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## INTRODUCTION

### Editors' introduction

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### Abbreviations used in this issue

Please note the use of the following Abbreviations used in this Special Issue:

Bowring	<i>The Works of Jeremy Bentham</i> , published under the superintendence of his executor John Bowring, 11 vols (Edinburgh, 1843).
CWJB	<i>The Collected Works of Jeremy Bentham</i> , General Editors J.H. Burns, J.R. Dinwiddy, F. Rosen, and P. Schofield (London, 1968–81; Oxford, 1983–).
CWJSM	<i>The Collected Works of John Stuart Mill</i> , General Editor J.M. Robson, 33 vols (Toronto and London, 1963–91).
IPML	<i>An Introduction to the Principles of Morals and Legislation</i> (first published 1789), ed. J.H. Burns and H.L.A. Hart (London, 1970).
Traités	<i>Traités de législation civile et pénale</i> , ed. E. Dumont, 3 vols (Paris, 1802).
Traités 2010	<i>Traités de législation civile et pénale</i> , ed. E. Dumont, prefaced by M. Bozzo-Rey, A. Brunon-Ernst, and E. de Champs (Paris, 2010).
UC	Bentham Papers in the Library of University College London. Roman numerals refer to boxes in which the papers are placed, Arabic to the leaves within each box.

Jeremy Bentham is known as the founder of classical utilitarianism, and as a profound analyser and theorist of law. Occasionally, he is also mentioned (though for the most part fleetingly) as among the thinkers who contributed to the development of economics as a discipline. Insofar as the *homo economicus* of modern economics is assumed to be a self-interested utility maximizer, Bentham would recognize his own characterization of typical human motivation (provided only that utility was understood as a net balance of pleasure over pain). However, he also recognized that, in seeking to maximize their own utility, human beings often make mistakes, through laziness or lack of time, overhasty associations of ideas, or desire to think and act like their fellows. In the English-speaking world at least, the previous sentence will be instantly recognizable as a summary of the findings of behavioural economics in general, and the nudge theory of Richard Thaler and Cass Sunstein in particular.<sup>1</sup> Unfortunately for Bentham, he never published the material in which he most fully developed his insights into the obstacles to rational choosing, and to the range of possible governmental responses to both those obstacles and to the failures of rationality to which they give rise. That work, Bentham's essay on 'Indirect Legislation', is the topic of this special issue.

The origin of Bentham's writings on indirect legislation lies in his efforts to complete his most famous work, *An Introduction to the Principles of Morals and Legislation*,<sup>2</sup> almost all of which was printed in 1780, although the work was not published until 1789. He decided that the distinction between penal and civil law required a brief explanation, and set out to provide one, only to find that

this separation could scarcely be said as yet to exist: and that to set up one of my own in such manner as to answer as nearly as possible the purposes for which the verbal distinction is made, would involve a

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<sup>1</sup>See R.H. Thaler and C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (first published 2008), new international edition (London, 2009).

<sup>2</sup>*An Introduction to the Principles of Morals and Legislation* (first published 1789), ed. J.H. Burns and H.L.A. Hart (London, 1970 (*The Collected Works of Jeremy Bentham*)); henceforth in this issue *IPML* and *CWJB*.

multitude of problems of the most intricate kind which nobody seem'd hitherto to have thought of solving.<sup>3</sup>

The product of this inquiry was *Of the Limits of the Penal Branch of Jurisprudence*, which quickly expanded to the length of a volume, and contains the fullest statement of Bentham's theory of law, and the development and exposition of his logic of the will.<sup>4</sup> Bentham planned and drafted two further additional Chapters for *IPML*, namely 'Indirect Legislation' and 'Place and Time', which concerned respectively 'the several ways of preventing misdeeds otherwise than by (force of) punishment immediately applied to the very act which is obnoxious',<sup>5</sup> and the 'influence of *time* and *place* on the expediency of a law. Some parts of a perfect body of law will be equally adapted to all times and places: others not'.<sup>6</sup> Neither of these essays, written in 1782, has yet appeared in the *Collected Works*, although a preliminary text of 'Place and Time' appeared in 2011.<sup>7</sup>

Bentham neither completed nor published his essay on 'Indirect Legislation', which, like *Limits*, expanded to voluminous proportions. However, writing in French, he returned to discussion of indirect legislation in the mid-1780s when drafting another work which was later to be abandoned unfinished, namely 'Projet d'un corps de loix complet'.<sup>8</sup> Some or all of these two bodies of manuscripts were utilized by Bentham's Genevan friend and editor Étienne Dumont,<sup>9</sup> who produced a version of the material in the third volume of his recension *Traité de législation civile et pénale*,<sup>10</sup> published in 1802, a work which succeeded in establishing for Bentham a considerable reputation on the continent as a political writer of note. Forty years later, after Bentham's death, large parts of the *Traité*s were retranslated for inclusion in the 11 volume Bowring edition of Bentham's collected works,<sup>11</sup> and Dumont's version of 'Indirect Legislation' appeared in the first volume.<sup>12</sup>

