



Article

Bentham's Theory of Evidence: Setting a Context

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Bentham's Theory of Evidence: Setting a Context¹

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Abstract

Bentham's massive writings on evidence, procedure and judicial organisation (EPJ) survive in over 13,000 pages of manuscript in addition to 15–20 published works, for some of which full manuscripts no longer survive. These are all quite closely linked. In order to start to understand the Rationale of Judicial Evidence it is useful to consider it in three broad contexts: Bentham's other works in addition to those on EPJ, especially those works on the pannonion and the constitutional writings; attempts to construct a 'theory of (judicial) evidence' in the Anglo-American tradition of common law, especially those of J. B. Thayer and J. H. Wigmore; and recent efforts at UCL and elsewhere to develop evidence as a distinct multi-disciplinary field.

Keywords: Bentham; evidence; legal studies; jurisprudence; J. B. Thayer; J. H. Wigmore

I feel rather like the Auto-icon, a relic of the past wheeled out to observe your proceedings impassively or cryptically. In 1983 I felt that I was the only person in the world who had read all of the *Rationale of Judicial Evidence* – except perhaps Jimmy Burns who seemed to have read everything by Bentham. I had also read *An Introductory View*, *Scotch Reform*, and Dumont's *Traité des preuves judiciaires* in both French and English. I had looked at several hundred unpublished Bentham manuscripts on adjective law and had tried to transcribe some. Surely I was unique. But there was not at the time funding for an edition of the *Rationale* for the *Collected Works*, let alone the ocean of manuscripts relating to evidence and procedure (adjective law), judicial organisation, *Scotch Reform* and several minor works which were all intimately related to each other.

In 1980–81 Claire Gobbi and I prepared a report for the Bentham Committee on Bentham's writings on evidence and cognate works.² Claire did a detailed survey on *Scotch Reform* and we did a more cursory survey of the published writings and unpublished manuscripts on evidence, procedure and judicial organisation (EPJ), and some borderline cognate works, including *Court of Lords' Delegates*, *Lord Brougham Displayed*, *Truth versus Ashhurst* and *Justice and Codification Petitions*. We concluded that the total material on EPJ is directly related to 17 published works of varying length and 13,326 manuscript pages.³ We also concluded that all these works were so closely interrelated that 'it would be artificial (and risky from a scholarly point of view) to try to treat them as discrete units'. Furthermore, we estimated that the combined works in this general area would fill between four and seven volumes of the *Collected Works*, quite apart from the J. S. Mill edition of the *Rationale of Judicial Evidence*. While the unity of this vast collection was recognised, it was decided that it would not be feasible to obtain funding for a single major project, and work on this area was adjourned *sine die*.

My interest in Bentham on evidence was part of a broader project to rethink the subject of evidence in law in a broader framework than had been traditional. I abandoned my plan to help with editing the *Rationale of Judicial Evidence* and instead published a short exploratory book called *Theories of Evidence: Bentham and Wigmore*, which included a detailed précis of the *Rationale*.⁴ As a result I have not reread the *Rationale* or any other of Bentham's works in the area for about 35 years, except *An Introductory View*, which is probably still the best starting-point for studying Bentham on evidence. It is short, relatively readable, used less editorial licence than Dumont's *Traité*, and contains some material not in the *Rationale*, including Bentham's critique of Gilbert (see below).

To illustrate how alone I felt, let me begin with an anecdote. When I started to take an interest in Bentham on evidence in the 1970s, I thought that it would be nice to own a copy of the original J. S. Mill edition of 1827. In about 1980 I called in at Wildy's, the famous law bookshop in Lincoln's Inn Passage, and enquired if a copy had ever come their way. The manager looked puzzled and then said, 'Wait a minute', and went to consult a box of dog-eared old-style index cards. He came back smiling. They did have a search out for it. However, there was one person ahead of me in the queue. Uninhibited by data protection, I gained access to the card. It read 'R. Cross', with a London address, that is, before Rupert Cross was elected a Fellow of Magdalen College, Oxford, in 1948. Cross became the leading evidence scholar of his generation in England. So far as I know he never owned a copy of the *Rationale* and never even cited it. For his generation Bentham on evidence was an almost complete blank.

I stopped working on Bentham on evidence nearly 35 years ago. I have not read any of these works *in toto* since – although I have occasionally dipped into them, using the indexes of Mill's edition of the *Rationale* and the useful one in the Bowring edition. Instead of discussing the details of that monstrous work I shall try to set it in a broader context and suggest some questions that scholars brave enough to dive into this ocean of thought may need to investigate.

