The Principles of Utilitarian Penal Law in Beccaria, Bentham and Mill

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To my teachers
Chapter 7

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The classical form of utilitarian theory encompasses two essential elements: (1) the rightness or wrongness of an action is determined by the goodness or badness of its consequences, and (2) the only thing that is good in itself is pleasure and the only thing bad in itself is pain, and happiness is the net aggregate of pleasures over pains. Based on these elements, the doctrine is then expressed in the form of the greatest happiness principle: the rightness of an action is determined by its contribution to the happiness of everyone affected by it. From these foundational propositions, developed under the influence of the proto-utilitarians Claude Adrien Helvetius and Cesare Beccaria, among others, Jeremy Bentham and John Stuart Mill advanced additional propositions and arguments, and derived secondary principles, intended to guide the design and application of law in a wide range of policy areas, including the domain of penal law. Since the principles of their theory of penal law were shaped in all-important respects by the foundational ideas of the underlying utilitarian theory, clarification of the structure of that theory will be a helpful starting point (section I below). I will then elucidate Beccaria’s contribution to the development of the theory, particularly as it relates to penal law (section II), Bentham’s examination of the objectives and forms of punishment (section III), the relationship between harm and punishment in Mill (section IV), and the differences between Beccaria, Bentham, and Mill on the issue of the death penalty (section V). The chapter will conclude with a note on the principles, punishment regime, and purpose of Bentham’s panopticon penitentiary (section VI).
in business or in education, clearly they are involved in a calculation, more or less, of the consequences of their decision. But in the conduct of their day-to-day lives, decisions are most often made in conformity with past behavior and consistent with extant rules. In short, both Bentham and Mill recognized the absurdity of expecting individuals to function as rational calculators before engaging in everyday action, and held that rules based on utilitarian considerations ought to be the guide of a person’s conduct in most situations. Where new evidence suggests that the rules are ineffective, improperly constructed, or produce outcomes inconsistent with utility, then the agent must engage in a first-order calculation. This is something we might expect judges in a court of law to do when the law is confused, inapplicable in the specific case, or obviously runs contrary to utility. It is frequently a matter for legislators when they address new areas of jurisdiction. In general all codes of conduct are the result of first-order calculations made by persons at some point in the history of the institutions in which they are in effect. In the ordinary run of things, however, we must rely on rules to guide our actions. To the criticism that utilitarians sacrificed principles of liberty, Mill replied that it was expedient to observe the rules associated with general utility and implied that only saints could be act utilitarians, able to continually calculate the consequences of their actions.

Further, the bedrock of the utilitarian theory expressed by Bentham and Mill is that the interests of each and all must count, and count equally, in the aggregation of utilities. This is not to say that optimal utility was not the goal, only to stress that optimal utility will best be achieved where there is an approximate equality in the distribution of the basic requirements of happiness. Critics have frequently noted the implications of an aggregate-utilitarian calculation in situations in which unequal sacrifices appear to be determined by simple calculations of optimal utility. In an indiscriminate calculation where only total quantity of pleasures counts, minorities are especially vulnerable to risk. Bentham was aware of the problem and consequently amended the utility principle to omit “of the greatest number” from the formulation, and Mill followed suit in consistently employing the “greatest happiness principle” as the appropriate nomenclature. Moreover, both Bentham and Mill were clear that basic securities must be afforded to each member of society, and that violations of these interests are not justified, whether they be perpetrated by other individuals or by government. To this extent, at the very least, each person’s happiness must count. The “security-providing principle” guarantees the security of the basic interests (Mill would say the “permanent interests”) and legitimate expectations of everyone, and neither Bentham nor Mill would allow that such securities might be breached based on “act utilitarian” calculations—beyond of course, the initial calculation that they are vital to a person’s happiness and therefore to the general happiness. This implicit equality provision is an essential ingredient in the utilitarian theory expounded by Bentham and Mill. While it does not prevent utilitarians from supporting utility-optimizing policies that produce an unequal distribution of benefits, this would only be acceptable so long as the protection of the basic or “permanent interests” of each person is not infringed.