Neither Bentham's unpublished English essay 'Indirect Legislation' nor the published versions of Dumont's recensions of it attracted very much interest from interpreters of Bentham's thought until the second half of the twentieth century. Notwithstanding the ground-breaking contribution of Brunon-Ernst below, indirect legislation makes no explicit appearance in the 33 volumes of the *Collected Works* of J.S. Mill, or in Sidgwick's *Methods of Ethics*. Similarly, it is not discussed in either Stephen's *English Utilitarians*,<sup>13</sup> or Albee's *History of English Utilitarianism*,<sup>14</sup> and receives only a passing mention in Halevy's *Growth of Philosophic Radicalism*.<sup>15</sup> Even C.K. Ogden, who edited and published an

<sup>3</sup>Bentham to Lord Ashburton, June 3, 1782, *The Correspondence of Jeremy Bentham*, Volume III., ed. I.R. Christie (London, 1971 (CWJB)), 121–30, at 123.

<sup>4</sup>*Of the Limits of the Penal Branch of Jurisprudence*, ed. P. Schofield (Oxford, 2010 (CWJB)). *Limits* first appeared as *The Limits of Jurisprudence Defined*, ed. C.W. Everett (New York, 1945), before being edited for the *Collected Works* by H.L.A. Hart as *Of Laws in General* (London, 1970), and re-edited by Schofield in 2010.

<sup>5</sup>Bentham to Ashburton, *Correspondence* (CWJB) III. 127.

<sup>6</sup>*Ibid.*

<sup>7</sup>'Place and Time', ed. P. Schofield and S.G. Engelmann, in *Jeremy Bentham: Selected Writings*, ed. S.G. Engelmann (New Haven & London, 2011), 152–219.

<sup>8</sup>The following full title of this projected work appears at University College London collection of Bentham manuscripts (henceforth UC) xcix. 156: 'Projet d'un corps de loix complet, à l'usage d'un pays quelconque: avec les principes et les raisons tant générales que particulières sur lesquelles chaque disposition aura été fondée'.

<sup>9</sup>Pierre Étienne Louis Dumont (1759–1829), produced five recensions of Bentham's works.

<sup>10</sup>'Principes du code pénal. Quatrième partie. Des moyens indirects de prévenir les délits', in *Traité de législation civile et pénale*, ed. Étienne Dumont, 3 vols, Paris, 1802, III. 1–199 (henceforth *Traité*s). For a modern edition of the *Traité*s in one volume see *Traité de législation civile et pénale*, edited by E. Dumont, prefaced by M. Bozzo-Rey, A. Brunon-Ernst, E. de Champs (Paris, 2010) (henceforth *Traité*s 2010).

<sup>11</sup>*The Works of Jeremy Bentham*, published under the Superintendence of his Executor, John Bowring, 11 vols, Edinburgh, 1843 (henceforth Bowring).

<sup>12</sup>'Principles of Penal Law. Part III. Of Indirect Means of Preventing Crimes', *Bowring* I. 533–80.

<sup>13</sup>Leslie Stephen, *The English Utilitarians: Volume I. Jeremy Bentham* (London, 1900).

<sup>14</sup>Ernest Albee, *History of English Utilitarianism* (London and New York, 1902).

<sup>15</sup>See Elie Halévy, *The Growth of Philosophic Radicalism* (first published at Paris, 1901) (London, 1928), 78–9, 145.

English version of Dumont's *Traité*s in 1931,<sup>16</sup> and thus republished 'Of Indirect Means of Preventing Crimes', included no discussion of, indeed no reference at all to, indirect legislation in his introduction.

No editorial work was undertaken on Bentham's English draft of 'Indirect Legislation' until the late 1970s, when Charles F. Bahmueller at the Bentham Project prepared a draft text, consisting in a Preface, a Plan cum Introduction, 19 Chapters, a Conclusion, and nine Appendices. Further work on the text and notes was undertaken in the early 1980s by Frederick Rosen, Stephen Conway and Claire Gobbi. The successive eddies and currents of the funding environment within which the Bentham Project has always operated (and continues to operate) have meant that neither time nor money has yet been available to complete the work which Bahmueller started. Until money and time become available for further editorial work, however, this text is the best available for scholars interested in Bentham's exposition of indirect legislation, as expounded in his native language. In recognition of this fact, and with grateful acknowledgement to the work of Bahmueller, the contributors to this special issue were equipped with this draft text, with no new editorial intervention beyond checking the draft text against the original transcripts for accuracy. We are, however, very happy to report that the manuscripts containing Bentham's essay 'Indirect Legislation' are now open to public view (and hopefully public transcription) via the platform of the award-winning crowd-sourcing initiative Transcribe Bentham, administered by the Bentham Project at UCL.<sup>17</sup>