1. What Is a Theory of Evidence?

All of you have drawn inferences from evidence in the last 24 hours. The news media have also been full of items involving evidence – fake news, poisoning in Salisbury, chemical weapons in Syria, weapons of mass destruction, dope testing of athletes, and investigations and speculations about Donald Trump have all featured in the media recently. Police investigations, scenes of crime officers, forensic anthropologists and unsolved mysteries of many kinds are staples in popular culture. Sherlock Holmes is the patron saint of Evidencers. After September 11 2001, one of the most iconic events of recent times, the whole American intelligence system was shaken up, because Donald Rumsfeld, George Tenet and Robert Gates decided that 'American intelligence agencies did not possess the analytic depth or the right methods of analysis accurately to assess possible threats'.⁵ In short, the FBI and the CIA had not been taking analysis of evidence seriously enough.⁶ The Director of the FBI at the time was Robert Mueller.

‘The field of evidence is no other than the field of knowledge’,⁷ wrote Bentham, and based his approach on the ordinary common-sense inferential reasoning accessible to nearly all citizens, indeed humans. Moreover, all of us nearly all of the time (except in law and evidence-based medicine) live in a world of free proof, that is, free from rules of admissibility or weight or quantum or priority. Only in law and some rigid bureaucratic regimes are there formal binding rules of evidence. They are diminishing in extent and, as we shall see, lawyers, especially evidence scholars, greatly exaggerate their importance.⁸ Nearly all of you assume something like Bentham’s theory of evidence, that is, that there are no formal binding rules of evidence.

What is a theory of evidence? And what kind of theory was Bentham’s? I suggest that theories of evidence come in various shapes and sizes. First, we need to distinguish between a theory of evidence in law and evidence as a potential multi-disciplinary field. The latter idea has been promoted by Professor David Schum, a psychologist and statistician, who has also taken a special interest in law, historiography, probability theory and intelligence analysis.⁹ Schum’s ambitious attempts to create a distinct field or domain led first to a modest project in the Netherlands in 1994¹⁰ and then to a major programme at UCL which, despite being wound up in 2011 with an edited volume called *Evidence, Inference and Enquiry*, is still unfinished business.¹¹ The concern there was to explore the commonalities and differences, epistemological, logical, institutional and technical, about the concepts, frameworks, theories and technologies (as in forensic science) found in thinking about, reasoning and using evidence in disciplines ranging from archaeology and astronomy through probability theory and proof of the existence of God right up to zoology and zymurgy. Every empirically oriented discipline and occupation is concerned with evidence.

Bentham is clearly relevant to this ambitious multi-disciplinary UCL project, but his main writings on the subject were directly related to law. Should we think of his theory as a theory of the law of evidence or, more broadly, of evidence in law? Or is it wider than that? There have been quite a few attempts to construct such theories in England (especially during the nineteenth century), in Continental Europe (especially France and Scandinavia), and above all in the United States. These have had varied objectives.¹² Most of them were concerned to construct a coherent account, both analytical and normative, of the law of evidence in municipal, i.e. domestic, law. Let me mention just four. James Fitzjames Stephen (1829–94) tried to subsume all of the seemingly disparate rules of the

common law of evidence under the principle of relevancy.¹³ Exclude all irrelevant evidence, admit the best evidence. Sir Frederick Pollock and others called this a 'splendid mistake'. James Bradley Thayer (1831–1902) superseded Stephen, who was treated as being correct in identifying relevance as a key concept, but having erred in trying to subsume the law of evidence under a principle of relevance: this is because the rules were *exceptions* to the principle of free proof. Thayer, writing at the end of nineteenth century, maintained that the common law of evidence was based on two principles:

(1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy of law excludes it.¹⁴

In other words, exclude all irrelevant evidence and admit all relevant evidence *unless* there is a clear ground of policy of law which excludes it.¹⁵ In this view the bulk of the law of evidence consisted of a disparate series of *exceptions* to a principle of free proof; these exceptions are based on different grounds of policy, such as national security, preservation of family relations, lawyer–client relations, unreliability (e.g. hearsay) and what in Anglo-American law today is expressed in terms of excluding any evidence whose prejudicial effect outweighs its probative value.¹⁶

