

## CITIZENS AND LEGISLATORS OF THE WORLD<sup>1</sup>

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“Poets and philosophers”, Percy Bysshe Shelley declared in *A Philosophical Review of Reform* in 1819, are the “unacknowledged legislators of the world”. Shelley never lost faith in humanity, even during the final darkest months of his life. He clung resolutely to the hope that humanity would progress towards some form of secular redemption. That redemption depended upon two conditions; upon the prior destruction of the nation-state, and upon humanity embracing a political and legal philosophy that was founded, not in statutes or cases, sovereign bodies or institutions of government, but in the “unapprehended inspiration”. The principal “instrument of moral good”, he consistently advised, “is the imagination”.<sup>2</sup>

Shelley would have been excited today. He would have thrilled at the anarchic tendencies of globalization, and at their ability to disturb the tired complacencies of analytical jurisprudence and modern political philosophy. He would have been exhilarated by the much-touted ‘end’ of the European nation-states. But, he would also have been angry. He would have railed against rampant capitalism, and the fragmentation of communities within and without the apparently decaying nation-states. He would have shaken his head at the sight of his own compatriots sleeping on the streets, begging for food and freezing to death. Above all, he would have been frustrated. He would have despaired at the inability of the ‘new’ world order to usher in a suitably ‘new’ international public philosophy. He would have castigated a jurisprudence that argued so much about ‘rights’ and so little about the ‘human’.

Night after night in the spring of 1819, along with his wife Mary and any number of the various house-guests who visited the Casa Ricci in Livorno, Shelley would discuss free love and the romantic imagination, political philosophy and the essence of humanity. And he would read, avidly, devouring essays on political philosophy and reform. For Shelley was passionately engaged in the Enlightenment ‘project’, in the possibilities of a European public philosophy, in the changing shape of nation-states, in the notion of a universal sense of humanity, of human rights even.

William Twining’s recently published *Globalisation and Legal Theory* is just the kind of book that would have excited discussion at the Casa Ricci: its central arguments, the case for a revitalised “general” jurisprudence, for a renewed sense of humanity, and for a reappraisal of the very idea of political communities in a ‘new’ world order, are precisely those which occupied Shelley in 1819. This review article will specifically address

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<sup>1</sup> A review article of W. Twining, *Globalisation and Legal Theory*, (Butterworths, 2000).

<sup>2</sup> P. Shelley, *Prose Works*, (ed E. Murray), (Oxford University Press, 1992), 221-1, 282-3, 293.

two of the central arguments in *Globalisation and Legal Theory*, that globalisation demands a return to the kind of ‘general’ jurisprudence advocated by Jeremy Bentham, and that this return will require a reinvestment of the political imagination. It will be suggested that both arguments would have earned the approval, not just of Shelley but of many of his contemporaries; for what these arguments demand, in the final analysis, is a return to certain core principles of an Enlightenment public philosophy.

### A Citizen of the World

We live, Twining advances, in a “increasingly cosmopolitan” world, a “global neighbourhood, which is not yet a global village”. Twining approves Boaventura de Sousa Santos’s distinction between “globalised localism”, meaning the globalisation of local phenomena, and “localised globalism”, meaning the reshaping of local conditions in response to global pressures.<sup>3</sup> What this means, in a geopolitical sense, is that globalisation has destabilised what might otherwise be understood by the term ‘local’. The argument, indeed, goes further still; for it is now impossible to demarcate clearly the boundaries of any political community, local, national or transnational.

The destabilisation of the ‘local’ has clear implications for legal theory. At the heart of *Globalisation and Legal Theory* is the thought that legal theorists must now respond to this destabilisation, that their discipline has been and will continue to be reshaped by the impulses of globalisation, and that they should now return, past the ‘particular’ jurisprudences of later positivists, such as John Austin, and indeed their critics such as Hart and Dworkin, to the more ‘general’ capacity of Benthamite utilitarianism. In essence, if it is no longer possible to define discrete political communities, then it is no longer credible to talk in terms of discrete, or ‘particular’, legal theories.

The thesis is challenging, precisely because it undercuts more familiar relativist arguments that in a post-modern world, a world devoid of metaphysics and ‘meta-narratives’, law must always be radically contingent. The nature of this contingency varies from one ‘post’-modernist to another. In Foucauldian terms, modernist theories of law merely describe relations of power, wealth and knowledge. In Rortian terms law is simply a radically unstable myriad of overlapping metaphors. Either way, law is denied any firm metaphysical foundation.

But, Twining suggests, it does not have to be this way. The ‘modern Benthamite’, he counters, wants to be a “citizen of the world”.<sup>4</sup> And he wants his moral and political philosophy to cater for this aspiration. The ‘modern Benthamite’ does not cast law into the outer darkness of radical instability. Particularism does not run wild. On the contrary, the ‘new’ world order, by denying the pretended discreteness of nation-states and similar political communities, invites a return to ‘general’ legal theories, and perhaps also to ‘general’ moral theories. Whilst resisting the idea that

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<sup>3</sup> Twining, *Globalisation*, 3-5, 212-14.