The first scholar to study the manuscripts of Bentham's English draft of the essay in depth, and to publish her discussion, was Mary Mack. Mack's indictment of the lack of attention previously accorded to indirect legislation was trenchant: 'The total neglect of these manuscripts is mystifying and deplorable, for next to the logic of the will itself, they may well be his most original contribution to the history of thought.'<sup>18</sup> For her own part, she first made the effort to integrate indirect legislation into Bentham's theory of law, and second devoted an extensive discussion to an analysis of the essay.<sup>19</sup> Mack also foreshadows two of the issues which arise in relation to indirect legislation, anticipating on the one hand those who see indirect legislation as Bentham's ideal form of law, intended in the long run, through mobilization of the moral sanction, to supersede coercive law,<sup>20</sup> and advancing on the other a hypothesis to explain the apparent disappearance of the concept from Bentham's legislative tool-box.<sup>21</sup> Neither thesis is completely convincing, but Mack should be credited with an astute identification of some of the most important issues.

Perhaps inspired by Mack's investigation, Douglas Long also analysed Bentham's essay on 'Indirect Legislation'.<sup>22</sup> Long sensibly treated the essay together with 'Place and Time', also drafted in continuation of *IPML*. Long also draws attention to the interaction between the political and moral sanctions, and notes Bentham's discussion of indirect means of preventing misrule. Like Engelmann in this issue, he stresses Bentham's attachment to 'the right of arming and association', and his denial that these rights pose a threat to the existence of government.<sup>23</sup> L.J. Hume also used 'Indirect Legislation' to good effect in developing his original interpretation of Bentham's theory of law and its application to all aspects of state behaviour: 'Government could only be accounted for and analysed

<sup>16</sup>J. Bentham, *Theory of Legislation* (New York, 1931). Ogden used as the basis of his text Richard Hildreth's translation of the *Traité*s, first published as *Theory of Legislation*, 2 vols (Boston, 1840).

<sup>17</sup><http://blogs.ucl.ac.uk/transcribe-bentham/>. The manuscripts in question are in boxes lxxxvii (87), lxii (62), xcvi (96) and xcix (99).

<sup>18</sup>M. Mack, *Jeremy Bentham: An Odyssey of Ideas, 1748–1792* (London, 1962), 174n.

<sup>19</sup>See *ibid.*, 170–5, 291–327.

<sup>20</sup>See *ibid.*, 292–3.

In the 'transcendental' future, the good legislator will have provided for basic physical needs and subsistence for all, abolished the irrational and frightening religious sanctions, and sought in every way to minimize his own professional judicial and legislative operations. In that ideal time, the moral sanction will have replaced the political. Men would choose to behave well because they understood utilitarian rationales, not because their wills were coerced by threats of punishment.

<sup>21</sup>See *ibid.*, 326: 'When Bentham laid aside his chapters on Indirect Legislation he began a new age of compromise. He no longer ran from a good thing to a better; he now retreated from the best to the possible.'

<sup>22</sup>D.G. Long, *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to His Utilitarianism* (Toronto, 1977), 135–49.

<sup>23</sup>See *ibid.*, 144–5, citing 'Indirect Legislation', UC lxxxvii. 119–20.

in legal terms, and the established body of legal analysis could easily be extended to cover any aspect of the state.<sup>24</sup> Hume also brought out the focus of ‘Indirect Legislation’ on ‘the techniques of government, the means of establishing social control’, and, developing a theme picked up by Marciniak in this issue, concluded that Bentham’s essay was ‘a sort of manual of preventive police’.<sup>25</sup> Informed by his editorial work on ‘Indirect Legislation’, Bahmueller made use of Bentham’s discussion of indigence in the essay in his analysis of Bentham’s poor law writings.<sup>26</sup> Thereafter, little attention was paid to the subject until Stephen Engelmann’s seminal article of 2003,<sup>27</sup> which prompted a renewed interest, and was quickly followed in 2005 by Christian Laval’s ‘La chaîne invisible’.<sup>28</sup> Laval rightly paid tribute to Engelmann’s contribution in his own article, which, notwithstanding its exclusive reliance on Dumont’s version of the text, has been equally influential. The editors are grateful to him for allowing the excellent translation by Helen Tomlinson, and to Emmanuelle de Champs, editor of the *Revue d’études benthamiennes*, for permitting the republication of the article in this issue,<sup>29</sup> which will finally make it accessible to students in English. In France, several scholars have built on Laval’s pioneering work,<sup>30</sup> while in Japan Bentham’s readiness to use public power in manipulating environments to good ends has been widely noted and defended, for instance, by Itai.<sup>31</sup> In England, by contrast, perhaps because of Hart’s focus on Bentham’s theory of law as command, there has been very little work on the subject.<sup>32</sup> In their introductions to Bentham both Dinwiddy and Crimmins do discuss Indirect Legislation, but only very briefly,<sup>33</sup> while the subject does not merit an entry in the most recent encyclopedia of Utilitarianism.<sup>34</sup>

