noblesse héréditaire: le patrimoine du mérite deviendrait bientôt celui de la naissance. Donnez des gratification, élevez des statues, conférez des titres, mais que ces distinctions soient personnelles; conservez toute la force, toute la pureté de l'honneur; n'aliénez jamais ce fonds précieux de l'état en faveur d'une classe orgueilleuse qui ne tarderait pas à s'en servir contre vous" (R. Smith's translation of this passage is more reticent. See *Rationale of Reward*, in Bentham 1838-43: II, 201: "Fortunate Americans! fortunate on so many accounts, if to possess happiness, it were sufficient to possess everything by which it is constituted [...]! Preserve it for ever: bestow rewards, erect statues, confer event titles, so that they be personal alone; but never blind the crown of merit upon the brow of sloth"). See also *Manual of Political Economy*, in Bentham 1952-54: I, 252, where Bentham affirms that the typical "blindness" and "folly" of "statesmen" is "the property of country gentlemen and their blind guides". In this too Smith, who attributed to the stupidity of landlords the acceptance of the «mercantile system», had preceded him. See Smith, 1776: 462.

par la crainte des lois, ni par celle du blâme public" (Bentham 1829-30: II, 144)²².

However, Bentham was convinced that laws could be arranged in a way to check corruption. His analysis of reward indicated that the best of all laws was that which combined individual interest with the official duty attached to public functions²³. The kind of "political mechanism" (*Ibid.*: 136. See Bentham 1838-43: II, 200) was no more efficacious than economic, in that it saved the transaction costs of inspection and procedure. There is no need to stress the importance of this piece of analysis, which clearly foreshadowed all the elements Bentham developed in his later reflections on "sinister interest" and on the ways to ensure the "moral aptitude" of public functionaries. It is significant that Bentham exposed the first significant elements of this new conception in a *Defence of Economy*, in which he discussed the speech Burke had pronounced thirty years earlier²⁴.

²² See *Rationale of Reward*, in Bentham 1838-43: II, 208: "it is not necessary to ascribe to men in general an extraordinary proclivity towards corruption: ordinary prudence and probity are sufficient to enable a man to abstain from whatever is reputed dishonourable; but it requires somewhat more than ordinary honesty and prudence to be proof against the seductions of an interest that acts with continual energy, and whose temptations are not opposed either by the fear of legal punishment, or the condemnation of public opinion".

²³ These laws corresponded to the following rules: "1° que la peine résulte immédiatement de la contravention, sans procédure particulière; 2° que la loi substitue à un certain délit un autre délit plus facile à constater, et punit plus sévèrement que le premier" (*Théorie des récompenses*, in Bentham, 1829-30: II, 136. See *Rationale of Reward*, in Bentham 1838-43: II, 199: "When it is said [...] that the law executes itself, it is [...] meant [...] that its provisions are so arranged that punishment immediately follows its violation, unaided by any form of procedure; that to one offence, another more easily susceptible of proof, ore more severely punished, is substituted").

²⁴ An analysis of the continuities and discontinuities between Bentham's *Théorie des récompenses*, and the theory of aptitude developed in the *Constitutional Code* would be necessary at this point. Unfortunately I must postpone it to another occasion. It

1.2. Economy as to other branches of the legislative science

The analysis of reward has revealed that there are obvious connections between public economy and the other branches of Bentham's science of legislation. No surprisingly a chapter of the work on reward (I.iii) was devoted to "reward and punishment combined". In fact, according to Bentham, as there were "reasons for husbanding" rewards (I.v), there must be equal grounds for applying economic criteria to the choice of punishments. On this ground too, Bentham was conscious of the 'revolution' he was intentionally importing in the language of penal law, no more than of the distance between his approach and common language. In introducing chapter I.iv of *Théorie des peines légales*²⁵, devoted to the "expense of punishment", Dumont formulated Bentham's thought in the following terms:

"Dépense des peines. Cette expression, qui n'appartient pas encore au langage commun, sera d'abord accusée de singularité et de recherche; cependant, elle a été choisie avec réflexion, comme la seule propre à rendre l'idée qu'on veut donner, sans renfermer un jugement anticipé d'approbation ou de désapprobation. Le mal produit par les peines est une dépense que fait l'état en vue d'un profit. Ce profit, c'est la prévention des crimes. Dans cette opération, tout doit être calcul de gain et de perte; et quand on évalue le gain, il faut soustraire la perte: d'où il résulte évidemment que diminuer la dépense ou augmenter le profit, c'est

should however be observed that *Théorie* is already a 'spurious' work, in that it is based on early manuscripts, but was published under Bentham's superintendence in 1811 (see above, note 3).

²⁵ This was the first part of *Théorie des peines et des récompenses*. This part too was based on different bundles of early manuscripts. It was retranslated in English as *Rationale of Punishment*, as part II of *Principles of Penal Law*. See Bentham 1838-43: I, 365 and following.

également tendre à obtenir une balance favorable" (Bentham 1829-30: II, 5)²⁶.

This approach to the subject - which attracted Gary Becker's attention in his famous article on "Crime and Punishment: an Economic Approach" (1968) - involved an analysis of the costs and benefits of punishment in terms both of psychological consequences on individuals (criminals, victims, and the society at large) and of the expense made by governments in order to prevent crimes and keep up penal establishments. The *Panopticon* was a model prison in the latter sense, since one of its goals was to reduce to a minimum its costs for the public (Bentham 1838-43: IV, 47-9, 121-5). It would be interesting to follow Bentham in his analysis of the calculations made by criminals in order to evaluate the comparative profits of violating the law and the amount and probability of punishment (Bentham 1829-30: II, 4) Equally interesting would be his weighting the pain of privation suffered by the victims with the pleasure of gain enjoyed by criminals - a balance which always turned in favour of the victims, since an "axiom of mental pathology" established that "[s]um for sum, and man for man, the suffering of him who incurs a loss is always greater than the enjoyment of him who makes a gain" (Bentham 1952-54: I, 239). Still more

²⁶ See Bentham 1838-43: I, 398: "*Expense of punishment*. This expression, which has not yet been introduced into common use, may at first sight be accused of singularity and pedantry. It has, however, been chosen upon reflection, as the only one which conveys the desired idea, without conveying at the same time an anticipated judgement of approbation and disapprobation. The pain produced by punishments, is as it were a capital hazarded in expectation of profit. This profit is the prevention of crimes. In this operation, every thing ought to be taken into the calculation of profit and loss; and when we estimate the profit, we must subtract the loss, from which it evidently results, that the diminution of the expense, or the increase of the profit, equally tend to the production of a favourable balance". In the English version, the chapter is II.v, "Expense of punishment"

interesting would be Bentham's analysis of the "evils of second and third order" (i. e. "danger" and "alarm"), which measure the mischievous "fecundity" of crimes for the security of society (Bentham 1829-30: I, 120-30; II, 3). But more important for my present purposes is that Bentham himself intended these calculations as an application of an economic methodology to criminal law:

"L'expression de *dépense* - Dumont continued -, une fois admise, amène naturellement celle d'*économie*. On parle ordinairement de la *douceur* ou de la *rigueur* des peines. Ces deux termes portent avec eux un préjugé de faveur ou de défaveur, qui peut nuire à l'impartialité de l'examen. Dire une *peine douce*, c'est associer des idées contradictoires; dire une *peine économique*, c'est emprunter la langue du calcul et de la raison.