<sup>4</sup> Twining, *ibid*, 100-2.

legal theory can be refounded on any clean distinction between the 'universal' and the 'particular', Twining admits that it must be reshaped within these particular conceptual parameters.<sup>5</sup> Somewhere within this frame of reference, in the relation between the 'global' and the 'local', the 'universal' and the 'particular', lies a jurisprudence for the twenty-first century.

The thought that legal theory must be radically adjusted to take account of globalisation has found a voice elsewhere. Neil MacCormick, for example, argues that the apparent demise of the nation-state must lead inexorably to a new jurisprudence, one that can be projected "beyond" simple Austinian theories of unitary sovereignty, and which instead can be redefined in terms of a "universally storable acceptance of diversity in human groupings with mutual respect and like rights to respect"; a jurisprudence, indeed, of "world citizens".<sup>6</sup>

In fact, MacCormick's thesis is concentrated more particularly on the shape of the 'new' European order, and the possibility of a resurrected European 'commonwealth'. But the extent to which this new order actually represents the 'end' of the European nation-state remains a matter of considerable debate.<sup>7</sup> It may be that the European 'community' retrenches a politics of exclusivity; merely replacing nation-state nationalism with European nationalism. Whether a European political 'community' actually enhances notions of 'world' citizenship must, therefore, remain moot.<sup>8</sup>

Moreover, the extent to which the complexities of the European Union can be better understood in terms of a 'general' or a 'particular' jurisprudence, must remain equally elusive. Again a European jurisprudence might be said to lie somewhere between the two. But precisely where is anyone's guess. An identifiable European citizen may be definable in terms of a 'general' jurisprudence, or he or she may be defined by their subjection to a 'particular' European jurisprudence.

Of course, the idea of Bentham as a champion of a 'general' jurisprudence must be distinguished from the thought that he was tempted by any of the more metaphysical political philosophies which captured the minds of certain of his romantic contemporaries. In his *Anarchical Fallacies*, he castigated the "inexorable trash" that passed for natural rights in the French Declaration of the Rights of Man and Citizen, which had been adopted in August 1789. At the centre of the Declaration lay the injunction, "People, behold your rights! If a single article of them be violated, insurrection is not your right only, but the most sacred of your

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<sup>5</sup> Twining, *ibid*, 15-21, 47-9.

<sup>6</sup> N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, (Oxford University Press, 1999), 188-9.

<sup>7</sup> For a concentrated discussion of this thesis, see MacCormick, *ibid*, particularly chapters 8-12. For the alternative view, see A. Milward, *The European Rescue of the Nation-State*, (Routledge, 1992).

<sup>8</sup> For various commentaries on this conundrum, see J. Derrida, *The Other Heading: Reflections on Today's Europe*, (ed P. Brault and M. Nass), (Indiana University Press, 1992), and J. Weiler, *The European Constitution*, (Cambridge University Press, 1999), particularly chapters 3, 8 and 10.

duties". The Declaration, Bentham maintained, was intended to "sow the seeds of anarchy broad-cast".<sup>9</sup>

Yet, Bentham did not reject the political aspirations of 1789. Indeed, like so many of his compatriots, he was momentarily thrilled by the events taking place across the Channel. He did, however, reject the "deception" that motivated the rhetorical injunctions found in the Declaration. The "delusions" of metaphysics, he argued, are as much an enemy to genuine political reform as are the platitudes of conservative romantics such as Blackstone or Burke.

Yet the pull of natural science could never be fully insulated from the seductions of metaphysics, most particularly the temptations of the human "sensibility". In *Anarchical Fallacies*, Bentham immersed himself in linguistic acrobatics in order to approve certain types of 'right' or constraint that might be of value to a society, and offer "securities against misrule", but which can be situated outwith both metaphysics and positive law. The most obvious of these constraints is "publicity"; the "very soul of justice" as he later termed it in his *Constitutional Code*. Such 'publicity', as he averred in his *Introduction to the Principles of Morals and Legislation*, can only be generated by the developed moral "sensibilities" of educated citizens.<sup>10</sup>

The dismissal of natural rights, accordingly, should not be misinterpreted as being a dismissal of moral philosophy. Bentham's writings are saturated in moral philosophy. And it is within this context that any Benthamite "world citizen" should be placed. As Herbert Hart rightly emphasised, whilst dismissing natural legal rights from the province of jurisprudence, Bentham readily accepted the constituent role of the "ought" within the wider public philosophy of "general utility".<sup>11</sup>

A theory of happiness is intended to be a theory of humanity. Bentham repeatedly showed his awareness that happiness, the "end" of utilitarianism, depended upon a shared appreciation of humanity and human nature. The very first page of *A Fragment on Government*, Bentham's first published work, declared that "it is the greatest happiness of the greatest number that is the measure of right and wrong". The avowed ambition of the *Fragment* was to deploy the same disciplines of natural science, which had proved so adept at making scientific discoveries, to the field of moral "reformation", something which is

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<sup>9</sup> It should be observed that part of Bentham's antipathy to the French revolution might have lain in personal frustration. Despite his many and varied attempts to impress upon the revolutionaries the virtues of a Benthamite legal code, the newly empowered National Assembly remained unpersuaded. See H.Bedau, "'Anarchical Fallacies': Bentham's Attack on Human Rights", *Human Rights Quarterly* 22, 2000, 266, and J.Burns, "Bentham and the French Revolution", *Transactions of the Royal Historical Society*, 5<sup>th</sup> ser.16, 1966, 95-114.