Thayer is important for three reasons. First, his theory is generally accepted as the one that best explains the common law of evidence even today; it is the basis of the Federal Rules of Evidence and many recent attempts at codification; and nearly all the controversial topics such as hearsay and improperly obtained evidence can be treated as internal debates within Thayer's theory.¹⁷ The second reason is that although Thayer favoured the retention of a few exclusionary rules, he is an intellectual descendant of Bentham (mediated by nineteenth-century writers) and a bridge between today's common law of evidence and, it could be argued, modern Continental systems.¹⁸ A third reason for Thayer's importance is that he taught John Henry Wigmore, who for at least 40 years from 1900 dominated American evidence law through his great *Treatise*, which had no rivals until quite recently.¹⁹

Wigmore was a fairly loyal disciple of Thayer's, but he glossed his ideas in two important ways that are relevant here. First, although, like Thayer, he wanted to retain a few exclusionary rules, he maintained that these were in fact far less important than was commonly believed

by practitioners and evidence scholars; furthermore they had steadily diminished in importance and scope during the nineteenth century. But most scholars and discourse about evidence in law omitted the basic principle(s) to which the disparate rules were exceptions. If the law of evidence is a fragmented series of exceptions to a principle of free proof, surely one should first study that principle. Wigmore put it this way: the study of evidence in law consists of two parts: the law of evidence, which he misleadingly called 'the Trial Rules', and 'the Principles of Judicial Proof as found in Logic, Psychology and General Experience'.²⁰ The principles are anterior to and more important than the trial rules and have been neglected by lawyers. Apart from his lengthy attack on the technical system of procedure, most of Bentham's *Rationale* is concerned with these principles. Until the 1970s Bentham and Wigmore were the only scholars who had paid sustained attention to these principles in law, though there was scattered interest elsewhere in logic, probability theory, forensic science, psychology and historiography.²¹

Wigmore's second deviation from, or maybe just a gloss on, Thayer arose in the context of constructing a code of evidence for the American Law Institute.²² Wigmore recommended that the rules should be '*directory not mandatory*';²³ that is, they should not be binding on bench and bar. This is very close to Bentham's 'cautionary instructions': the law of evidence should consist of non-binding guidelines rather than peremptory rules. However, Wigmore, who was quite conservative, advised that the code should contain precepts that followed closely the existing law, and his draft occupied 550 pages. But that again is not very different from Bentham, who discusses most of the concerns of the law of evidence while considering what guidance should be given to judges.²⁴

Two of Wigmore's contemporaries, Edmund Morgan and Charles E. Clark, went even closer to a Benthamite approach in urging that most of the existing rules should be abolished and much more should be left to judicial discretion.²⁵ In England we are not far from that position today in civil evidence; most teaching of the law of evidence focusses on criminal evidence, which survives in truncated form, as if evidence scholars were saying: 'What can we teach if there are no rules? If there are no rules there is nothing to learn.' My answer is: there is a great deal.²⁶

There is room for further research as to how close Morgan, Clark and, from an earlier generation, Charles F. Chamberlayne were to being Benthamite in their approach to judicial evidence.²⁷ But it should be noted that while Wigmore's great treatise on the 'Trial Rules' was a best-seller, Chamberlayne's treatise foundered at the first edition. Wigmore's

Principles probably only reached a third edition because the publishers needed to keep their most successful author happy. It is as if practitioners were saying, where there are no rules, there is nothing to look up.

Before moving on to Bentham's theory of evidence and what I have called his 'antinomian thesis', let me intrude another personal anecdote. In 1972 I heard Rupert Cross (now Sir) – the same person who had not obtained the *Rationale* (at least from Wildy's) – say in a debate on criminal evidence, 'I am working for the day when my subject is abolished.'²⁸ Although this sounded Benthamite in spirit, my reaction was not 'He is following Bentham'; rather it was *political*, a right-wing attack on some important and worthwhile rules, for I thought, and still think, that some safeguards for accused persons are worth preserving.

More important jurisprudentially, Cross's statement just did not make sense. For how could anyone *abolish* the subject of evidence in law? For inferential reasoning from evidence pervades decision-making in litigation and all other legal contexts as it does in other spheres of life. One could not abolish the field of evidence in law or in everyday life any more than one could abolish the rules of logic.