It is not part of my objective in this chapter to mount a comprehensive defense of utilitarian theory. However, at least one part of such a defense would be to stress that having laid down the overarching goal of the greatest happiness early on his career, it was the operationalization of the utility principle that absorbed most of Bentham’s energies through a long and highly productive working life. In the “Article on Utilitarianism,” written in 1829 only a few years before his death and generally acknowledged as presenting his last thoughts on the evolution and significance of the utility principle, Bentham states that his purpose in adopting and developing the principle was to provide a practical “instrument of direction . . . for pointing out the path most proper to be pursued, on every occasion . . . by every individual, whether acting in his private and individual capacity, as a member of the whole community, for his own benefit alone, or in his public capacity acting for the benefit of others in the character of a member of the governing part of the community.” In this sense the utility principle was for Bentham “the oracle” to which, on every occasion, he applied for instruction, and which validated the “arrangements” in all the fields of “thought and action” it suggested. It rendered service in three distinguishable ways: “1. as an end in view; 2. as a storehouse of means employable for the attainment of that end; 3. as a storehouse furnishing motives by the force of which, on several occasions, men may be induced to act in ways conducive to that end.” The “end of view” is the greatest happiness; the “means” for the attainment of the end are properly constructed rules; and the “motives” by which people may be induced by the moralist, educator, or legislator to act in ways conducive to the greatest happiness are “the several pleasures and pains of which man’s nature is susceptible.”

The operationalization of the utility principle, then, took for granted that the end of government is the greatest happiness, but this alone would not suffice to guide the legislator. First, all the primary elements of law—civil, penal, constitutional, and procedural law—should be codified, and the resulting body of law made clear in its principles and certain in its execution. Second, the realization of utilitarian objectives in practice requires the translation of the utility principle into sets of subordinate ends, secondary principles, and other such precepts, maxims or rules. “In founding a system of Jurisprudence upon the principle of utility,” he announced near the beginning of his career as a legal philosopher, “I do no more than found it upon a set of rules.” However, this was more than the Humean observation that utility was embedded in customary
rules that had evolved over time. The maximization of utility required that a "censorial" eye be cast on existing practices and rules to test their capacity to enhance the greatest happiness, and where they are found wanting new precepts and rules must be developed that demonstrably accord with the utility principle. In the structure of Bentham's utilitarian theory the justification for the subordinate ends and principles is located in their manifest utility, while they in turn produce the practical benefits that give concreteness to the philosophically abstract end of the greatest happiness. Every subordinate end, supportive principle, and subset of rules is founded on its capacity to contribute to substantive utilitarian outcomes. This can be seen in the method Bentham employed in each of the principal areas of the law.

Utilitarian civil law is premised on the pursuit of the subordinate ends of security, subsistence, abundance, and equality, and when considering reforms to existing property law the minimization of pain was to be achieved by adherence to the "disappointment-preventing principle." The latter constitutes "the first application, or say examination, of the greatest happiness principle," by which all the arrangements of the law of property "in its most extensive sense," meaning "all objects of general desire," are ordered. Based on the intuitively sound supposition that measure for measure quantities of unhappiness or pain outweigh quantities of happiness or pleasure, the avoidance of pain caused by the disappointment of legitimate expectations was to be given priority over the acquisition of new pleasures in the legislator's calculations. In civil law "security of expectations" is the legislator's first order of business. Similarly, procedural law was elaborated by Bentham in terms of rules and precepts governing evidence and adjudication. In the same way, the commonly misunderstood panopticon prison was also designed with specific guidelines in mind, such as severity tempered by humanity, economy, transparency, and accountability. The last three rubrics were equally important in Bentham's utilitarian account of administration, as were devices to ensure the maximization of "intellectual," "moral," and "active" utility in public officials. In the area of constitutional law, utilitarian outcomes required democratic procedures which functioned as "security against misuse": "virtual" universal suffrage, annual parliaments, the secret ballot, provisions for transparency, publicity, and unconstrained public debate. Much of what he had to recommend in this domain was governed by the "the interest-function-prescribing principle," designed to ensure that the interests of those with power would be reconciled with the public interest. A vital element in this political schema is the "Public Opinion Tribunal," the open court of public opinion founded on the freedom of the presses, by which government actions could be held up to public scrutiny. And, just as the panopticon was to be monitored by the publication of regular reports, so regular reports of government activity were required to keep the democratic