<sup>10</sup> This aspect of the *Fallacies* is developed further in W.Twining, "The Contemporary Significance of Bentham's *Anarchical Fallacies*", *Archiv fuer Rechts- und Sozialphilosophie*, 61, 1975, 335-8, and also G.Postema, *Bentham and the Common Law Tradition*, (Oxford University Press, 1986), 363-402.

<sup>11</sup> H.Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford University Press, 1982), 84-99.

necessarily “connected” with the “welfare of mankind”. The whole purpose of utility, and its justification as a tool of political analysis, lies in its ability to teach men and women right and wrong, to release the spirit of moral reform from the “shackles of authority”.<sup>12</sup>

The *Fragment* is possessed of a youthful spirit of idealism; an invitation, as Bentham observed in a handwritten note on his own copy, to “break loose from the trammels of authority and ancestor-wisdom on the field of law”.<sup>13</sup> But the core of Bentham’s humanism remained consistent; utility is a humanist philosophy. Large sections of his *Principles of Morals and Legislation* are a testament to Bentham’s humanism. Indeed, the foundation of utilitarian public philosophy lay in the practical experiences of individual pleasure and pain. Utility itself, as Bentham suggested in the very first chapter, is founded on the “natural constitution of the human frame”.<sup>14</sup>

The opening chapters of the *Principles* are dedicated to refashioning a moral philosophy that can underpin a public philosophy, but which is not described by the “splenetic deities” of political theology.<sup>15</sup> At the same time, in these same chapters, Bentham is anxious to demarcate his legislative ‘science’ from more visceral notions of “sympathy and antipathy”. Yet, whilst they may be removed from the immediate domain of legislation, Bentham readily admits that a “well-constituted” government is one in which “men’s moral sensibility is commonly stronger, and their moral biases more conformable to the dictates of utility”. And it is the duty of the legislator to take note of these sensibilities. Thus, in the chapter on ‘Motives’, Bentham asserts that a legislator must recognise the “love of amity”, the desire to “contribute to the happiness of a considerable number of persons”, which defines the good citizen. The happiness of the individual is necessarily a function of the happiness of others.<sup>16</sup>

Following Adam Smith’s *Theory of Moral Sentiments*, Bentham repeatedly affirms that “sensibility” is the mark of the good society, and the good individual; a necessary constituent of “general” public philosophy, if not of a “general” legal science.<sup>17</sup> This conjuncture is perhaps clearest in Chapter XVII of the *Principles*, “Of the Limits of the Penal Branch of Jurisprudence”. It is here that Bentham struggles with the practicalities of trying to distinguish private ethics from public philosophy. Whilst there is no immediate congruence, the aspiration of legislation and private ethics is shared; to promote the greatest happiness of the greatest number. It is here also, in a long footnote, that he famously muses on the possibility that causing unnecessary cruelty to animals might be as immoral as causing unnecessary cruelty to slaves. The thought is

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<sup>12</sup> J.Bentham, *A Fragment on Government*, (ed R.Harrison), (Cambridge University Press, 1988), 3-4, 26-7, 114.

<sup>13</sup> Quoted in Bentham, *ibid*, vi.

<sup>14</sup> J.Bentham, *An Introduction to the Principles of Morals and Legislation*, (ed J.Burns and H.Hart), (Methuen, 1982), 13.

<sup>15</sup> Bentham, *ibid*, 18-19.

<sup>16</sup> Bentham, *ibid*, 119.

<sup>17</sup> Bentham, *ibid*, 67-8.

premised on the necessary relation between a good society, one that is populated by “sensible” citizens, and the progressive society, one that is founded on principles of utility. A mutual respect for fellow citizens, as Bentham avers in his discussion of “probity” and “beneficence”, is as necessary for the political and moral “reformation” of a modern society as is progressive legislation.<sup>18</sup>

In *Globalisation and Legal Theory*, Twining cites with approval Peter Singer’s suggestion that a Benthamite utilitarian moral philosophy describes humanism in terms of a reciprocity of respect. A concentration on a principle of respect was not, of course, reserved solely for the Benthamite. It also comprised the second ‘doctrine’ of Immanuel Kant’s *Metaphysics of Morals*, the ‘doctrine of virtue’; a text completed less than a decade after Bentham’s *Principles*. Kant did not define respect as a component of positive law. But it was, most certainly, a necessary ingredient of any moral law, and therefore of any discrete public philosophy. A “sense of justice” is a “moral principle” which is “inherent in every man because of his rational disposition”. And, because it is universal, and because it is described by a categorical imperative, it obliges reciprocity. All rational public philosophies, Kant concluded, inhere this essential ‘principle’ of reciprocal respect for others.<sup>19</sup>

Of course, Bentham was far less enthused than Kant with the idea of universal human ‘rights’. Rights, for Bentham, only made sense if they contributed towards the sum of individual happiness. It is for this reason that they must be positive rights, rights that are the “fruit of the law” and which can be enforced in practice, rather than natural rights, rights that merely express metaphysical aspirations. With regard to ‘human’ rights, Bentham’s jurisprudence was both ‘general’ and ‘particular’; general in that it was founded upon a universal theory of humanity and human nature, particular in that it was not anterior to any established forms of government or political community.<sup>20</sup>

Bentham’s “general” jurisprudence, and the utilitarian moral philosophy upon which it was founded, vied for position amongst a myriad contemporary political theories. Kantian metaphysics provided perhaps the most enduring alternative theory of a “general” or universal jurisprudence; though it was not familiar in England until introduced by Samuel Taylor Coleridge in the second decade of the nineteenth century. An alternative that would have been more familiar to Bentham or Shelley was Tom Paine’s idea of human and civil rights, imported from the American ‘founding fathers’ and then from the French revolution. Essays such as *Common Sense* and most obviously *The Rights of Man* are saturated in ideas of universal rights to which all men are “born equal”.<sup>21</sup> These are not, of course, the kind of rights that appealed to Bentham.