For me the big question has been: what would one study if there were no rules? Wigmore and Bentham provided a starting-point. Wigmore said, 'The Principles of Proof'; Bentham said: 'abolish all formal rules addressed to the will but pay attention to instructions addressed to the understanding'. Their answers went a long way to answering my question, except in one major respect: they focused on *judicial* decision-making. In my view that is much too narrow: adopting a total-process model of litigation and like processes, I have argued that basing decisions concerning questions of fact on inferential reasoning from evidence was an aspect of the agency of many kinds of actors with different roles in changing contexts; for the subject of evidence in law extends far beyond adjudication to include such matters as fact investigation, decisions to make a claim or to prosecute, plea bargaining and settlement out of court and on through post-trial decisions, for example by parole boards and probation officers. In this perspective adjudicative fact-determination by judges or juries is wholly exceptional, especially in a system which relies heavily on guilty pleas and on lay people – magistrates and jurors – to make final determinations. Many decisions relating to evidence are taken in the shadow of the law.

What kind of theory was Bentham's? First, it is just part of a general theory of procedure and adjudication which in turn belongs to a comprehensive political and legal philosophy. I think that Halévy got this right:

Bentham's main period of work on evidence, roughly 1802 to 1813, coincided with changes in his political views and preceded *Constitutional Code*.²⁹ Evidence is part of adjective law, which is concerned, along with judicial organisation, in implementing the pannomion, which in turn is a means of implementing his democratic theory based on utility. They are all of a piece.

Thus Bentham's theory of evidence (or evidence and proof) in law is primarily a design theory for a system of adjective law, the main role of which is to implement substantive law assumed to be consonant with utility. The direct end of procedure is rectitude of decision, that is, correct application of law deemed to be good to true facts by means of reasoning based on relevant evidence. The indirect end of procedure is avoidance of preponderant vexation, expense and delay also judged by utility. Thus evidence is the means to arrive at truth in adjudication, and Bentham firmly stated that no artificial binding rules could promote rectitude of decision. There should be no formal rules of evidence, although I am not confident that Bentham was serious about this in respect of procedure.

A typical passage comes in discussion of the estimation of the probative force of circumstantial evidence:

On this as on every other part of the field of evidence, rules capable of rendering right decisions secure, are what the nature of things denies. To the establishment of rules by which misdecision is rendered more probable than it would otherwise be, the nature of man is prone. To put the legislator and the judge upon their guard against such rashness, is all that the industry of the free inquirer can do in favour of the ends of justice.³⁰

In short, peremptory rules of evidence are inevitably going to be over-inclusive or under-inclusive.³¹

Bentham's espousal of the natural system and his attack on all formal rules of evidence seemed extreme to lawyers in his time and still seems so to most lawyers today. But let us pause a moment: how far is legal decision-making based on rules of evidence today?

In modern law it is generally accepted that relevance is a matter of logic, not law. As Thayer put it, 'The law has no mandamus to the logical faculty'.³² Yet, as Bentham saw clearly, the most important means of exclusion is on grounds of irrelevance, but that is not a 'rule'.

Secondly, with only very minor exceptions, we have no rules of weight or probative force. That too is a matter of logic and general

experience. Wigmore went so far as to say that talk of rules of weight or credibility is akin to 'moral treason on our system'.³³

Similarly there are almost no rules of quantum, i.e. specifications of the amount of evidence that is necessary for a decision of guilt or liability. That gets rid of the old numerical system that specified the number of witnesses or the amount of evidence. Rules requiring corroboration have atrophied and have barely survived except in rare cases of treason, perjury and procuration of girls for prostitution.³⁴

Especially interesting in the digital era is Bentham's attack on priority rules and the incapacity of classes of witnesses. Sir Jeffrey Gilbert's *The Law of Evidence* (written in the 1720s, published 1754) gave Bentham a clear target to attack. Gilbert had organised his account of the law of evidence around a scale of rules of weight linked to 'the best evidence rule' (now known as an evidentiary 'ghost').³⁵

Bentham's Influence?

Today there are almost no priority rules, no rules of weight or probative force, and hardly any rules about capacity of witnesses or corroboration. By 1900 nearly all of Bentham's main targets had disappeared from English law, but not because of his direct 'influence'. There is no doubt that nearly all changes in the law of evidence since Bentham's day have moved in the direction that he charted, but in a piecemeal and slow fashion that he would have deplored. There are remarkable affinities in trends towards simplification, flexibility and greater judicial discretion.