Nous dirons donc d'une peine qu'elle est *économique*, lorsqu'elle produit l'effet désiré avec le moindre emploi possible de souffrance; nous dirons qu'elle est trop *dispendieuse*, quand elle produit un mal plus qu'équivalent au bien, ou quand on pourrait obtenir le même bien au prix d'une peine inférieure. C'est un acte de prodigalité" (Bentham 1829-30, II, 5)²⁷.

This passage conveys two parallel messages. First, penal law would gain in certainty and efficiency by applying the economic language to the choice and measurement of punishment, instead of other more vague 'humanitarian' criteria. Second, and more important, the economic language

²⁷ See Bentham 1838-43: I, 398: "The term *expense*, once admitted, naturally introduces that of *economy* or *frugality*. The mildness of the rigour of punishments is commonly spoken of: these terms include a prejudice in the one case of favour, in the other of disfavour, which prevents impartiality in their examination. But to say that a punishment is economic, is to use the language of reason and calculation.

We should say then, that a punishment is *economic*, when the desired effect is produced by the employment of the least possible suffering. We should say that it is too *expensive*, when it produces more evil than good; or when it is possible to obtain the same good by means of a less punishment".

itself must undergo a radical transformation. Bentham was conscious that the traditional common-sense ideal of 'economy' as husbanding - a wise and prudent selection of the means, which must avoid the extremes of stolid avarice and wasteful prodigality - could be applied, and was actually applied to any sphere of human choice. Yet, when employed in legislation, this language still lacked determinacy. The economic paradigm that was necessary to the science of legislation should therefore be grounded on exact terminology, calculation and rational criteria of analysis and evaluation²⁸. Once again psychological hedonism and utilitarian ethics were the instruments Bentham offered for this 'scientific revolution', which eventually brought to a mature 'economics of crime and punishment'²⁹.

The same scheme of reasoning could be applied to other fields of the science of legislation. One example I will leave aside in this paper was "civil law", especially for the aspects relative to distributive justice (see Postema 1982; Kelly 1990). Here, as more than one commentator has stressed (see Parekh 1970), the "axiom of mental pathology" quoted above was an argument in favour of the security of property and expectations, while another "axiom", which amounted to a modern formulation of decreasing marginal utility, was employed as a *caeteris paribus* argument in

²⁸ The expressions employed by Dumont reveal that the model of scientific treatment to which Bentham's economics tends is that of Condillac's "langue des calculs". See Condillac 1798. See also the prefatory note entitled "Objet de cet ouvrage" in Condillac 1776: 242.

²⁹ I suspect that Bentham's criticism of the notion of 'sweet punishment' in the passage quoted above was also addressed against Beccaria's theory of punishment. Although Bentham was ready to acknowledge Beccaria's pioneering contribution in this field, especially for his ideas concerning the proportion between crimes and punishments, he thought that a further step in the scientific transformation of criminal law should be based on the adoption of a rigorous economic methodology. See *Théorie des peines légales*, in Bentham 1829-30: II, 13-14 note.

favour of equality (see *Principes du code civil*, in Bentham 1829-30: I, 60-1).

Another case, in which the connections with other parts of Bentham's economics of legislation were more evident and frequent, was legal procedure. This for Bentham was an interesting example of the confusion and inefficacy of the English legal system based on "judge-made law" and uncodified legislation. Moreover, even independently of particular historical cases, procedure appeared to Bentham's eyes as a field in which lack of rigour made room for huge conflicts of interests, delays, vexations, unjustified profits, and in the last resort negation of justice. Therefore, even where a system of laws was based on a well-calculated economy of punishment and reward, its efficacy and efficiency could be still entirely annihilated by bad economy in legal procedure. It was important that the judicial establishment and legal proceedings be organised so as to implement in every circumstance the fundamental principle of the "junction" of interest and duty. One of the more striking examples of "hurtful reward" made in *Théorie des récompenses* was the system of fees paid to "superior judges" according to the length of legal suits. A consequence of this system was that judges had an interest in producing artificial incidents and delays, while the making of a claim was expensive and unsupportable for private citizens³⁰. The inefficacy of this system was

³⁰ Bentham, 1829-30: II, 145: "Ainsi les grand judges, outre leurs ample salaires, qu'il ne faut pas leur envier, ont un profit casuel qui se multiplie à proportion des incidents et des longueurs". The English translation is this time more bespeaking: "In England, the superior judges, beside their ample salaries, which it would be improper to grudge them, receive certain fees which it is impossible not to grudge them; since it is from this source alone that they can generally be considered liable to corruption, and that so much the more easily, since they may be subject to its influence without themselves perceiving it. These fees are multiplied in proportion to the incidents of procedure, the

examined in another of Bentham's writings of the 1790s: *A Protest against Law Taxes* (1793). According to Bentham, a tax paid *ex ante* by the suitor was "a tax upon distress" (Bentham 1838-43: II, 573). It was the worse of all taxes, since it signified "neither more nor less than a denial of justice" (*Ibid.*: 574). The poor suffered by this tax more than others, since the cost of legal suits was in absolute terms higher than the average annual wages of common labourers (*Ibid.*: 574-75). An interesting aspect of this critique was that not only Bentham dismantled Montesquieu's and Voltaire's general admiration for the English constitution, but he explicitly ran counter Smith's approbation of the English judicial system on account of this very system of fees (Smith 1776: 713. see Guidi 1999).

Bentham's interest in legal procedure led him to develop the subject of evidence. The *Rationale of Judicial Evidence*, written between 1803 and 1812, was edited by John Stuart Mill and published in volumes VI and VII of Bowring's edition of the *Works* (see Twining 1985). From the point of view of this paper, its interest consisted in the analysis of the conflicting interests that dominated even *vis-à-vis* the "trustworthiness" of testimonies. According to Bentham, judges and lawyers had a "sinister" interest in mendacity. Their accurate calculation was explained in details:

"It is their interest that wrongs of all sorts be sometimes punished, lest plaintiffs be discouraged, and the mass of litigation and profit be diminished at one end: it is their interest that wrongs of all sorts remain sometimes unpunished and triumphant, lest the mass of litigation and profit be diminished at the other hand" (Bentham 1838-43: VI, 266).

multiplication of which incidents proportionably increases the expense and delay of

The novelty of Bentham's approach to procedure can be appreciated in this passage. Bentham's analysis of the functioning of the judicial system was grounded on the rational reconstruction of the interests involved and of the cases in which these could become "repugnant" with one another. This analysis demonstrated that no reform of this system could be effected if these objective constraints were not taken into account. The goodness of a legal system and of a system of procedure could not be evaluated only in terms of clearness and consistence of the norms that it enacted. Individuals - Bentham thought - will comply with these rules only if they prescribe to them an *optimum* in terms of personal costs and benefits. As a consequence, a good legal system must produce an *optimum* 'conciliation' of individual interests. As Bentham explained in the second letter of *Rid Yourselves of Ultramarina*, an interest was "sinister" not because it was in itself 'immoral' to profit of the power conferred by public functions. A functionary had an equal right to his own happiness as any other individual. The problem was that his gains were more than compensated by the losses incurred by the "subject many", so that the result was largely suboptimal from a social viewpoint (Bentham 1995: 31-3). It is evident that this conclusion was exactly in harmony with the "greatest happiness principle": it should also be clear now that Bentham considered it as an application of 'rational' economy to problems of policy and legislation.