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<sup>18</sup> Bentham, *ibid*, 281-93.

<sup>19</sup> I Kant, *The Metaphysics of Morals*, (ed M.Gregor), (Cambridge University Press, 1991) 181-213. For a commentary, see I Ward, *Kantianism, Postmodernism and Critical Legal Thought*, (Kluwer AP, 1997), 32-5.

<sup>20</sup> See Bedau, “Anarchical Fallacies”, 272-3, 277-8, and also Hart, *Bentham*, 81-2.

<sup>21</sup> See T Paine, *The Rights of Man*, (Penguin, 1985), 41-5, 51-70.

Paine's 'rights of man' resonated too much with the anarchic 'fallacies' found in the French Declaration.

A more intriguing comparison can, perhaps, be found in the writings of William Godwin, the man who, in the words of Hazlitt, "blazed as the sun" of English radicalism in the 1790s. Godwin, too, was a committed utilitarian, convinced that the "true object of moral and political disquisition is pleasure or happiness".<sup>22</sup> Godwin's *Enquiry Concerning Political Justice* is rooted in utilitarian ideas of humanity, in the "spirit of universal kindness" which distinguishes a public philosophy of "rational anarchy".

Much of Godwin's *Enquiry* owed its origins to the 'good old cause' radicalism of John Milton and Algernon Sidney. It is for this reason that Godwin's anarchism pivots around ideas of toleration and reciprocal respect. A state of 'rational' anarchy is one in which politics is subservient to the necessarily transient nature of political discussion. It is, to use contemporary parlance, a theory of radical political constructivism. Any political "truth", according to Godwin, is derived from nothing more than a willingness to listen to others with "sincerity", and the political processes of a state of "rational" anarchy should seek to do no more than to facilitate this "principle" of reciprocal discussion.<sup>23</sup>

Thus, like Bentham, Godwin seeks to make a fundamentally anti-metaphysical thesis "universal", and to do so by founding it on a utilitarian theory of human nature. In place of the brute force of positive law, a truly "rational" state of anarchy triumphs over the "moral law"; principles of justice, equality and respect to which the "whole family of mankind" aspires. The purest state of humanity is a state of anarchy.<sup>24</sup> The tone of Godwin's discussion of "rational" anarchy was, of course, far too idealistic for the likes of Bentham. But the derivation of their theses bears striking comparison. Godwin's "species" of rational anarchy was necessarily utilitarian.<sup>25</sup>

But where does this leave Twining and his Benthamite "world citizen"? Twining is committed to the "revival of a general jurisprudence". And he is equally willing to embrace a "central message" of "complexity". In jurisprudential terms, the central message becomes a central challenge: a willingness to appreciate the virtues of complexity, to abandon the dogged determination that a legal science can only be right if it is stripped down to

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<sup>22</sup> W Godwin, *An Enquiry Concerning Political Justice* (Penguin, 1976), 75-9.

<sup>23</sup> W Godwin, *ibid*, 228-31, 247-53, 308-21. For a discussion of Godwin's legal and political thinking, and the nature of 'rational' anarchy, see I Krammick, "On Anarchism and the Real World: William Godwin and Radical England", *American Political Science Review*, 66, 1972, 114-28, and I Ward, "Law, Liberty and Humanity: Godwin, Shelley and the Case for Rational Anarchy", *Turku Law Journal*, forthcoming.

<sup>24</sup> W Godwin, *ibid*, 67-87, 165-208, 410-61.

<sup>25</sup> Of course, utilitarianism was very much the common language of late eighteenth century English public philosophy. Even Burke thought himself to be a utilitarian. See his comments, in E Burke, *A Philosophical Enquiry into the Origins of Our Ideas of the Sublime and the Beautiful* (Oxford University Press, 1990), 12-17, 29-40.

its bare jurisprudential essentials, to its rules and regulations, sovereigns and statutes.

But does this make the Benthamite “world citizen” a closet anarchist? And Twining too perhaps? To a certain extent the answer is yes. Twining readily admits that the “modern” Benthamite would have to adjust to certain changed conditions, to an appreciation that the world has progressed beyond the narrow geopolitics of nation-states, that jurisprudence must likewise adapt itself to life without the pretended certainties of unitary sovereignty and command theory, and that theories of law must be understood within the broader context of social science.<sup>26</sup>

This does not, of course, mean that the modern Benthamite must embrace a post-modern anarchy. But he or she may need to concede a certain amount to the kind of rational anarchy advanced by Godwin. Godwin, like Shelley, would have argued that a world which had progressed beyond the constraints imposed by modern nation-states, and the equally restrictive jurisprudences of sovereigns and statutes, was one which was approaching a state of rational anarchy, one where the sheer complexity of political, social and economic relations, militated against accretions of political power, and their innately abusive and exploitative tendencies. In such a condition humanity looks about and sees only itself.