Christopher Allen in *The Law of Evidence in Victorian England* (1997) has convincingly punctured many exaggerated claims about Bentham's immense influence, especially in relation to evidence. His story shows that, for the most part, proposed changes had to win the support of the legal profession and that by no means all of the proponents of change were Benthamites; moreover, those who used Bentham's arguments rarely attributed the ideas to him. Rather, the uneven processes of change were due to 'a variety of social, political, and intellectual pressures' during the Victorian era.³⁶

Bentham's ideas may have seemed radical, his attacks on the legal profession may not have forwarded his case and his influence on law reform may have not been as direct as has often been stated, but there is no doubt that the mainstream set of working assumptions in law today, in most kinds of decision-making and in everyday life, are dominant, despite

post-modernist, relativist and other sceptical tendencies. Seek empirical truth by informal inferential reasoning based on evidence in the presence of the parties.

There is one exception that we need to keep an eye on. The more doctrinaire versions of evidence-based medicine (EBM) are established on something akin to the priority rules set out in Gilbert's *The Law of Evidence* (1754), which Bentham destroyed over two centuries ago in *An Introductory View* (ed. James Mill, 1810). When I recently visited a doctor, he brought up on screen an algorithm which set out priority rules for ranking classes of evidence, with randomised, repeated, controlled clinical trials at the top, and expert opinion near the bottom. Luckily, he was also interested in what I thought. In its purer forms EBM allowed no room for intuition, judgement based on experience, let alone 'a patient's idiosyncratic preferences'.³⁷ Within EBM there has been a softening of dogma, but beware: computer programmers and Big Data want priority rules and are gaining influence. Are protocols and algorithms in the context of bureaucracy and modern technology not creeping in the direction of Gilbert's priority rules? Come back JB.

Notes

- 1 The keynote lecture of 'Bentham's Theory of Evidence: An Anglo-French Symposium', held at UCL on 12–13 April 2018, generously supported by UCL/French Embassy Arts, Humanities and Social Workshop Fund.
- 2 See the accompanying report.
- 3 We also noted that these works are intimately related to the *Constitutional Code*.
- 4 W. Twining, *Theories of Evidence: Bentham and Wigmore*, Weidenfeld and Nicolson, London, and Stanford University Press, Stanford, CA, 1985 (hereafter *TEBW*).
- 5 William Twining, *Rethinking Evidence*, Cambridge University Press, Cambridge, 2nd edn, 2006 (hereafter *RE*), Chapter 15.
- 6 See T. Anderson, D. Schum and W. Twining, *Analysis of Evidence*, Cambridge University Press, Cambridge, 2nd edn, 2005, 46–55.
- 7 *An Introductory View*, Chapter 1 (Bowring, vi. 5–6).
- 8 *RE*, 210–16.
- 9 See, for instance, David Schum, *The Evidential Foundations of Probabilistic Reasoning*, Wiley, New York, 1994, Chichester, 2001, and *Evidence and Inference for the Intelligence Analyst*, 2 vols, University of America Press, Lanham, MD, 1987.
- 10 W. Twining and I. Hampsher-Monk, eds, *Evidence and Inference in History and Law: Interdisciplinary Dialogues*, Northwestern University Press, Evanston, IL, 2003.
- 11 P. Dawid, W. Twining and Mimi Vasilaki, eds, *Evidence, Inference and Enquiry*, Oxford University Press, Oxford, 2011. See W. Twining, *Jurist in Context*, Cambridge University Press, Cambridge, 2019, 265–6.
- 12 *RE*, Chapters 2–4.
- 13 J. F. Stephen, *The Indian Evidence Act: with an Introduction on the Principles of Judicial Evidence*, Macmillan and Co., London, 1872.
- 14 J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law*, Little, Brown, Boston, 1898, 530; cf. 266.