A further application of this approach was that of the rewards to informers and accomplices, developed in chapters I.xiii and I.xiv of *Théorie des récompenses*. Here, Bentham criticised Beccaria for his moral disapproval of any encouragement of "treachery" even among criminals

obtaining justice" (*Rationale of Reward*, in Bentham 1838-43: II, 209).

(Bentham 1829-30: II, 159-60). Again, Bentham's 'economic' arguments demonstrated that these rewards were necessary in many cases, and that moralistic distaste was self-contradictory and self-defeating. Rewards for informers were necessary for many reasons, among which Bentham ranged pity towards criminals, disapproval for some parts of the law, fear of revenge, indolence³¹, and people's disinclination to renounce to "des occupations qu'ils ne peuvent interrompre sans perte" (*Ibid.*: II, 157)³². Thus, the opportunity cost of renouncing to economic activities measured *caeteris paribus* the amount of the rewards to informers. Bentham was however so cautious as to recommend that no judgement be based on the sole evidence furnished by the informers' testimony (*Ibid.*: 158). As far as the rewards for accomplices were concerned, Bentham objected to Beccaria that in the cases in which their testimony was absolutely necessary to detect crimes, to renounce to this advantage meant to bid adieu to justice and general security. Bentham accepted Beccaria's argument that the keeping of promises is a fundamental rule of civil life. However he objected that this rule could not be applied to criminal conventions: "Que deviendrait le monde avec ce principe, que le crime même est un devoir lorsqu'on l'a

³¹ This element was stressed in *Rationale of Judicial Evidence*, although in an opposite sense. Bentham explained that the "love of ease" was so universal a motive of human action (or, in this case, inaction) that it was *caeteris paribus* a guarantee of the trustworthiness of testimonies. Whereas truth demanded only the work of memory, mendacity required the work of imagination (Bentham 1838-43: VI, 263-4). According to Bentham, it was an "axiom of mental pathology" that "[t]he work of the memory is in general easier than that of the invention" (*Ibid.*: 262).

³² See *Rationale of Reward*, in Bentham 1838-43: II, 222: "from a disinclination to submit to that loss which would arise from the interruption of their ordinary occupations".

promis?" (*Ibid.*: 159)³³. On the contrary, it was important that every criminal, in deciding to commit a crime in combination with others, could anticipate the probability of this very special 'breach of trust'. This expectation functioned in such a case as a deterrent against crimes.

1.3. Political economy and the economics of legislation

Was this scientific reformulation of both public economy and 'penal' (and possibly 'civil') economy independent of Bentham's parallel interest in political economy? Many elements seem to prove the contrary. Let us take some examples by way of introduction. First, it can be demonstrated that one of the central topics in Bentham's political economy, that of the encouragements and discouragements to "inventive industry", was examined for the first time in the unpublished *Essay on Reward* of 1778-82³⁴. Here Bentham concluded that the three main obstacles to innovations were "1. The limitation of the legal rate of interest. 2. The enormous expense of Patents for inventions. 3. The rule of Common Law which prevents a man from lending money on condition of sharing the profits of a manufacturing or other trading concern without hazarding his whole fortune" (U.C. CLXVI, 14). Second, the essay that developed the first of these arguments, *Defence of Usury* (1787), contained a digression in which

³³ See *Rationale of Reward*, in Bentham 1838-43: II, 224: "What would become of society, were it once established as a principle, that the commission of a crime became a duty if once it had been promised?"

³⁴ See U.C. CLXVI, 13-15, spec. 14 [1794 ca.], where, after referring to *Defence of Usury* as published seven years earlier, he adds that his ideas on Patents and limited partnership (in French "commandite") were "at least twice as long what they are, but as to the making of them public seeing them attended with any fruit was by much too faint to present an equivalent for the trouble".

Bentham formulated a parallel critique of the prohibition of "maintenance" and "champerty" (financial assistance motivated by the prospect of sharing the profits of the suit) in English legal procedure. Just as the usury laws - Bentham alleged - condemned the meritorious projector either to renounce to his investment or to pay higher illegal rates of interest, so the prohibition of financial assistance condemned the suitor who had no money to renounce to *any share* of his claim (Bentham 1952-54: I, 163-7). Third, the tables of contents of the section of *Projet* devoted to "Finance" reveal that Bentham's aversion to law taxes was an outcome of his general demonstration of the superiority of proportional over *per capita* taxation (U.C. XCIX, 149). Lastly, one should not forget that Bentham's lifelong interest in colonial emancipation (see Boralevi 1984: 120-41) was the result of the combination of arguments of political economy with others of public economy. As demonstrated by *Rid Yourselves of Ultramarina!* - recently published with all its preparatory materials thanks to the scholarly editorial work of Philip Schofield (Bentham 1995)³⁵ - Bentham's opposition to colonies was jointly grounded on the demonstration of the evils generated by restrictions imposed on commerce, of the unjustified administrative costs imposed to both colonists and the mother country, and of the additional temptations to corruption created by colonial government.

There are many reasons to believe that these examples are no less the fruit of obvious albeit occasional intersections between confining social sciences, than the mark of more substantial intercommunication. While

³⁵ Bentham's interest in the colonial question dates at least from the years immediately following the publication of *Defence of Usury*. See the fragment "Colonies and Navy" (1790 ca.), in Bentham 1952-54: I, 211-8; and *Jeremy Bentham to the French Nation. Emancipate your Colonies!* (1793), in Bentham 1838-43: IV, 407-18.

political economy, as we have seen above, is neither the only science nor the only *economic* science available to legislators, it should not be forgotten that it is always for Bentham a branch of the science of legislation. Although its main concerns are the 'subordinate ends' of abundance and subsistence, political economy is not indifferent to security and equality when these ends are either threatened or improved by the agency of individuals in the marketplace³⁶. Conversely, the other branches of the science of legislation must examine the connections of civil, penal and remuneratory laws with the ends of abundance and subsistence. These connections embrace what Bentham considered the 'formal' articulation of the science of legislation³⁷. As far as the 'matter' was concerned, it should be observed that political economy shared with other parts of the legislative science the same structural elements. Indeed, the originality of Bentham's approach to political economy, compared to the standards of the time, was twofold. On the one hand, it concentrated on the efficacy and efficiency of alternative policy strategies, and, on the other hand, its analysis of the

³⁶ Thus, e. g., the manuscript *Sur les Prix* (1801, see Bibliothèque Publique et Universitaire, Genève, *Manuscrits Dumont*, L, 30-440), partially published by Stark in English translation (Bentham, 1952-54: III, 61-216; see Sigot 1998), deals with the threats to security caused by inflation and bankruptcy, while Bentham's proposal of extension of the law of escheat is intended as a measure in favour of equality (see *Supply without Burthen or Escheat vice Taxation* (1795), in Bentham, 1952-54: I, 279-367. See also *Principes du code civil*, in Bentham 1829-30: I, 68-9, and the unpublished manuscript dating from 1789 headed "Finance. Supply. Escheat. To Mirabeau", U. C. CLXVI, 3-11. This ms. corresponds to the first letter of a planned series addressed to Mirabeau, entitled "Short view of economy for the use of the French nation". See U. C. CLXVI, 1. Letter I was headed "Supplies. A New Species Proposed. Appropriation of collateral successions").