### Mapping

If the early essays in *Globalisation and Legal Theory* are dedicated to reinvesting a Benthamite ‘general’ jurisprudence, the later ones embrace the more playful, impressionistic world of de Sousa Santos and the novelist Italo Calvino. Twining adopts de Sousa Santos’s metaphor of “mapping”.<sup>27</sup> The metaphor has a double resonance. It speaks, on the one hand, to the geopolitical theme that underpins *Globalisation and Legal Theory*, the theme that suggests that it is no longer so easy to demarcate discrete political communities. On the other hand it also speaks to the idea that legal theories are themselves merely maps, impressions, perspectives. It is this impressionistic aspect of the metaphor that is deployed at the centre of Calvino’s *Invisible Cities*, in which the young Marco Polo describes fifty-five cities to the aging Emperor Kublai Khan; fifty-five cities or perhaps just fifty-five descriptions of the same city.<sup>28</sup>

What Calvino implies, and what de Sousa Santos and Twining urge, is an awakening of the jurisprudential imagination, an appreciation that laws are impressionistic, and that their “complexities” can only be comprehended in terms of a cartographer’s perspective. Legal orders, like cities, are “made up of complexes of social relations, ideas, ideologies, norms, concepts, institutions, people, techniques and traditions”. Law, in other words, is always set in a social context that can never entirely be stabilised, but merely described from one map to another. It is only in this

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<sup>26</sup> Twining, *Globalisation*, 102-4.

<sup>27</sup> A theme, and a metaphor, that Twining introduced in earlier form in his MacDermott lecture, published in (50) *Northern Ireland Legal Quarterly*, 1999, pp 12-49.

<sup>28</sup> Twining, *Globalisation*, 136-41, 152-3, 212-13.

way that the ‘general’ jurisprudence retrieved from Bentham can accommodate the real “complexity” of the ‘new’ world order. The conclusion, it seems, is to take Bentham’s jurisprudence and to season it with a dash of Marco Polo.

It is a conclusion that has been hazarded before. At the tender age of twenty-one, John Stuart Mill suffered a nervous break-down, one that was brought on by the thought that Bentham, his father’s great friend and mentor, and his own intellectual hero, had not read sufficient poetry. Mill, like Twining and de Sousa Santos, feared that Benthamite legal and moral philosophy might be imaginatively deficient.<sup>29</sup>

In two early essays, Mill compared Bentham with Coleridge in an attempt to carve out an intellectual resolution of the apparent conflict between the rigours of jurisprudential analysis and the freedom of human sentiment; a resolution necessary if a utilitarian ethics was to be mediated by a due sense of sympathy and humanity.

Bentham, he averred, was the great iconoclast, the “great subversive”, the first to “speak disrespectfully” of the “particular” jurisprudence of the English common law, and for this Mill had nothing but praise. But Bentham also suffered from an “incompleteness” of the mind, a “deficiency of Imagination” that rendered him “altogether cut off” from the “most natural and strongest feelings of human nature”. Bentham’s jurisprudence, accordingly, “overlooks” that “moral part of man’s nature”. It does not comprehend that a legal order is not merely a set of rules, but also a living organism representative of an evolving political morality. While Mill thoroughly approved the expulsion of “mysticism from the philosophy of law”, he admitted that it was too great a reliance on Benthamite jurisprudence which had driven Victorian England to neglect the more “general” implications of utilitarian moral philosophy.<sup>30</sup>

In comparison, Coleridge dedicated his entire being to the poetic “complexities of the human intellect and feelings”. And, thus, whilst Mill dismissed much of Coleridge’s metaphysics as that of an “arrant driveller”, he did admit that an appreciation of the sheer complexity of humanity demanded a necessarily more complex, and more imaginative, political philosophy. Mill also noted the essential paradox that ran through Coleridge’s political thought; that of the ‘particular’ and the ‘general’, of community and universality. It was Coleridge who had placed particular political communities at the heart of his public philosophy, who had recognised that any political community was a cultural artefact, the expression of a “strong and active principle of cohesion”. And it was Coleridge who had adopted Kant in order to make this a ‘universal’ principle. The political imagination, Mill realised, is nourished by senses of affinity and identity. And so the critical task for utilitarianism is to foster a sense of affinity and identity with the

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<sup>29</sup> J Mill, *Autobiography*, (Penguin, 1989), 59, 111-44.

<sup>30</sup> J Mill, “Bentham”, in *Utilitarianism and Other Essays*, (Penguin, 1987), 132-75.