- 15 Bentham excluded superfluous evidence; Thayer achieved the same result by a different route (*ibid.*, 516–18).
- 16 These two principles relate to admissibility of evidence (‘the exclusionary rules’). Thayer acknowledged that the law of evidence also dealt with other topics, e.g. standards of proof, presumptions. Like Bentham he had difficulty in drawing a clear line between evidence and procedure (‘adjective law’), and in order to make the subject of evidence coherent he tended to shunt some topics off to procedure. In considering Bentham’s approach to evidence it is appropriate to take a wider view of the law of evidence than Thayer’s.
- 17 See Eleanor Swift, ‘One Hundred Years of Evidence Law Reform: Thayer’s Triumph’, *California Law Review*, Vol. 88, No. 6, 2000, pp. 2437–76.
- 18 *RE*, 85–6, 199–200.
- 19 See *TEBW*, 109–114.
- 20 On ‘general experience’ see *TEBW*, 145–52.
- 21 On ‘The New Evidence Scholarship’, which developed in the 1970s, see *RE*, 244–8, 332–4.
- 22 The Code started in 1942 and continued through various projects to the Federal Rules of Evidence, enacted in 1975.
- 23 J. H. Wigmore, ‘The American Law Institute Code of Evidence: A Dissent’, *American Bar Association Journal*, Vol. 28, No. 1, 1942, pp. 23–8; *TEBW*, 42–4.
- 24 For example, the extensive treatment of hearsay under ‘makeshift evidence’ in *Rationale of Judicial Evidence*, Book VI.
- 25 *TEBW*, 162–3. Clark was associated with American Legal Realism and thus with alleged ‘rule-scepticism’, but that is another story.
- 26 See Anderson et al., *Analysis of Evidence*, *passim*.
- 27 On Chamberlayne see *TEBW* 122–3.
- 28 *RE*, p. 1.
- 29 Elie Halévy, *The Growth of Philosophic Radicalism* [1928] (trans. Mary Morris), Beacon Press, Boston, 1955; *TEBW*, p. 169.
- 30 Bowring, vii. 64; *A Treatise on Judicial Evidence*, 180.
- 31 See F. Schauer, *Playing by the Rules*, Clarendon Press, Oxford, 1993.
- 32 Thayer, *A Preliminary Treatise*, p. 314n.
- 33 Cited in *RE*, p. 71.
- 34 However, judges have a duty to warn a jury about the reliability of certain kinds of evidence, e.g. evidence of identification. See P. Roberts and A. Zuckerman, *Criminal Evidence*, Oxford University Press, Oxford, 2nd edn, 2010, index, under ‘warnings’.
- 35 In *RE* I summarised Bentham’s critique of Gilbert as follows: ‘According to Bentham the efficient cause of Gilbert’s error was a defective scheme of arrangement; the final cause was the sinister interest of the legal fraternity to throw and keep the subject in confusion; the result a false theory which, *inter alia*, erroneously gives precedence to written over oral evidence. By making the distinction between written and oral evidence the foundation of their system, Gilbert and his successors were led into several errors: they overlook real evidence, give insufficient attention to circumstantial evidence and ignore several crucial distinctions. ... The main target is ostensibly Gilbert’s scheme of classification but the object of attack is the attempt to regulate judgments of probability by formal rules’ (*RE*, pp. 39–40).
- 36 Christopher Allen, *The Law of Evidence in Victorian England*, Cambridge University Press, Cambridge, 1997, p. 186.
- 37 ‘The so-called “philosophy” of the EBM movement was that a strictly empirical approach, based largely on randomised controlled clinical trials of interventions, could – and, crucially, SHOULD – provide all the information that doctors needed for clinical decision making. A perfect clinical decision was one that was made on the basis of a thorough assessment of all the relevant research literature (where “research” was judged in a strict hierarchy with randomised controlled trials at the top and expert opinion at the bottom). EBM in its pure form was thus seen as antithetical to intuitive judgment, expertise or experience. Later developments in EBM allow that clinical experience and intuition, and the patient’s idiosyncratic preferences, CAN play important roles alongside evidence from trials. But many unanswered questions remain ...’ (Patricia Greenhalgh, ‘Is Evidence-Based Medicine Dead?’ (UCL seminar, 2003), cited in *RE*, p. 439).

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Appendix

BENTHAM PROJECT

Evidence, Procedure and Judicial Organization: a report to the Executive Committee

1. At its meeting on October 22nd 1980, the Executive resolved to ask Miss Gobbi to undertake a pilot survey of the manuscripts relating to procedure and judicial administration in order to provide a basis for a preliminary assessment of their extent and their relationship to the manuscripts on evidence. This survey was prompted by Professor Twining's memorandum of August 25th 1980, headed 'Adjective Law and Judicial Organization', which surveyed the history of the Evidence Project and raised some questions about a possible strategy for dealing with the writings on evidence, procedure and judicial organization as a whole (hereafter EPJ).

2. Miss Gobbi began work on the survey part-time in October 1980. To begin with she concentrated on *Scotch Reform*, which proved to be more extensive, more complex and more significant than had hitherto been appreciated. Accordingly she did a rather more thorough analysis of the relevant manuscripts than had originally been envisaged; and she made a detailed report on this, a précis of which is attached as Appendix II to this memorandum. In September 1981 Professor Twining and Miss Gobbi spent several days on a preliminary survey of the boxes containing manuscripts on procedure and judicial administration. It must be emphasised that this involved only a very cursory examination of the material, but it provided a basis for making a rough estimate of the amount of material and, in general terms, of its relationship to Bentham's published writings in this area. A more thorough appraisal of the Evidence material had already been completed as part of the evidence project. Accordingly we have decided to submit this composite report on writings on EPJ in order to enable the Executive to develop some long-term plans for work in the area. We emphasise that the findings on procedure and judicial administration are only tentative.