³⁷ It is known that the *Project* was subdivided in two parts "Forme" and "Matière". The material of the former was employed by Dumont to compose *Vue générale d'un corps complet de législation*, and *De la promulgation des lois* (1802, in Bentham 1829-30: I: 265-301, 303-70).

internal functioning of market relationships and of the individual reactions to policy regulations was systematically grounded on the behavioural assumptions of psychological hedonism. As a consequence, the central issue of Bentham's political economy was that laws and policy regulations are ineffective if individuals have more profitable alternatives at hand. Of course, these individuals were represented in a manner that anticipated John Stuart Mill's *homo œconomicus*. Like the latter, they "prefer a greater portion of wealth to a smaller in all cases, without any other exception than that constituted by the two counter motives" of "aversion of labour, and desire of the present enjoyment of costly indulgences" (Mill 1844: 138-9). These regulations are either "nugatory", if they impose what individuals would have spontaneously chosen in their absence, or "obnoxious", if they oblige individuals to pursue sub-optimal goals. *Defence of Usury* was an exemplary analysis of the social costs due to the inevitable evasion of too rigid constraints imposed to the credit market, while *Manual of Political Economy* and *Institute* focused on the inefficient reallocation of investments produced by *dirigiste* regulations of industry and trade. Lastly, the *Observations on the Restrictive and Prohibitory Commercial System* Bentham addressed to the Spanish liberal government in 1821, provided an impressive analysis of the 'rationality' of smuggling (Bentham 1995: 360-64), which emulated that attempted more than fifty years earlier by Cesare Beccaria (1864a).

Thus, the role of political economy as a branch of the science of legislation was multiform. Sometimes it pointed out some concrete problems that should become serious objects of concern for legislators. In other circumstances it furnished evaluations of the social impact of policy

regulations that might function, by way of analogy, as a guideline for similar cases. In still other circumstances it elaborated an analysis of patterns of behaviour that were relevant to the study of other situations.

But, more essentially, some of the principles Bentham adopted for his analysis of economic policies represented at the same time a problem, a warning and a potential model for other branches of the science. One of these principles consisted in the statement that "[e]very restraint of liberty is so far an evil: and it lies on him who proposes any such restraint, to shew the greater good by which this evil is counterbalanced" (Bentham 1952-54: I, 197)³⁸. Even more important is Bentham's belief that "the quantity of labour that can be bestowed upon any object will be limited by the quantity of capital that can be bestowed upon it" (*Ibid.*: 228), and the "chance which there is of the best choice" relative to the "advantageousness of the direction given to a quantity of capital", "will be [1.] in proportion to the degree of interest which he, by whom the choice is made, has in making the best possible: 2. in proportion to the chance he has of possessing the faculties of knowledge and judgement in relation to the business in the highest degree possible" (*Ibid.*: 229). A consequence of these assumptions was that:

"In not one of these particulars is the statesman likely to be more than upon a par with the individual whose choice relative to the subjects in question he is so ready to controul: in almost all of

³⁸ One of the consequences of this statement was Bentham's aversion to government interference in matters of "self-regarding prudence" (Bentham 1780: 289-90), an argument that clearly anticipated that exposed by John Stuart Mill in his essay *On Liberty* (1859). See also *Defence of Usury*, in Bentham 1952-54: I, 133, where Bentham, who is dealing with the advisability of the repression of prodigality, concludes: "the tacking of leading-strings upon the backs of grown persons, in order to prevent their doing themselves a mischief, is not necessary either to the being or tranquillity of society".

them he is constantly and necessarily inferior beyond all measure" (*Ibid.*).

These arguments, so proximate as they were to Hayek's criticism of 'constructivist' reason (Hayek 1973-79)³⁹, were essential for Bentham's discussion of hurtful and needless remuneration, of "competition as to rewards" (*Théorie des récompenses*, I.xv), and of trust vs. contract management (*Ibid.*: II.xi). It should be observed that one of the more striking applications of Bentham's preference for contract management was the organisation of *Panopticon* (Bentham, 1838-43: IV, 125-34).

These guidelines of Bentham's political economy raise an important general question relative to the evolution of his *political* thought. On the one hand, there is some textual evidence that Bentham's notion of "aptitude" as developed in his later writings derives from the triad of "inclination, knowledge and power" exposed in *Manual* and *Institute*⁴⁰. Once elaborated

³⁹ A more striking resemblance is that with Tommaso Campanella's notion of the three "primaryities" (*primalità*) of beings: power, knowledge, and love (See Campanella 1623: VI.v-xi). This triad had been resumed at the end of the 17th century by Gianbattista Vico (1720: 34), and restated as the three elements of knowledge: "nosce, velle, posse" [to know, to will, to be able to]. What is more important, the triad became popular at the beginnings of the 19th century among the main Italian economists and legal thinkers, Melchiorre Gioia, Giandomenico Romagnosi and Carlo Cattaneo (all of them more or less enthusiast followers of Bentham). Moreover, the debate between them was centred upon the necessity of encouraging inventive industry, with Gioia supporting State intervention and Romagnosi and Cattaneo more inclined to *laissez-faire* and Smithian political economy. See Gioia 1815-18: I, 56; Romagnosi 1835: 17, 157, 314; Cattaneo 1839.

⁴⁰ In *Observations on the Restrictive and Prohibitory Commercial System* the argument of *Manual* is restated in the following terms: "...the prosperity of every branch of industry will increase and decrease in the ratio of the degree of aptitude - of moral, intellectual, and active aptitude - on the part of the persons engaged in it; on the degree, absolute or comparative, of prudence, vigilance, exertion, appropriate information, and industrious talent, possessed by them" (Bentham 1995: 370). And discussing the "prohibitory commercial system", Bentham concludes: "Among the effects of the mode of supposed encouragement in question, will be its operating in the

and generalised, the theory of "aptitude" became the unifying element of Bentham's political economy, public economy and constitutional theory. Bentham was able to demonstrate on the same ground both the absurdity of government interference in matters of industry and trade, and the necessity of submitting political and administrative power to rigorous procedures of transparency and verification, and in the last resort to the judgement of the constituency and of the "Tribunal of Public Opinion" (Bentham 1983: 301)⁴¹. On the other hand, it is known that in the years preceding Bentham's 'conversion' to democracy, this same triad functioned as a criterium of policy evaluation only in matters of political economy, while it played a marginal role in other domains (public economy, colonies, finance, distributive law). Thus, the argument that the statesmen's confidence in their ability to interfere with the market was the result of their "ignorance and folly, and blindness, and vanity, and presumption, and despotism" (Bentham 1952-54: I, 199) made a striking contrast with the portrait of an uninterested legislator who is perfectly able to direct the leverages of punishment and reward towards the purposes of legislation, on the simple condition that he is acquainted with the principles of the utilitarian science⁴². And although the problem of corruption was already examined at this stage, it was considered as a simple albeit "endemic" (*Ibid.*) possibility, the fruit more of

character of a prohibition on superior appropriate aptitude, and giving to inferior appropriate aptitude the advantage over it" (*Ibid.*).