plicity informed and able to hold public officials to account. Utilitarian penal law is similarly framed in terms of subordinate ends (deterrence, disablement, moral reformation, compensation), an exhaustive classification of offenses according to types and degrees of mischief or harm, the principles governing the appropriate qualities and quantities of punishment, and the rules of sentencing to be followed in structuring penal law and applied in courts of law.

II. Beccaria: "The Father of Censorial Jurisprudence"

The origins of utilitarian penal law are located in Beccariá's Dei Delitti e delle Pene (1764), recognized by Bentham as a groundbreaking text in the history of penology. In A Fragment on Government (1776) he styled Beccaria "the father of Censorial Jurisprudence," a philosopher unfraid to tackle the established conventions and legal systems of the day, and to boldly set down principles for a new, rational, and humane system of penal law. The primary sources on which Beccaria drew for his seminal work on crimes and punishments were Rousseau, Montesquieu, and Helvétius. Following Rousseau, he deployed the idea of a contract to explain society's institutional arrangements, though the idea that people enter into a contract for the purpose of "self-preservation," a right that is never laid down, sounds much like Hobbes' justification of resistance to a punishing sovereign. Like the "immortal Montesquieu," Beccaria situated liberty at the heart of his theory, but more important were the ideas on punishment he found in the French thinker's Esprit des lois (1748). These included the injunction that punishment ought to be approached in a humane spirit, the proposition that punishment not clearly founded on the necessity of protecting the security of the people is an exercise in tyranny, the importance of encouraging criminals to choose the lesser crime by employing punishments to provide sufficient motives to that effect, and the requirement that there be a proper proportion between crimes and punishments. This instruction was of considerable value to Beccaria, but it did not amount to a systematic treatment of penal law. It is generally accepted that the primary influence on the critical method Beccaria employed was Helvétius' De l'esprit (1758), from which he extracted the idea that penal law, like all other law, ought to be founded on public utility. Near the beginning of De l'esprit Helvétius announced it was upon a principle analogous to the Newtonian principle of physical motion that he sought to found moral science: "If the physical universe be subject to the laws of motion, the moral universe is equally so to those of interest." Interest is "the mighty magician" of action and a principle "so agreeable to experience" that it is therefore "the only and universal estimator of the merit of human actions." Just as gravitation is the great causal principle that explains the behavior of the heavenly bodies, so interest or personal happiness is the causal principle that explains
human behavior. This is the material with which the legislator has to work to enhance public utility. Utility, understood as general happiness, "ought to inspire the legislator with the resolution to force the people to submit to his laws," and to this principle "he ought to sacrifice all his sentiments, and even those of humanity itself." The art of legislation consists in fashioning laws according to one "simple principle, . . . the principle of the utility of the public, that is to say, of the greatest number of men subject to the same form of government; . . . a principle which embraces the whole of morals and legislation." For Helvétius, "morality is evidently no more than a frivolous science, unless blended with policy and legislation . . . if philosophers would be of use to the world, they should survey objects from the same point of view as the legislator." The art of legislation "consists in forcing [people] by self-love to be always just to each other." Utility can only be maximized by designing a system in which each person, by following his or her own interest, will contribute to the general happiness. It is the task of the legislator to institute efficacious institutions, including the applicable laws. Bad behavior, according to Helvétius, results from bad government.