“community of mankind”, one that is comparable in strength to that enjoyed by ‘particular’ national communities.<sup>31</sup>

It was because Bentham had failed to explore the dynamic capacity of the imagination, its ability to foster “sentiments” of humanity, that the innate morality of utilitarianism was only “faintly” described in the *Principles*. Whilst this dismissal of Bentham’s “morality” might be slightly unfair, Mill was determined that his particular theory of utility would be defined by its enhanced comprehension of human nature. The public philosophy of his *Utilitarianism* aspired to the happiness of “individuals within the limits imposed by the collective interests of mankind”. What “the assailants of utilitarianism seldom have the justice to acknowledge”, Mill confirmed, is that the “happiness which forms the utilitarian standard of what is right” is “not the agent’s own happiness, but that of all concerned”.<sup>32</sup>

It is in these strictly utilitarian terms that particular communities are legitimated. A particular “society” is a “natural condition”, outside which a proper sense of humanity cannot survive, for it is only in an established political community founded on universal principles of “liberty”, “justice” and “morality” that such a sense can be fostered. Justice is neither a metaphysical abstraction nor an analytical concept, but an “intensity of sentiment”. From his earliest ambition to be a “reformer of the world”, to his later struggles in Parliament for female suffrage, Mill never wavered from a belief that any political reform must be premised upon a moral imperative that is nourished by the political imagination. When a man comes to appreciate “his feelings” for humanity, the “good of others becomes to him a thing naturally and necessarily to be attended to”.<sup>33</sup>

What Mill really craved was the “spirit” of humanity. It was for this reason that he religiously read Coleridge or Wordsworth each night before he went to bed, in the hope that he would somehow absorb a sense of the poetic and the sublime. By his own sad admission, he never really did.<sup>34</sup> But there is no doubt that Mill devoted his life, both politically and intellectually, to the study of humanity. Indeed, utilitarianism, for Mill, was a progressive public philosophy, precisely because it was a public philosophy rooted in a proper understanding of humanity.

Mill’s aspiration is that which is now articulated by de Sousa Santos and Twining: to reinvest public philosophy, and more particularly legal theory, with an imaginative capacity. Mental “mapping” demands an active political imagination, one that can comprehend politics in a world where political communities are no longer discrete, but where the integrity of human beings remains essential. It is this appreciation of humanity which, as Godwin emphasises, roots a ‘rational’ anarchy. An absolute conception of political freedom is founded on the reciprocal ability of enlightened

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<sup>31</sup> J Mill, “Coleridge”, in *Utilitarianism*, 177-226. For a discussion of Mill’s treatment of Coleridge and Bentham, see R. Williams, *Culture and Society 1780-1950*, (Penguin, 1963), 67-9.

<sup>32</sup> J Mill, “Utilitarianism”, in *Utilitarianism*, 286-91.

<sup>33</sup> Mill, *ibid*, 304-5, 334.

<sup>34</sup> Mill, *Autobiography*, 121-2.

citizens to comprehend human worth, and such a comprehension depends, in turn, upon a cultivated political imagination.

This argument for a 'rational' anarchy nurtured by the political 'imagination' finds a more contemporary voice in Richard Rorty's "post-modern" liberal "irony". Rorty, like Godwin and Bentham, rejects 'foundationalism'. In the place of the illusory "truths" of modern liberalism, there is simply the "conversation of humanity" and the political imagination which it nurtures. This imaginative capacity, the ability to realise that political discourse is nothing more than the engagement of a "mobile army of metaphors", is central to Rorty's thesis. The politics of the twenty-first century, Rorty suggests, will be one in which life is made "easier for poets and revolutionaries", where the intellectual and political barriers thrown up by modernism are cast down, and where the imaginative and creative capacity of all is given the space in which to revitalise a post-modern sense of humanity.<sup>35</sup>

The rejection of foundationalism does not, then, necessitate a rejection of constructive political engagement. Rorty believes in community, and he believes in a "solidarity" between communities that is nurtured by a reinvested sense of humanity. Politics is, ultimately, about human engagement; for the "world does not speak. Only we do". Rather, anti-foundationalism encourages the active participation of all in the constant fashioning and refashioning of human relations. A politics of "irony" is thus also a politics of progress and "public hope"; one that is both founded upon, and dedicated to, a sense of "sympathy" for the human condition. A post-modern liberal public philosophy is one in which political communities are held together, not by rules and rights, but by the simple appreciation that their essential "interdependence" is rooted in a reciprocal sense of humanity, in the ability to recognise "cruelty" and to abjure it, and in a common sensitivity to "sad and sentimental stories". A post-modern "irony" describes a post-modern humanism.<sup>36</sup>

Whilst Twining may be as reluctant a post-modern ironist as he is a post-modern anarchist, the coincidence of his vision of legal theory in a global world with Rorty's idea of a post-modern liberalism is striking. Mapping and metaphors describe the language of legal and political discourse in the new world order. The case for anarchy, the case for irony, and the case for humanity, it seems, run together.

### **The Case for Humanity**

As Shelley set sail on his final fateful voyage in the Gulf of Spezia in 1822, he was still completing drafts of his last poem, the ambiguously entitled 'Triumph of Life'. The "triumph of life", it seems, brought with it the triumph of anarchy. The closing lines of Shelley's poem project an age when "Mask after mask" will fall from the "countenance" of

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<sup>35</sup> R Rorty, *Contingency, Irony, and Solidarity*, (Cambridge University Press, 1989), 23-43, 50-4, 60-1.