Notwithstanding the very limited attention so far paid to Bentham’s writings on indirect legislation, many provocative questions arise in relation to them, some of which are directly treated in this special issue. Among the questions which might be posed are ‘What is the relationship between direct and indirect legislation, and what is the place of the latter in Bentham’s theory of law and his art and science of legislation?’; ‘What is the explanation of the apparent disappearance of the term indirect legislation from Bentham’s vocabulary after about 1790, and does it involve the rejection of the concept – as well as the term – from his legislator’s toolbox?’; ‘To what extent does Bentham’s indirect legislation pre-figure the nudge theory of Thaler and Sunstein?’; ‘Is Bentham open to charges of dissimulation, and of seeking to manipulate a public opinion unconscious of its manipulation?’; and, finally, ‘Does the alleged esotericism of indirect legislation directly contradict Bentham’s oft-repeated commitments to transparency in the exercise of public power?’ It is our view that Bentham’s writings on indirect legislation raise issues which go to the heart of the task of interpreting his thought on the one hand, and which remain at the centre of thinking about law and politics in our own time on the other. The contributions to this issue by no means purport to resolve all these questions, but it is our hope that they will stimulate others to revisit them (and these writings), and help to facilitate both original thinking and a collegiate exchange of ideas and arguments, and thus make a small contribution to their resolution.<sup>35</sup>

<sup>24</sup>L.J. Hume, *Bentham and Bureaucracy* (Cambridge, 1981), 77.

<sup>25</sup>*Ibid.*, 96, 97.

<sup>26</sup>C.F. Bahmueller, *The National Charity Company: Jeremy Bentham’s Silent Revolution* (Berkeley, 1981).

<sup>27</sup>S.G. Engelmann, ‘“Indirect Legislation”: Bentham’s Liberal Government’, *Polity* 35 (2003): 369–88.

<sup>28</sup>C. Laval, ‘La chaîne invisible: Bentham et le néolibéralisme’, *Revue d’études benthamiennes* 1 (2006).

<sup>29</sup>See 34–52 below.

<sup>30</sup>See, for example, M. Bozzo-Rey, ‘Le droit comme système de contrôle social: La question des normes chez Bentham et Foucault’, *Revue d’études benthamiennes* 8 (2011); A. Brunon-Ernst, *Utilitarian Biopolitics: Bentham, Foucault and Modern Power* (London, 2012).

<sup>31</sup>See, for instance, H. Itai, A. Inoue, and S. Kodama, ‘Rethinking Nudge: Libertarian paternalism and classical utilitarianism’, *Tocqueville Review/La revue Tocqueville* 37 (2016): 81–98.

<sup>32</sup>‘Indirect Legislation’ is not discussed, for instance, in H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford, 1982).

<sup>33</sup>J. Dinwiddy, *Bentham* (Oxford, 1989), 30, 90–1; J. Crimmins, *On Bentham* (Toronto, 2004), 62–4.

<sup>34</sup>*The Bloomsbury Encyclopedia of Utilitarianism*, ed. J.E. Crimmins (London, 2013).

<sup>35</sup>David Lieberman, the quality of whose scholarship is exceeded only by that of his generosity of spirit, agreed to contribute an article discussing the relationship between indirect legislation and codification, but has been unable to do so because of a serious

Several developments make this the perfect time to bring together the contributions of different scholars to a special issue on ‘Indirect Legislation’. On the one hand, the impact of the ‘Nudge’ is too pervasive to need comment. In different ways, Engelmann, Brunon-Ernst and Bozzo-Rey tackle the issues of the extent to which Bentham anticipated nudge, and of what might he make of the charge that the subtle manipulation of individual preferences to improve outcomes is fundamentally illiberal. On the other, there can be no doubt that the focus of ‘Indirect Legislation’ is preventive. As Marciniak brings out in her contribution, a vigorous debate rages over the legitimacy of preventive measures, in terms of health, in terms of climate change, and, above all, in terms of security and counter-terrorism.

## 1. Summaries of the articles in this special issue

In Bentham’s works, indirect legislation is embedded in his art of legislation and has complex relationships with what he calls direct legislation. The special issue opens with an article by Michael Quinn, which unravels some of the complexities of Bentham’s legal theory, and in so doing makes subtle distinctions between Bentham’s indirect legislation and Nudges.