3. Classification of material. So far as possible we have tried to identify all material relating to the following categories:

- (a) Evidence, including manuscripts marked 'Evidence and Procedure';

(b) Procedure, fairly narrowly conceived: the bulk of this material consists of (i) manuscripts prior to 1800; (ii) manuscripts relating to the ‘Principles of [Judicial] Procedure’, mainly from the periods 1800–1805 and 1823–28; (iii) *Projet Matière*; and (iv) ‘Letter to the Electors of Great Britain and Ireland’.

(c) Judicial administration, including aspects of judicial organization not covered by the *Constitutional Code* and miscellaneous writings on administration of justice.

(d) *Scotch Reform* and ‘Court of Lords Delegates’.

(e) Borderline and doubtful cases, including *Lord Brougham Displayed*, *Truth versus Ashurst*, *Justice and Codification Petitions* (see Appendix I).

So far as possible we have tried to relate each body of manuscript either to a particular published work or to a specific projected work. In most cases this has proved to be possible, but there are naturally some exceptions and some unresolved problems.

4. The relevant published works and the main bodies of manuscript material covered by the categories in paragraph 3 are outlined in the chart in Appendix I. From this it will be seen that the total material on evidence, procedure and judicial administration is directly related to approximately 17 published works of varying length and 33,326 pages of manuscript.

5. On the basis of this survey, we have come to the following tentative conclusions about the body of material.

(a) There is, as we suspected, a close interrelationship between the writings on evidence, procedure and judicial administration, with the result that it would be artificial (and risky from a scholarly point of view) to try to treat them as [discrete] units. There is also a close relationship with the constitutional writings, so that a general project on EPJ would be a natural successor to the volumes of *Constitutional Code*.

(b) Much of the material is repetitive, including early drafts of subsequently published works (e.g. the *Rationale*), with considerable overlaps between the various bodies of material. Although this will require careful checking, it is our impression

that most of Bentham's ideas on evidence and procedure were fairly stable and that much of the early material on these subjects is sufficiently similar to the later writings to make extensive publication of the early writings difficult to justify. It may well prove to be adequate to make quite a lot of the material available to scholars in the form of rough working typescripts, (as has already been done with the evidence) to assist them to identify particular passages in unpublished manuscripts. No decision need be taken on this issue at this stage, but our findings do suggest that the scale of the task of preparing the main writings on EPJ is rather less than we had anticipated. In our judgment the total number of CW volumes required to cover the general area would be not less than four volumes and not more than seven volumes (for details, see below).

(c) Because of the close interconnections between this body of material it would be very helpful both for editors and for users of CW volumes to have a composite analytical index of all the EPJ writings and, in the published volumes, to have a single system of cross-referencing this material.

(d) For the above versions, it would be highly desirable, if feasible, for work on editing—especially preliminary editing—of all the EPJ material to proceed roughly contemporaneously. This suggests that a relatively large scale exercise carried on over a relatively short period of time (say 4–5 years) would be preferable to tackling individual volumes *seriatim* over a longer period.

(e) Some of the material, notably *Scotch Reform* and 'Court of Lords Delegates', may have a broader appeal than we had originally anticipated. These works are not solely of interest in respect of EPJ, for they deal extensively with matters of language, oaths, various administrative and a lot else besides. They are also of historical interest, not least in relation to the question of the development of Bentham's political views (see for this Claire Gobbi's Report on *Scotch Reform*).

6. Possible CW volumes: a provisional scenario.

(a) Evidence

(i) 'Introductory View' and '*Swear Not At All*' (1 vol.).

(ii) Possibly *Treatise [of Judicial Evidence]* or *Traité [des preuves judiciaires]* as a work by Dumont and Bentham, with supplementary manuscript material (est. 75–150 pp). (1 vol.). (see WLT memorandum of 25.8.80).

(iii) Exclude the *Rationale of Judicial Evidence* from CW on the grounds (a) that almost none of the original manuscript survives; (b) a modestly priced facsimile of the J.S. Mill edition has recently been published; (c) very little could be added to (b) in a CW edition, except a few notes, cross-references and an improved index, most of which could be covered by a comprehensive index for the EPJ volumes.