<sup>36</sup> Rorty, *ibid.*, xiii-vi, 5-6, 198, and also "Human Rights, Rationality and Sentimentality", in S Shute and S Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993*, (Basic Books, 1993), 111-34.

humanity, but not before humanity itself has fallen, “as I have fallen, by the wayside”.<sup>37</sup> Behind the mask there is always another mask. Behind every aspiration, every hope for the future, there is the spectre of illusion and futility. By the end of his young life, Shelley doubted humanity, his former exhilaration tempered by the horrible fear that what was ‘new’ was not really new at all, merely the most recent example of humanity’s ability to imagine a brighter future and its capacity to delude itself in thinking that it was attainable.

Shelley’s doubts had been advanced two years earlier, in his *Prometheus Unbound*, a poem that was written in the shadow of an intense study of Milton’s *Paradise Lost*. For Shelley the pivotal figure in Milton’s epic is not the “Son” of God, but Satan. The gods try to suppress Prometheus, just as God tries to cast out Satan.<sup>38</sup> They seek to deny the essential power of self-determination. The overcoming of the forces of “tyranny”, the false gods who peddle “Hypocrisy and custom” and who stamp on “Truth, liberty and love”, will only be effected by a “sense of love” which can “bind” the “human heart”, a love that creates “human thought”. Despite his torture, Prometheus clings to the thought that he alone is “king over myself”.<sup>39</sup>

And of course he is, to a degree. But an inner Satan possesses Prometheus, for his urge for absolute freedom is tempered by the countervailing realisation that such a freedom is self-consuming. Humanity presumes the existence of others, and constrains freedom accordingly. Shelley’s anarchy, like that of his father-in-law, Godwin, is a rational anarchy. In the closing book of *Prometheus*, Shelley projects an idyllic world, of “Man, one harmonious soul of many a soul,/ Whose nature is its own divine control,/ Where all things flow to all, as rivers to the sea”.<sup>40</sup> It was the urge to translate this idyll into political reality which prompted Shelley to turn momentarily from verse, and to compose his *Philosophical Review of Reform* in the hope that the politics of the future might indeed be written by poets.

Shelley’s doubts have endured. Indeed, in many ways, they have come to define what has been termed the twentieth century ‘condition’. A century after Shelley set Prometheus to defy the gods, Albert Camus sought to ameliorate humanity’s lot by imagining Sisyphus “powerless and rebellious”, but also “happy”, content with the unfathomable, the absurd and the complex. “Happiness and the absurd”, Sisyphus realised, “are two sons of the same earth”, the necessary constituents of the human condition. Sisyphus, like Prometheus, denied any deeper metaphysics than happiness. He recognised that the “fate” of “human matter” is “settled among men”.<sup>41</sup>

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<sup>37</sup> P Shelley, “Triumph of Life”, in *Complete Poetical Works*, (Oxford University Press, 1971), ll.496-7.

<sup>38</sup> Shelley mischievously suggested that Satan was the first Whig ‘hero’, the subject of Tory High Church oppression.

<sup>39</sup> P Shelley, *Prometheus Unbound*, in *Works*, 1.621, 651, 2.4.63-66, 73, 3.4.102, 131-4.

<sup>40</sup> Shelley, *ibid*, 4.4.400-3.

<sup>41</sup> A Camus, *The Myth of Sisyphus*, (Penguin, 1975), 107-111.

The thought that there might be a post-modern humanism tantalised a generation of existentialists. In his *Existentialism and Humanism*, Jean-Paul Sartre suggested that the politics of the future would be of “action and self-commitment”, one which reinvested a sense of humanity in a world of radical “inter-subjectivity”. It would, in short, be anarchic, an expression of the “absolute character” of the “free commitment”, a “humanism” that is defined by the common realisation that man has “no legislator but himself”.<sup>42</sup>

It is not unreasonable to assume that Bentham might have been an existentialist, even if he would have shied away from the anarchic logic of radical utilitarianism. Shelley certainly would have been. There is no record of Shelley actually meeting Bentham, though he did strike up a close friendship with one of his protégés, Walter Coulson. But Bentham was certainly included, along with Godwin and Hazlitt, as the kind of philosopher who should be recruited to the cause of political reform advanced in the *Philosophical Review*. Despite Mill’s later doubts, Shelley concluded that Bentham was just the kind of philosopher who could reveal the “inevitable connection between national prosperity and freedom, and the cultivation of imagination and the cultivation of scientific truth”. In a contemporary letter to Leigh Hunt, Shelley excitedly suggested that his *Philosophical Review* was written in just the same vein as “Jeremy Bentham’s something”.<sup>43</sup>

Though he struggled to remember precisely what it was called, Shelley was undoubtedly taken with Bentham’s “something”. He would certainly have approved the humanism that underpinned Bentham’s *Principles*; even if it was a humanism that Mill detected only so “faintly”. And he would have sympathised even more with Bentham’s determination to educate “world citizens”; even if he would have been rather less convinced by the thought that human nature could be categorised.