Quinn’s starting point is the normative nature of direct legislation. The role of the legislator is to identify pain-producing actions which demand a response in the form of deterrent sanctions, themselves consisting in pains, the justification of which rests in the exclusion of ‘some greater evil’. As Bentham seeks to minimize the mischief of pain, the infliction of legal punishment can be understood as a failure of penal laws to act as effective tools for crime prevention. Quinn points to some formulations in Bentham which imply that non-penal modes of law-making and of prompting compliance should be promoted. These modes involve a shift in the legislative focus, insofar as direct legislation acts on the interests or inclinations (that is the will) of the potential offender, while many indirect legislation initiatives (such as the creation of accessory offences) operate on the interest, knowledge and power of persons other than the potential perpetrator of the principal offence (thus the *indirect* nature of indirect legislation). Bentham also makes the distinction between the legislator’s primary and the secondary wills (with the latter being contained in subsidiary or adjective laws, and being used in the delivery of penal sanctions in enforcement of the former). Thus Quinn demonstrates that many expedients categorized by Bentham as indirect legislation are simultaneously exercises of direct legislation. Beyond the complexities of legal theory, the appeal of indirect legislation lies in its focus on knowledge, rather than on interest or power, thus contributing to the elimination of asymmetries of knowledge between potential offenders and potential victims by providing official standards and factual information.

The seemingly consistent distinctions built by Bentham break apart when Quinn investigates particular initiatives, such as taxes and self-executing laws, which challenge the above-mentioned distinction between direct and indirect legislation. The latter might mobilize the force of the moral sanction, where the former works through the force of the legal sanction. In doing so, indirect legislation imposes on the Legislator a duty to appeal to people’s understanding through arguments and education, while at the same time undercutting the monopoly role of her legislative will by turning opinion-formers into potential legislators. However, Quinn warns us that if all communications of will by government were construed as indirect legislation, this would extend the concept to encompass practically everything that governments do, thus depriving it of much of its usefulness in normative analysis of law. Quinn then raises the issue of the use of the ‘secret art of governing opinion’ displayed in certain measures of indirect legislation, and asks whether such strategies conflict with Bentham’s commitment to transparency. He concludes with the following statement:

On the one hand, the objective, rationalist, Enlightenment Bentham wants to focus on improvement by communication of truth, of facts, between understanding and understanding. On the other, the subjective and, to be self-consciously anachronistic, ‘post-modern’ Bentham, aware of both the constructivist nature of the world

created by human imagination, and of the weaknesses of human rational and cognitive processes, entertains the manipulation of popular will by the manipulation of popular perceptions.

Quinn's opening paper, by analysis of the unpublished manuscripts, provides a clear and subtle presentation of the workings of indirect legislation in Bentham, and thus sets the stage for the further discussions in this issue of the later (conscious or unconscious) re-appropriations of the concept by J.S. Mill, Michel Foucault, contemporary theorists of prevention, and Thaler and Sunstein.

Christian Laval's seminal paper is published here in English for the first time. It has had a major influence among Francophone Bentham scholars, because it highlights the way in which Foucault's interest in Bentham extended far beyond the concept of panopticism, and gives a prominent position to the workings of indirect legislation as a biopolitical tool.<sup>36</sup> Laval starts by briefly reviewing the conflicting representations of Bentham as either an ultra-liberal or as an inveterate social organizer in political theory, a contrast also drawn later in this issue by Stephen Engelmann and Angela Marciniak. Laval sets out to demonstrate that these interpretive categories 'miss the essential point when it comes to examining Bentham's relationship to classical liberalism and contemporary neo-liberalism'. His starting point is utilitarian government as the government of interests, under which individuals form and pursue their own ends or interests in a context which government needs to organize. This is what Foucault calls the utilitarian approach to liberalism. Bentham describes this new form of government as an 'invisible chain', that is an invisible, anonymous, permanent and regular power.

As rights and duties can only be imposed in a hierarchized political society, there is no such thing as 'natural liberty', but only a system of laws which creates both security from encroachment by others on the one hand, and security against abuse of power by the holders of political power on the other. This can only be done by facilitating the formation, recognition and pursuit of individual interests with a view to the underlying human psychological dynamic of real or imaginary pleasures and pains. In that the governing of interests is enmeshed in the language used to describe them, the legislator also needs to reform language in the direction of a neutral and dispassionate description of real entities. All this paves the way for individuals to calculate their interests. The Legislator must both understand how interests are formed, and exercise influence over their formation. Her actions must guarantee the stability of expectations needed for the production of individual and social well-being. Laval seizes on Bentham's motto 'Be quiet', which is used in his writings on political economy, to exemplify his guidance to legislators in the economic field.