⁴¹ An example of this unified vision is *Rid Yourselves of Ultramarina!*. Another is represented by the chapters on the Trade Minister and Finance Minister in *Constitutional Code*, II.XI.xii and xiii. See Bentham 1838-43: IX, 447-52.

⁴² See e. g. U. C. XXVII, 109, 114, 151, where the names of Frederick II and Catherine II are suggested as examples of enlightened monarchs. See *ibid.* 141: "Machiavelli supposes his statesman a villain [...] I suppose my statesman a patriot and a philanthropist" (the page containing this passage is headed "Critical Jurisprudence, 1778ca.").

bad arrangements and of the confusion of unwritten and written law, than of the universal influence of "sinister interest".

Since the aim of this paper is not to undertake a discussion of Bentham's "transition to political radicalism" (see Dinwiddy 1975; Rosen 1983; Burns 1984; Jackson 1997), I will just conclude this section on two remarks. First, Halevy's distinction between "natural harmonisation" and "artificial conciliation" of interests, as far as it marks the absence of conceptual communication between two areas of Bentham's thought, partially applies only to the first period of his intellectual production. Second, Bentham's interest in political economy, concentrated as it was in the years 1786 to 1801 (albeit not exclusive of this period), was essential for the evolution of his political ideas. The notions of "inclination, knowledge and power", coupled with the principle "capital limits trade", transformed the Smithian political economy into a powerful engine for the critique of politics, and this critique furnished to Bentham the instruments on which he eventually established his democratic doctrine⁴³.

2. The economic analysis of legislation

I hope that what I have said in the section above has cleared up the multiplicity of Bentham's approaches to economics and the role the latter

⁴³ There are possibly other fields which Bentham innovates in introducing an economic approach. One of them is 'spatial economy'. The analysis of the rational geographical distribution of the panoptical "industry houses" managed by the National Charity Company (see *Outline of a Work Entitled Pauper Management Improved*, in Bentham 1838-43: VIII, 369, 373-4), of 'chairs' for the diffusion of useful sciences (Bentham

played in his science of legislation. However, Bentham's economics of legislation would be of little interest if it had remained to the stage of simple enunciations. A short review of some of the analytical tools elaborated by Bentham and of their application to the study of legal and political phenomena will show the extent he gave to economic analysis and the fecundity of his approach.

2.1. The structure of Bentham's economics

Bentham's economic analysis, independently of the field to which it was applied, resulted from the addition of a series of steps⁴⁴.

First, Bentham developed a *logical* analysis of the law or laws examined. These laws were sometimes compared to similar cases, or to actual or hypothetical alternative regulations. This logical analysis focused on the *consequences* of laws, and compared the goals these laws explicitly or implicitly pursued with their unintended results, which ordinarily were the opposite of those aimed at, or represented a second best⁴⁵. This analysis was grounded on the assumptions of psychological hedonism Bentham had elaborated in the *Introduction to the Principles of Morals and Legislation*

1829-30: II, 194-5), and of administrative districts (Bentham 1983: 11-8), are examples of this attitude.

⁴⁴ A work in which these steps are evident is *Defence of Usury*, which functions as a model for other works.

⁴⁵ In *Defence of Usury*, Bentham examines the following goals of usury laws: prevention of usury (letter II), prevention of prodigality (lett. III), protection of indigence (lett. IV), protection of simplicity (lett. V), prevention of projects (lett. XIII). The unintended results attained by usury laws are examined in letters VI to VIII. A comparative case is examined in letter XII (the laws against maintenance and champerty). Lastly, some similar regulations, in which the limit of 5% to the rate of

(1780). The analysis of the motives of action, the "axioms of mental pathology", the individual attitude to calculation, with the "dimensions" of pleasures and pains, the analysis of circumstances influencing sensibility and of the "four sanctions" (Bentham 1970: I-VI). The latter were very important since they placed individual deliberation in a social context in which public opinion, religion, laws and physical needs influenced individual choices. Additionally, although logical arguments prevailed, Bentham often turned to positive historical examples and statistical data where available, in order to demonstrate the validity of his conclusions⁴⁶. In this, he aimed to show himself faithful to the Newtonian paradigm he declared to subscribe to.

Second, as shown in section 1, this analysis brought Bentham to develop a critique of 'the law as it is'. This critique was based on different arguments, although those concerning the efficacy and social costs of laws and policy regulations were prominent. With these important modifications, the logical strictures of Bentham's critique of laws were still those of an Enlightenment thinker and kept intact the 'flavour' of the pamphlets written some decades earlier by Voltaire, one of Bentham's *maîtres à penser*.

Third, this critique was followed by an alternative normative proposal, in which the defects of existing laws were removed. Often - as in the case of Usury Laws - what Bentham suggested was simply "a sponge" (Bentham 1952-54: I, 185). In other circumstances Bentham's prescriptions took into account the encouraging and discouraging effects of regulations. In the case

interest is not imposed, are examined in letter VIII (pawnbroking, bottomry, respondentia, etc.).

⁴⁶ See Bentham 1838-43, II, 575 note, where Ch. Davenant, A. Anderson, and A. Smith are quoted as sources of empirical data concerning the wages of common labourers. Another author often referred to is Arthur Young.

of patents, while any duty paid *ex ante* amounted to a discouragement to "inventive industry", a moderate tax on the benefits of inventions - if exacted with a delay of some years - was much more bearable, since it was applied only to "successful" endeavours (Bentham 1829-30: 230)⁴⁷. In the case of Law Taxes, the 'efficient' alternative proposal was grounded on the necessity to "annex punishment to misconduct" (Bentham 1838-43: II, 579). Bentham suggested to postpone the payment of legal fees "till the last stages of procedure" (*Ibid.*). Then if an offence were ascertained, the fees would fall upon the guilty. Otherwise, both parties would share them. It should be observed that the measure suggested was intended also as a check on litigation.