Like so many of his contemporaries, Shelley was horrified by the corporate apostasy of the previous generation of romantic poets and humanists: those who had first embraced and then turned so viscerally against the principles of “liberty, equality and fraternity”. He was particularly horrified by William Wordsworth’s brutal rejection of “Babel-like” ideology in the later 1790s. Yet, the belief that a proper sense of humanity is more effectively nurtured in stanzas than in political ideology was a shared one. Wordsworth, like Shelley, like Rorty indeed, believed that the idea of humanity depends far more upon nurturing a common sensitivity to ‘cruelty’ than it does any high-blown political ideology. In ‘Tintern Abbey’, the poem that signaled Wordsworth’s turn from ideology to romantic humanism, he invoked a “sense sublime/ Of something far more deeply interfused”, a power of imagination, an ability to recall “nameless, unremembered acts/Of kindness and of love” which resonated with the “still, sad music of humanity”.<sup>44</sup>

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<sup>42</sup> J-P Sartre, *Existentialism and Humanism* (Methuen, 1989), 44-56.

<sup>43</sup> See R Holmes, *Shelley: The Pursuit* (HarperCollins, 1995), 380, 591-3.

<sup>44</sup> W Wordsworth, Tintern Abbey, in *Complete Poetical Works*, (Oxford University Press, 1936), ll.30-5, 48-9, 90-6, 111, 154.

As Charles Taylor has recently suggested, the invocation of the political imagination in order to resuscitate a sense of humanity and justice, was the defining characteristic of the Enlightenment. It may have been only “faintly” discernible in Bentham, but it was pervasive in the whole, and was saturated in the stanzas of poets such as Shelley and Wordsworth. And it is to these “subtler languages” of “sympathy” and “sentiment”, Taylor argues, that political discourse is now returning.<sup>45</sup>

It is a conclusion also reached by Martha Nussbaum, who suggests that the new “world citizen” will be one whose sense of humanity is nurtured by a revitalised political imagination, whose “mind” has been liberated “from the bondage of habit and custom”, and who will be able to more effectively “function with sensitivity and alertness” to the “whole world”. A public philosophy for the new world order will be one that “speaks about us, about our lives and choices and emotions, about our social existence and the totality of our connections”. It will be one that recognises that there is “after all more joy in the kind of citizenship that questions than in the kind that simply applauds, more fascination in the study of human beings in all their real variety and complexity than in the zealous pursuit of superficial stereotypes, more genuine love and friendship in the life of questioning and self-government than in submission to authority”.<sup>46</sup>

There is only one possible ‘imagining’ for a ‘new’ world order, and that lies in a reinvested sense of humanity. It is this insight that has been appreciated across the modern political spectrum, from Shelley, Bentham and Mill, to Taylor, Nussbaum and Rorty, and to Twining too. Ultimately, the legitimacy of any political community depends upon its ability to countenance humanity. And whether or not that sense of humanity, and that legitimacy, is more readily countenanced within nation-states, or localised communities, or vast transnational empires, matters less than whether it is countenanced at all.

Rather than over worrying about the fate of nation-states, and the prospective descriptions of political communities in a ‘new’ world order, there is much to be said for thinking rather more about humanity. This, certainly, is what engaged Shelley’s attention two centuries ago, and it is what he would advocate now. It also the sentiment that underpins *Globalisation and Legal Theory*. What, Twining asks, are “the prospects for a genuine *ius humanitatis* dealing with the common heritage of mankind?”<sup>47</sup>

The answer, he implies throughout, lies in a jurisprudence that is resituated within a broader public philosophy, redefined as an expression of an essential humanity. A jurisprudence of legal rights and “rules” cannot “come anywhere near to catching in today’s world the richness,

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<sup>45</sup> C Taylor, *Sources of the Self: The Making of Modern Identity*, (Cambridge University Press, 1989), 115-23, 159-68, 212-49, 275-89.

<sup>46</sup> See M Nussbaum, *Love’s Knowledge: Essays on Philosophy and Law*, (Oxford University Press, 1990), 3-7, 171, and *Cultivating Humanity: A Classical Defense of Reform in Liberal Education*, (Harvard University Press, 1997), 8-11, 84-6, 94-7.

<sup>47</sup> Twining, *Globalisation*, 50.

complexity, elusiveness and variety of phenomena of law which it is the task of our discipline to try to understand, describe and explain".<sup>48</sup>

It is not a question of whether a 'new' world order, a new humanism, is really attainable. It is the hope that matters, the ability to imagine, the inspiration to rethink what it is to be human, what it is to countenance sympathy and respect, and to contemplate a better way of describing political communities. It is for this reason that Shelley would have approved *Globalisation and Legal Theory*. He would have liked its ambition. He would have cherished the hope that a 'new' world might be a better place to live in, that it might be a place in which a sense of humanity is reinvested at the heart of 'new' public philosophy. Finally, he would have applauded a willingness to serve as an 'unacknowledged legislator'. Without vision, without the imagination, there is only, as Prometheus and Sisyphus readily appreciated, the horror of hopelessness.

It is, in the final analysis, the essence of humanity to hope, to aspire. It was certainly the essence of the Enlightenment, to resuscitate the Aristotelian injunction to progress. And it is, ultimately, Twining's injunction too: to stress the "complexities and elusiveness of reality, the difficulties of grasping it, and the value of imagination and multiple perspectives in facing these difficulties".<sup>49</sup> And, it could be added, to cherish the possibilities that complexity, and perhaps a little anarchy, offer humanity at the dawn of a new millennium.

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<sup>48</sup> Twining, *ibid*, 63.

<sup>49</sup> Twining, *ibid*, 243, specifically approving de Sousa Santos.