With a view to Foucault's *Birth of Biopolitics*, Laval then develops the concept of government as 'arrangement', through the distinction between direct and indirect legislation. Indirect legislation becomes a 'preventative tactic' which approaches interest obliquely to rule desires and prevent ancillary offences. Bentham's art of government thus does not aim to repress desires, but to divert them through specific initiatives and techniques. Foucault named this new genre of politics 'biopolitics'. Looking at the ways in which unprofitable short-term desires are re-channelled in the market or in the management of the poor, as well as the notorious measures to facilitate identification of individuals which are devised by Bentham, Laval expands on the phrase 'invisible chain', which he interprets as the product of several elements: laws guaranteeing security, the visibility afforded to the acts of all individuals, the consequent predictability of the outcomes of the actions of both agents themselves and of others, and – in a pre-choice-architecture framework – the constellation (or concatenation, to use a Benthamic term) of circumstances and sources of influence which constitutes the environment in which decisions are made. Bentham's art of government is thus 'a radically de-individualized and disembodied power' which expands beyond the scope of the panoptic eye of surveillance into mechanisms of mutual control in society as a whole, where the people are both the observers and the observed, and reciprocally keep in check each and everyone's interest.

<sup>36</sup>Laval's contribution was written a decade ago, before Bentham's writings on indirect legislation were made more readily available thanks to the Bentham Project's Transcribe Bentham platform: see note 17 above. His references are therefore to Dumont's *Traité*s, rather than to the manuscript sources.

In his contribution, Laval establishes Bentham as a pivotal author, taking his interpretation of utilitarian government a step further than Foucault, by stressing the unique mechanisms of indirect legislation, which the author of *The Birth of Biopolitics* had tentatively identified in Bentham's writings on political economy. As Quinn notes in his discussion, political economy is a field which exemplifies the contradictions at work in the distinction between direct and indirect legislation. Laval also shows the importance of indirect legislation in challenging any interpretation which places Bentham on either side of a false dichotomy between liberals on the one hand, and advocates of state intervention on the other, since the mechanisms of indirect legislation straddle the alleged divide in building a new governmental rationality.

Anne Brunon-Ernst's contribution moves both backwards – from the current debates over the 'nudge-phenomenon' – in search of the philosophical foundations of 'behaviourally informed initiatives', and forwards, from Bentham's original discussion of indirect legislation, in search of its influence on J.S. Mill. She begins by reviewing the impact of behavioural sciences on public policy, and introducing in particular both the nudge theory of Thaler and Sunstein, and the critiques to which it has been subjected on the grounds of its conscious interference in, and manipulation of, individual decision-making. She notes the 'strategic' use made of J.S. Mill as a theorist of liberty by both critics and proponents of nudging, and finds the interpretations of Mill's harm principle advanced by the latter deeply flawed. She considers some of the inconsistencies and tensions in Mill's own development of the principle, and notes that Bentham, the explicit maximizer of happiness, seems intuitively a rather better fit than Mill with the aims and methods of nudge. Brunon-Ernst explores this hypothesis via an examination of the extent to which Mill was familiar with Bentham's writings on indirect legislation, before presenting her arresting central thesis, which is that 'Mill's Harm Principle, and, more particularly, his subtle application of it in Chapter 5 of *On Liberty* is in effect a discussion of Bentham's use of indirect legislation'. She argues, that is, that behind the scenes Mill is engaging in an intellectual exchange with the spirit of Bentham concerning the limits and appropriate means of state intervention in individual decision-making. She shows that Bentham and Mill held identical attitudes to the sale of poisons, and for identical reasons, but that differences emerge when the comparison is broadened to include such issues as the taxation of alcohol and other 'sin' goods, and the provision of education to both children and, more strikingly, adults. She encapsulates the core difference between the two thinkers as follows: 'Mill's theory of government interference is negative, to prevent harm, whereas Bentham's intervention is both positive and negative, allowing positive interventions to promote happiness.' She concludes that they differ over what value to assign to active, reflective choosing, which for Mill is crucial to self-development, but for Bentham has, at best, an instrumental value. For this reason, it is indeed Bentham, rather than Mill, who seems the more ready (and sometimes eager) to sacrifice risk-laden individual self-determination to the maximization of socially conforming happiness; and thus it is Bentham, rather than Mill, who might provide the interventionist philosophical legacy behind nudge.

Stephen Engelmann's contribution undertakes a sustained comparison between Bentham's indirect legislation and the 'Liberal-Paternalism' of Sunstein and Thaler. Engelmann argues that nudge is fully compatible with, indeed is a species of, indirect legislation, and rejects superficial conflicts between the two approaches derived from their alleged differences either in focus (criminality for the former, prudence for the latter), or in degree of confidence in everyday human rationality (speciously deemed close to absolute in the former, and consistently low in the latter). Along the way, Engelmann draws attention to Bentham's deployment of many of the apparent failures in human cognitive functioning which, having been rediscovered by behavioural economics, constitute the central prescriptive core of nudge theory.