Fourth, Bentham estimated that his critique could not be conclusive if it was not accompanied by a *logical* explanation of the reasons why bad laws had been promulgated. As affirmed in *Defence of Usury*, "If our ancestors have been all along under a mistake, how came they to have fallen into it?' is a question that naturally presents itself upon all such occasions" (Bentham 1952-54: I, 157). And Bentham added: "To trace an error to its fountain head, says Lord Coke, is to refute it" (*Ibid.*). This step of the analysis was fundamental, since an obvious implication of Bentham's approach was that if individuals, at least on the public scene, are fundamentally self-interested, any regulation must favour the interest of at least one part of society. On this ground, there are some differences between Bentham's earliest writings and those following his conversion to political radicalism. In the former, prejudices, arrogance, indolence and lack of information on behalf of legislators were especially emphasised, whereas in

⁴⁷ U. C. CXLII, 259-260 suggest a delay of four years.

the latter the origin of mischievous laws was constantly traced to the "sinister interest" of the "ruling few". An example of the former attitude is the work on Law Taxes. Bentham explained the origin of these taxes with two reasons: first, they were erroneously interpreted as a check on litigation, and second, they had been confounded with other indirect taxes, like taxes on property and on passages of property, which were the easiest to perceive (Bentham 1838-43: II, 580-81). Bentham explained with more accurateness the origins of Usury Laws. Here social, cultural and even literary elements (the Christian opposition to greediness and cupidity, the prejudice against the Jew, the arguments of 'institutionalised' Aristotelian philosophy, representations of usurers at theatre) were combined with more practical reasons⁴⁸, and with arguments of social psychology⁴⁹. A last interesting example was the analysis of the "causes of the propensity in statesmen to the meddling or mercantile system" (Bentham 1852-54: I, 252 note) provided by *Manual of Political Economy*. One reason was, according to Bentham, what the Italian philosopher Giandomenico Romagnosi some decades later would call "mercantile emulation" (Romagnosi 1836: 24-5), i. e. national rivalry transported in the field of commerce (Bentham 1852-54:

⁴⁸ The existing prejudice against the Jews made it easier to plunder than than to draw money from other sources in case of necessity. See Bentham 1952-54: I, 158: "Christians were too intent upon plaguing Jews, to listen to the suggestion of doing as Jews did, even though money were to be got by it. Indeed the easier method, and a method pretty much in vogue, was, to let Jews get the money any how they could, and then squeeze it out of them as it was wanted".

⁴⁹ See *Ibid.*: 159: "Those who have the resolution to sacrifice the present to the future, are natural objects of envy to those who have sacrificed the future to the present. The children who have eat their cake are the natural enemies of the children who have theirs". The more interesting aspect of this analysis is that Bentham clearly accounts for a change in preferences along time. Whereas at the moment of establishing the contract the usurer is seen as a benefactor, when money is to be given back with the interests. he appears as an oppressor.

I, 251). Another reason was the stupidity of "country gentlemen and their blind guides" (*Ibid.*: 252). Then came the illusory impression made by the publication of the statistics on commerce, the statesmen's self-complacency in attributing to themselves the apparent success of national trade, and only in last position their "self-interest in creating dependants by the encouragement given" (*Ibid.*: 252 note).

Compared with this variegated list of arguments, the explanation of the origin of mischievous laws in Bentham's latest writings is much more schematic. Sinister interest became the *passe-partout* of Bentham's analysis. In *Observations on the Restrictive and Prohibitory Commercial System*, Bentham ranged among the causes of prohibitions: 1. "Combined public exertions", i. e. the lobbying capacity of the mercantile interest favourable to protection of national trade, an element Smith had already stressed (Bentham 1995: 370-1)⁵⁰; 2. secret or corruptive influence (*Ibid.*: 371-2)⁵¹; and 3. the weakness of the consumer's interest. A conclusion to be drawn from these comparative elements is that whereas Bentham's analysis of the origins of bad laws was richer in sociological and cultural elements in his early writings, it became more strictly 'economic' in his 'democratic period'. However, no straightforward dividing line can be traced between the two phases.

⁵⁰ Bentham examines both the case of big firms, whose influencing power is self-evident, and of that of "small districts", in which artisans and manufacturers find a natural ground to associate and defend their common interests. See *Ibid.*: 374. The latter notion clearly anticipates that of "industrial district" in Marshall. See Becattini 1987.

⁵¹ Bentham explains that influence implies a reallocation of time and information. The time a public functionary can devote to the examination of different policy regulations is naturally limited. The "familiarity" with some of them, and more incisively corruption, explain the preference they give to one subject more than to another.

The fifth and last element of Bentham's economic analysis of legislation was the explanation of the reasons why bad laws were maintained for a long time despite their defects. The arguments employed were similar to those applied to the explanation of the origins of these laws. Indeed, Bentham thought that "the great cause of all" that explained the existence of these laws was "the prospect of acquiescence" (Bentham 1838-43: II, 580-1). A single example will be sufficient. Bentham motivated the toleration of Law Taxes with many reasons. First, Bentham partially anticipated here the "lobbying" argument which was to become more extensive in his latest works: "Shopkeepers, tobacconists, glovers", he wrote, "are compact bodies - they can arm counsel - they come in force to the House of Commons" (*Ibid.*: 581). Conversely, "[a] tax on justice falls upon a man only occasionally: it is like a thunderstroke, which a man never looks for till he is destroyed by it" (*Ibid.*). Second, ignorance of alternatives played its role⁵². Third, there was a 'communicative' element, represented by the authority of those who defended the superiority of the English legal system⁵³. And fourth, there was class solidarity, "a sort of instinctive fellow-feeling among the wealthy" (*Ibid.*). Here Marx's idea that the dominating ideology is always that of the ruling classes seems to be anticipated: "It is the wealthy alone", Bentham asserted, "that either by fortune, situation, education, intelligence, or influence, are qualified to take the lead in

⁵² *Ibid.*: "As the consumers of tobacco confound the tax on that commodity with the price, so those who borrow or would have wished to borrow the hand of justice, confound the artificial with the natural expense of hiring it".

⁵³ *Ibid.*: "There want not apologists-general and talkers in the air, to prove to us that this, as well as everything else, is as it should be. The expense, the delay, and all the other grievances, which activity has heaped up, or negligence suffered to accumulate, are the prices which, according to Montesquieu, we must be content to pay for liberty and justice".

legislation" (*Ibid.*). Moreover, the upper classes had an interest in maintaining acquiescence, since Law Taxes offered them a surplus of power over the poor:

"Other taxes afford a man no indemnification for the wealth they take from him: this gives him power in exchange. The power of keeping down those who are to be kept down, the power of doing wrong, and the more generous pride of abstaining from the wrong which it is in our power to do; advantages such as these, are too precious not to be grasped at with avidity by human weakness: and, as in a country of political liberty, and under a system of justice in other respect impartial, they can only be obtained by a blind and indirect route such as this, the inconvenience of travelling in it, finds on the part of those who are well equipped for it, the more patient an acquiescence" (*Ibid.*).

Passages as this show how difficult it is to go in search of radical 'epistemological breakthroughs' in the evolution of Bentham's thought. This identification of class "repugnant" interests, and of their influence on political decisions lacks only the term "sinister interest" to become one of the typical arguments in the mouth of the old solitary of Westminster⁵⁴.