(b) Procedure

(i) Most of the original manuscript of the ‘Principles of [Judicial] Procedure’ (ed. Doane) appears to survive and presents a task similar in scale and difficulty to the ‘Introductory View’, i.e. it requires re-editing, but this is, by the standards of the project, relatively straightforward. *Projet Matière* is a short work, which presumably should be included in CW and might well be included in the same volume as the ‘Principles’. Our provisional judgment is that most of the earlier procedure MSS can be treated as early versions of the ‘Principles’; if this proves to be correct, only a limited amount of the early procedure material needs to be included in CW, in which case all of the procedure writings to be included in CW might fit into one volume of 350–450 pages.

(c) Judicial Administration

(i) *Scotch Reform*. On the basis of Miss Gobbi’s study it seems that this will require to be edited *ab initio* and will probably fill a substantial volume (est. 500 pages). Given the potential interest of this work we feel that it deserves quite a high priority within the project.

(ii) ‘Court of Lords Delegates’. *Prima facie* it seems that this will also require a volume of its own, but it might be possible to include some additional cognate writings, e.g. ‘[Draught of a New] Plan [for the Organisation of the] Judicial Establishment

for France'. This material requires further examination before any definite decisions are taken. If overlapping material in *Scotch Reform* and 'Court of Lords Delegates' was excluded, it might be possible to include both of these works in a single volume, but we are rather doubtful about this.

(iii) Other judicial administration material, including borderline and dubious cases. This includes *Lord Brougham Displayed*, 'Equity Dispatch Court [Plan]' and *Bill*, '[Draught of a New Plan]', *Elements of the Art of Packing* and *Justice and Codification Petitions* and other *opera minora* and fragments. The relationship of them to other of Bentham's writings has yet to be explained. The scale of the publishable material and the difficulty of editing it and its potential interest are, at least for us, largely a matter of speculation. Our very tentative conclusion is that this material is likely to take up not less than two and not more than four, conceivably five, volumes of *CW*.

Conclusion

Our provisional estimate is that the total number of volumes of EPJ in *CW* is likely to be not less than four volumes and not more than seven volumes, made up as follows: evidence (1–2); procedure (1); judicial administration (2–4). Our very tentative conclusion is that four or five volumes would suffice, if the *Rationale* is excluded and repetitive manuscript material is treated quite selectively.

7. Possible strategies

On the basis of the foregoing it is possible to outline several alternative strategies for dealing with EPJ. Three main strategic alternatives present themselves, each of which is subject to many variants. Briefly, these are: (a) A volume by volume approach, for example starting with 'Introductory View' and '*Swear Not At All*', proceeding to *Scotch Reform* and leaving open decisions about future volumes for the time being; (b) A single major project or programme involving several editors and assistants working simultaneously and in close liaison over a period of 4–5 years; (c) A two-stage project: stage one would involve dealing with all the material on procedure and judicial administration in much the same

way as the evidence material has already been dealt with and producing a working analytical index of all the material, without a view to immediate publication. The second stage would involve editing selected material for publication either on a volume by volume basis or as part of a co-ordinated programme as in (b).

8. The relative advantages and disadvantages of each of these approaches have been rehearsed in discussion on several occasions. We shall not attempt to repeat all the relevant arguments here. In our view, (b) is clearly the most desirable, if it is feasible; there are, however, several difficulties, notably that it would require a major fund-raising exercise, several editors would have to be recruited, extra accommodation might be needed and arrangements for publication would need to be negotiated in advance. Professor Twining has always been opposed to (a) on the grounds that the risk of error is too great, enormous duplication of effort is involved and the utility of individual volumes will be considerably less than an integrated group of volumes, (c) represents a compromise position, with the advantage that it is more manageable than (b) and the disadvantage that there will inevitably be some duplication of effort. The work on stage 1 is done by different people from stage 2 or if there is- a substantial gap in time between the two stages. Accordingly in our view the first question for the Executive to determine is whether the prospects for overcoming the obstacles to (b) were such as to justify the effort that would be involved in fund-raising, recruiting editors, negotiating with publishers etc. In short, is it realistic to think in terms of a single sub-project lasting 4–5 years which would result in the publication of 4–7 volumes and making available in rough typescript approximately 13,326 pages of unpublished manuscript?

W.L. Twining

Claire Gobbi

29 October 1981