However, although the essay cogently uncovers significant similarities between the two theories, its climax consists in a sustained exhortation to a parallel rediscovery of the political dimension of human life, which Engelmann argues might be no less attractive than familiar to Bentham, but which might well be close to unintelligible to his modern heirs. For Engelmann, Sunstein and Thaler are 'Benthamites, but Benthamites with a difference', while that difference consists in Bentham's

commitment to the vital importance of a political sphere in which human agents collectively construct, contest and develop the conditions in which they live. It is argued that Liberal Paternalism not only devalues politics, but comes perilously close to setting it aside altogether, by framing all decisions as questions of self-referential prudence, and thus diagnosing every evil as the product of individual cognitive failure, and prescribing treatment by nudges to facilitate better individual choices. In making this case, Engelmann makes good use of Bentham's repeated appeals in 'Indirect Legislation' to what is recognizably a notion of republican virtue, 'understood – as Bentham understands it – as the spirit of collective action'. The essay closes with an urgent warning that the apparent economization of human motives in Liberal Paternalism opens a short route to the denial of the need for collective dialogue, debate and action, and an appeal, which Bentham at least might urge us to heed, for the rehabilitation of politics, and the rediscovery of the value of that political liberty which 'facilitates the irreducibly collective action that is needed for its preservation'.

Angela Marciniak's paper is a fitting response both to Laval's initial criticism of outdated political categories and to Stephen Engelmann's interpretation of Liberal Paternalism as a de-politicized form of Benthamism. Marciniak focuses on the shortcomings of current prevention theories in order to argue for a critical re-assessment of the prevailing negativity towards the concept, and to offer a contribution to reconstructing a new theory of prevention. Marciniak starts her ambitious programme with an examination of contemporary concepts of prevention. She states that the prevention of harm has always been one of the most important ends of governance. However, owing to the number of fields in which prevention may be applied, and the dizzying range of techniques and policy instruments used in its application, including everything from penal law to nudges, she agrees that the concept is 'slippery'. A parallel could be drawn with Quinn's analysis of Bentham's indirect legislation, where he expounded on the pitfalls in deploying a political concept which could potentially cover all forms of human conduct. Marciniak highlights the way in which the concept of prevention is either left undefined, or carelessly equated with other competing concepts (such as risk, understood always and everywhere as exclusively risk of negative consequences, or the precautionary principle). Moreover, she shows that identifying the constituent elements of prevention, such as prediction and intervention, is no panacea for the negativism associated with the concept. In this unsatisfactory state-of-the-art, she nonetheless points to some useful typologies current in the field, such as the distinction between upstream, midstream and downstream prevention, which she later identifies with Bentham's categorization of interventions as respectively prevention, cure, or compensation.

Marciniak recoils from such a forbidding depiction of the present, and sets herself the task of exploring the creative possibilities of change. To do so, she moves on with the constructive statement that 'seeking to prevent harm in order to produce well-being is almost universally accepted to be a sensible idea', and she feels thus entitled to continue her endeavour by employing a history of ideas perspective. In this, she is helped by Bentham's indirect legislation, which she describes as means to prevent the circumstances that give rise to mischief, by attending to the causes of mischievous acts. She is quick to point out that Bentham's conception of prevention is very broad, and that, indeed, it encompasses everything from simple nudging to the provision of incentives and deterrents with potentially high material costs, and that its use extends across every branch of government. This forms the basis of her refusal to accept labels such as 'the police state' or 'the preventive state', as they ignore the fact that all branches of government and public policies have to operate interdependently. Marciniak then explores in detail the tools Bentham uses to achieve an effective prevention of harm, focusing more particularly on accessory offences, the role of the secondary will, and transparency. She challenges the idea that this must inevitably open wide the door to state surveillance and political arbitrariness, quoting Sunstein's insistence that the architecture of choice cannot be simply wished away, so that the very idea of non-interference in individual choice is an incoherent chimera, and the proper question is thus not one of government vs. absence of government, but of the ends pursued by government, and the means deployed in that pursuit. Marciniak shows that indirect legislation explicitly aims to prevent political misrule, and that, by so doing, it ensures that the individual will not get lost in the powerful machinery of government. Bentham's policy instruments

against misrule included controlling the governors, publicity of parliamentary debates, periodic elections, wide suffrage, a free press, and a tribunal of public opinion, as well as the capacity to make political representatives accountable in case of crimes and corruption.