⁵⁴ See the following passage in *Rid Yourselves of Ultramarina* (Bentham 1995: 32-3), in which the influence of Ricardian political economy is particularly evident: "Not only within the compass of the whole community, but also within the compass of the interest of the subject many, many pairs of particular and mutually repugnant interests have place in any number. For example, take the following. 1. Productive classes, and unproductive classes. 2. Non-proprietors, and proprietors. 3. Labouring // classes, and capitalists. 4. Producers, and Importers from abroad. 5. Creative and merely Distributive classes. 6. Retail dealers, and wholesale dealers. 7. Individuals concerned in the above several ways in this or that article, and individuals concerned in the same way in this or that *rival* article. 8. Individuals concerned in the above several ways in

2.2. Analytical tools and achievements

It remains to give some examples of the categories Bentham employed in his economic analysis of law and policy regulations. I will leave aside Bentham's analysis of salaries and corruption, having dealt with these subjects in another paper (Guidi 1997), and focus on some examples that reveal a more striking proximity with the subjects examined by modern Law and Economics.

An interesting series of analytical insights is that connected with the study of the incentivating and disincentivating effects of laws. Here Bentham considered the effects of adverse selection and moral hazard determined by bad regulations. These effects, as we have already seen, were often explained in terms of asymmetrical information *and asymmetrical motivation* between statesmen and individuals. The role played by transaction costs in determining individual reactions to laws and policy regulation was equally taken into account. Many cases of adverse incentive were analysed in *Defence of Usury*. An interesting example is the prohibition of compound interest. The intended object of this law was the moderation of rates of interest, and more precisely a certain equity in the sharing of benefits between moneylenders and creditors. Its actual result was, in the case of the borrower, that "[t]he gain, which the law which in its tenderness thus bestows on the defaulter, is an encouragement, a reward, which it holdes out for breach of faith, for iniquity, for indolence, for

grain or other articles regarded as *necessaries*, and individuals concerned, in like

negligence" (Bentham 1852-54: I, 162). A paradoxical effect was also determined on the side of creditors. The law was a discouragement for the "forbearing lender", while, if the latter decided to prosecute "the borrower upon the instant of failure", it converted itself into "a reward which it holds out to him for his hard-heartedness and rigour" (*Ibid.*).

Bentham's *Théorie des peines et des récompenses* was full of examples of this kind. An interesting topic was that discussed in chapter II.xi concerning "trust vs. contract management". As in the case of Usury Laws, here Bentham criticised Smith (1776: V.ii) for sharing the popular prejudice against contractors. In Bentham's view, Smith thought that there was something immoral in the fact that someone could raise a profit from the perception of taxes. Bentham demonstrated that this profit arose from the greater efficiency of contract management *vis-à-vis* trust. In the former, any delay, any unproductive expense, any negligence, represented a cost the contractor would endeavour to eliminate in order to maximise his profit. Therefore, contractors produced their goods or services at minimum costs for the public⁵⁵. In contrast, the administration by trust was afflicted by the typical evils that derived from the absence of correct incentives. One of them amounted to a clear anticipation of the modern theory of bureaucracy

manner, in relation to articles regarded as mere *luxuries*".

⁵⁵ Bentham 1829-30: II, 187: "L'intérêt du fermier est au contraire de réduire ses sous-employés au plus petit nombre possible, de leur allouer le plus faible salaire, de les rendre laborieux et exacts, parce que la moindre négligence du serviteur est une perte pour son maître. Ainsi le fermier remplit son but avec plus d'économie". The latter term is again omitted in the English version (Bentham 1838-43: II, 251): "The interest of the farmer, or contractor, is to have a few individuals employed under him as possible, and to pay each one no more than he deserves; and he will lose by every instance of their negligence. In these circumstances, though no greater amount should be received from the people than would have been collected by the state, a contractor might reasonably hope to find a source of profit".

(see van den Doel 1985: vi): "L'intérêt du ministre est d'avoir autant d'employés, c'est-à-dire autant de dépendents qu'il est possible: multiplier les agents, c'est multiplier ses créatures; leur donner de grands salaires, c'est les attacher d'autant plus à leur protecteur" (Bentham 1829-30: II, 187)⁵⁶. Moreover, a minister "n'a point de motif pour les surveillers de près, parce qu'il ne perd rien à leur négligence" (*Ibid.*)⁵⁷.

We have already seen other analytical tools at work in Bentham's writings: the attitudes to risk of individuals when evaluating punishments, the opportunity cost of denouncing criminals and accomplices etc. An interesting aspect of Bentham's analysis of the latter problem was that it took into account an element of strategic rationality. Bentham believed that rewards for accomplices were necessary. However, they should not be established "par une loi générale" (*Ibid.*: 159). In that he criticised Beccaria who, although he was contrary to the use of rewards in these cases, estimated that it was recommendable to fix them by law (*Ibid.*: 160. Beccaria 1764: xxxvii). Bentham objected that a law of this kind generated undesirable consequences, in that someone could be encouraged to organise criminal combinations only with a view to raising the reward for its denunciation, and possibly summing it up to the "natural" profit of the crime⁵⁸. Therefore, it was preferable to leave this reward "à la discretion du juge" (Bentham 1829-30: II, 159). In this case, the criminal was put in face of a situation of pure uncertainty. The judge was encouraged to employ

⁵⁶ See Bentham 1838-43: II, 251: "The personal interest of a minister is to have as many individual, that is to say, ad many dependants, employed under him as possible".

⁵⁷ *Ibid.*: "and he will lose nothing by their negligence".

⁵⁸ The case is similar to that of Usury Laws. Bentham thought that they stimulated the borrower to accept interest rates above 5% and then denounce the usurer, in order to reap the benefit of not paying any interest at all. See Bentham 1852-54: I, 146-7.

rewards only in the case in which they could not ascertain the crime otherwise. "Il y aura donc toujours un intervalle" - Bentham commented - "où tout criminel restera soumis à l'appréhension de subir une peine" (*Ibid.*)⁵⁹. As a consequence, the criminal could not know *ex ante* the judge's resolution to employ the instrument of reward instead of punishment after collecting evidence. While the probability of getting the reward was next to zero, the criminal was entirely under the ordinary threat of punishment, and the deterring effect of the latter was as usual in proportion to its intensity and probability. Conversely, Bentham thought that the threat of reward kept its force in the relationships between criminals. In combining with others, criminals should always fear the possibility that one of them accepted to denounce its accomplices in exchange of a reward. The 'prisoner dilemma' entirely functioned in this case, since it was impossible to anticipate both the judge's decision and the accomplices' reaction to it.

Still connected to procedure was Bentham's analysis of externalities and their reallocation, a notion also considered in relation to patents (Bentham 1952-54: I, 260-3). As we have seen above, in *A Protest against Law Taxes* Bentham criticised Smith's 'Blackstonian' approval of the English system of fees. According to Bentham, one of the arguments employed by Smith was that "the burthen of an establishment ought to lie on those by whom the benefit is reaped" (Bentham 1838-42: II, 576). Bentham thought however that while "the principle is incontrovertible", "the matter of fact supposed by the application of it is not true" (*Ibid.*). Indeed, the idea that the suitor was the only or principal beneficiary of the

⁵⁹ Bentham 1838-43: II, 223-4: "there will always be a longer or shorter interval, during which every criminal will feel himself exposed to the punishment denounced against his crimes".

legal suit derived from deceptive reasoning, in which the external economies reaped by other citizens were not taken into account.