For Bentham, security is a precondition for the enjoyment of freedom. Security is seen as a positive value and an individual good. To achieve the utilitarian aim of government, the legislator has to provide security of expectations. This leads Marciniak to establish a distinction between risk and security, the first being conceived in an abstract way, as a paragon of calculation, while the second is experienceable through the pleasure of confident expectation. However, even if, in Bentham, risks are always considered from the standpoint of calculation, he does not seek only to avoid them, but also to embrace them, and to seek means to generate the best possible outcome. The paper ends with a reassessment of indirect legislation, which is also a vibrant appeal for the construction of a fully fledged theory, or theories, of prevention: '[Indirect legislation] is also a supreme example of the paramount importance of developing such a conception through legitimate political procedures, in terms of deliberating the aims, the methods and means of public policy consistently'.

The special issue closes with Malik Bozzo-Rey's contribution, which unveils the conceptions underlying the elusive concept of indirect legislation. He suggests that a comprehensive re-evaluation of indirect means to influence behaviour is necessary. Contrary to the previous papers in this issue, that place indirect legislation within contemporary debates on liberalism and prevention theories, Bozzo-Rey takes a different perspective on Bentham's concept, looking into the underpinnings of this type of social regulation. His first concern is to find criteria which would make it possible for him to distinguish indirect legislation from direct legislation.

Firstly, he points that the proper functioning of indirect legislation relies heavily on as accurate and complete an account of human nature as possible. As a knowledge of human nature is needed when it comes to influencing human behaviour, psychology finds itself promoted to the status of a science of behaviours which could provide all the information necessary to ensure the efficiency of legislation. Bozzo-Rey then explores the epistemic and evidential issues involved in relying on psychology as the foundation for legislation, be it direct or indirect. Legislation in Bentham is based both on a psychological principle, which recognizes that people pursue pleasure and try to avoid pain, and on an attendant normative principle that they should promote the 'greatest happiness for the greatest number'. This description holds good for most contemporary forms of indirect means to influence behaviour, such as nudges. Nudge theory also needs an accurate and unifying conception of human nature. It relies on

observing and understanding how people *actually* behave, and how they *effectively* answer to incentives (broadly conceived), whatever they are, and independently of any *a priori* model of rationality which purports to explain how they *would* behave if they were acting rationally.

He shows how the nudge approach to human behaviour is not normative, but descriptive, highlighting its reliance on the application of empirically established evidence of heuristics and biases. He concludes the first part of his study by admitting that behavioural economics are more accurate and global than Bentham's psychology, but by reasserting the empirical and evidence-based approach shared by Bentham's utilitarianism and nudge theory. He nonetheless questions the reliability of the psychological principles on which behavioural economics is based, since these are often established by laboratory experiments, which are themselves potentially biased by the particularities of experimental design. Bozzo-Rey raises doubts about the capacity of behavioural sciences to provide robust evidence to support public policies.

Secondly, he investigates the criterion of temporality. On first inspection, it seems that direct legislation tackles the offender *after* the commission of the offence, whereas indirect legislation seeks to prevent the offence, and therefore operates *before* its commission. Bozzo-Rey nonetheless offers a more considered approach to this apparently clear distinction. He reaffirms that the direct and indirect legislation are interdependent, and then points out, as Quinn does in his paper, that the same law could simultaneously belong to either direct or indirect legislation, according to its aim and

its target, so that there could be several parties affected in different ways by one and the same law, and finally highlights the paradoxical implication that for the deterrent example of punishment to perform its allotted task in preventing offences, punishable offences have first to be committed. He concludes that it is impossible to maintain a strict distinction between direct and indirect legislation by an appeal to the lens of temporality. Parallel reservations apply to nudges, since the success of a nudge in changing behaviour at time  $t$  is no guarantee that it will continue to succeed at times  $t + 1$ ,  $t + 2$ , and so on. This leads Bozzo-Rey to raise the issue of the intrinsic capacity of a nudge to change preferences in the long term, rather than only targeting behaviour expressed through an act.

Bozzo-Rey comes logically to his third point when he questions the target of policies based on indirect legislation or nudges. Are these targets acts, circumstances, desires, or preferences? He identifies the inconsistencies of preference-change in nudge theory, and highlights the underpinnings of a theory which, behind the imperfect human chooser, implies a perfectly rational individual who is assumed to be able rationally to identify the general structure of her preferences and act accordingly. Similarly, he raises the issue of how behavioural sciences can help in knowing the preferences of individuals, when their decisions have impacts on other members of society, that is, on the preference-sets of other affected decision-makers. In a very Benthamic spirit, Bozzo-Rey's reaches the conclusion that one needs to identify precisely the sets of both decision-makers and of preferences targeted by nudging. In other words, in one sense, he calls for the nudgers to be nudged.

### Disclosure statement

No potential conflict of interest was reported by the authors.