"The persons on whom the whole of the burthen is cast, are precisely those who have the least enjoyment of the benefit: the security which other people enjoy for nothing, without interruption, and every moment of their life, they who are so unfortunate as to be obliged to go to law for it, are forced to purchase at an expense of time and trouble, in addition to what pecuniary expense may be naturally unavoidable" (*Ibid.*).

To these arguments, Bentham added another economic reason he drew from the analysis of mortgages (see Bentham 1952-54: I, 142-3): "Meantime", he asked, "which is of most value? — which most worth paying for? — a possession thus cruelly disturbed, or the same possession free from all disturbance?" (Bentham 1838-42: II, 576). A possession submitted to litigation or to criminal procedure - as one on which forced sale was imposed - lost part of its marketable value. So the suitor was a loser also from this standpoint. It was clear to Bentham that the burden of maintaining the judicial establishment was to be reallocated on the mass of taxpayers, who were the real beneficiaries of it⁶⁰. Bentham was also ready to admit that: "So far then from being made thus wantonly to pay an extra price, a man who stands in this unfortunate predicament, ought rather to receive an indemnification at the public expense for his time and trouble; and the danger of insidious or collusive contests, in the view of obtaining

⁶⁰ An interesting comparison is here suggested: "To throw upon the suitor the expense of administering justice, in addition to the trouble and the risk of suing for it, is as if, in case of an invasion, you were to take the inhabitants of the frontier and force them not only to serve for nothing, but to defray of themselves the whole expenditure of the war" (Bentham 1838-42: II, 576).

such an indemnity, is the only objection I can see, though perhaps a conclusive one, against the granting it" (*Ibid.*). Here, the argument of the reallocation of externalities *via* taxes is interestingly coupled with the analysis of adverse incentives.

Examining another argument in favour of Law Taxes (i. e. "that they are a *check to litigation*") (*Ibid.*), Bentham engaged himself in a personal discussion of the classical topic of 'legal procedure vs. private transaction'. The term "litigation", Bentham explained, has a neutral and a pejorative meaning. In the former sense, to reduce litigation amounts to a negation of justice, while as to the latter, one should make a distinction between "groundless" and "trifling" litigation. Groundless litigations should be then distinguished into those that are so for *mala fide*, and for "want of merit". The more interesting case was the former: Bentham thought that the Law Taxes encouraged litigation motivated by "malice" on both sides. On the one hand, the *mala fide* plaintiff had an occasion to do wrong to the defendant he could freely evaluate according to the intensity of his or her subjective desires. On the other hand, "it is on the defendant's side that anti-conscientious practice is most likely to be found" (*Ibid.*: 577). Without law taxes, the defendant would be encouraged to renounce to the suit in favour of private transaction, and this transaction would be more favourable to the plaintiff. The Law Taxes gave to the defendant an additional weapon. He knew that the plaintiff would have to pay the costs of the suit. Therefore it was the latter now who was encouraged to accept a private transaction, and this transaction would be less favourable to him in proportion to the amount of law taxes he so spared.

Even in the absence of law taxes, Bentham was convinced that there was an asymmetry between the interests of the plaintiff and those of the defendant, and that the latter had more than one reason for preferring a suit to private transaction. On the one hand, "a man will find no motive for instituting a suit for an ordinary pecuniary demand, without believing himself to be in the right; for if he is in the wrong, disappointment, waste of time, fruitless trouble, and so much expense as is naturally unavoidable, are, by the supposition, what he know must be his fate" (*Ibid.*)⁶¹. On the other hand, "a man upon whom a demand of that kind is made" has many reasons to accept a legal suit even if he is conscious he is wrong. Among these reasons there are the many imperfections of laws, the lack of sufficient evidence, the "criminal" possibility of fabricating false evidence, the plaintiff's lassitude, various incidents, among which the death of the plaintiff, lastly "the temporary difficulty or inconvenience of satisfying the demand, or (to conclude with the case which the weakness of human nature renders by far the most frequent) [...] the mere unwillingness to satisfy it" (*Ibid.*). All these elements could be transformed into arguments of the defendant's function of expected utility, and be evaluated in his calculation of the opportunity cost of instituting a legal suit.

Given the asymmetrical information between the guilty defendant on one side, and the judge and plaintiff on the other, and given the consequent

⁶¹ The conclusion was similar in the case of "trivial suits". While Bentham thought that everyone should have the right to establish what was trivial or not for him or herself, he also explained that both the evaluation of "triviality" and the propensity to litigation are an increasing function of income. See *Ibid.*: 578: "Trivial causes require no such factitious checks: to such causes were all expenses struck off that can be struck off, there are natural checks in abundance, that are unavoidable. There is the pain of disappointment: there is expense, of which a certain measure will every now and then

costs and risks of ascertaining the truth, Bentham seemed to mean that the defendant had no *absolute* preference for legal suits *vis-à-vis* private transactions. He or she had only a *relative* interest in it, compared with the costs and benefits of the alternative choices, and to the costs defrayed by the other parties. Moreover, even if the defendant was willing to accept a transaction, he had a *strategic* interest in accepting (or effectively menacing) the suit and playing a 'chicken game' with the plaintiff to establish who would propose an agreement to the other, and at what price⁶². So much so, the reduction of transaction costs (law taxes) rendered *caeteris paribus* more favourable the alternative of private transaction. Thus, while Bentham's conclusions are not incompatible with 'Coase's theorem' (Coase 1960), their contribution to the analysis of the 'dominant position' of defendants is highly valuable.

3. Conclusions

Bentham's role as 'founding father' of the economics of law and politics has sometimes been acknowledged, both for the method he

be absolutely unavoidable: there is consumption of time, which to the working classes, that is to the great majority of the people, is expense".

⁶² Bentham was not so clear in admitting the possibility of 'mixed strategies' which allow to share the costs and benefits of the game. The impression left by his analysis that the suit can end up in an absolute victory for either the plaintiff or the defendant. However

elaborated and for some analytical achievements he reached. This paper has intended to show: 1. that Bentham's works contain a substantive amount of economic analysis of legal and political phenomena; 2. that Bentham explicitly considered this analysis as a product of the scientific reformulation of the science of legislation; 3. that he made room in this science both for political economy, and for 'public economy' and the economic analysis of penal law, civil law and legal procedure; 4. that the study of Bentham's 'economics of legislation' is significant for the understanding of his legal and political thought; and throws new light on the interpretation of Bentham's transition to political radicalism; 5. that, not surprisingly, some of the analytical tools Bentham employed are similar to those of modern economics of law and politics; 6. lastly, that some of Bentham's conclusions can still inspire the current research in these fields.

Lastly, some examples made in this papers show that Bentham was not isolated in his attempt to elaborate an economics of legislation, and that a study enlarged to the 'age of Bentham' would be a promising subject of research.

the above arguments are not incompatible with the thrust of his reasoning - especially with that concerning the more favourable position of the guilty defendant.

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