Beccaria's aim was to apply systematically the principles enunciated by Helvétius, specifically those regarding the nature of motivation, and to apply this to penal law. Bentham, too, was enthused by Helvétius' explanation of human motivation in terms of utility perceptions and expectations, and by the useful suggestions he made for the application of this knowledge to law and other social questions. Helvétius clearly understood the potential for utility to act as a guide to human conduct by making a connection: "between the idea attached to the word 'pleasure' and 'happiness,' . . . and the ideas attached to the words 'pleasure' and 'pain,'" this meant that "attached to the words 'utility' and 'principle of utility' were now ideas in abundance, ideas which could not but be continuously present and familiar to the most inattentive, unobservant and scantily-instructed minds." Another of Helvétius' insights was "the influence exerted by interest on opinions," from which Bentham was able to deduce "the four psychological causes of misconduct in men, more particularly public men, that is to say, sinister interest, interest-begotten prejudice, authority-begotten prejudice, and primeval or innate fidelities.

As edifying as these foundational ideas were, neither Beccaria nor Bentham accepted the behavioralist implications of the Helvétian perspective—the idea that morality might be entirely determined by legislation. Nevertheless, it was from Helvétius' prescriptive science of morals and legislation that they took their lead: good government involves an arrangement so that, with as little coercion as possible, self-interest and general interest coincide. Certainly there was considerable work to be done to develop the specific mechanisms to accomplish this goal. Helvétius had laid the "true foundations of moral sci-
that it was possible for legislators to calculate the precise values of pleasures and pains, and therefore the precise amounts of punishment required to deter persons from criminal acts, Beccaria wrote: "If geometry were applicable to the infinite and obscure combinations of human actions, there ought to be a corresponding scale of punishments, descending from the greatest to the least." By thus measuring utility with "geometrical precision," appropriate proportions of punishments could be devised in order to effect deterrence, but with the important provision that punishment beyond what is required for deterrence should not be permitted.

In Bentham's view, Beccaria was a pioneer in the field of censorial jurisprudence, in which—"with an applause that in this country seems to be universal"—he established the principle of utility as "an all-commanding principle," to which all other principles, if legitimate, are subordinate. If not legitimate, they were to be "cast out as spurious." In this respect Bentham believed the "foundation" of his moral science closely resembled Beccaria's.

Considering that punishment is but pain applied to a certain purpose, that the value of a pleasure is composed of the same articles, and that pains and pleasures, and actions in so far as they had a tendency to produce or prevent the one and the other were all that morals and politics or so much as was of any use or meaning in those sciences had in view, it seemed to me that such an analysis was the very thing that was wanted as the foundation for a complete system of moral science.

This is what Beccaria had delivered in the context of his treatment of crimes and punishments. It was the essential platform from which Bentham launched his own project to assemble and refine the principles of utilitarian penal law.

III. Bentham on Punishment

In An Introduction to the Principles of Morals and Legislation (1789), one of the foundational texts of utilitarianism, Bentham announced that the principle of utility was the foundation of his system, and that the business of government is "to promote the happiness of the society by punishing and rewarding." He was brought to this understanding from his reading of Hëvelius and Beccaria in 1769, and throughout his career whenever he reflected on the foundations of his thought he acknowledged their enormous influence. If in Hëvelius Bentham found the essential connections between the idea of happiness and the idea of pleasure and pain, and between these and the role of legislation, in Beccaria's Dei Delitti e delle Pene, which Bentham read in French translation, he found a clear statement of the greatest happiness principle and its application to the examination of criminal law. He followed Beccaria in holding that punishment ought to be analyzed critically and not left to the domain of prejudice, and that a system of punishments could be established, stripped of brutality and unnecessary suffering, that would reduce the incidence of crime and the misery caused by crime, and enhance the greatest happiness. Like Beccaria, Bentham's focus on security served to emphasize the place of liberty in his theory, though he eschewed the natural law and contractual underpinnings of Beccaria's analysis. With the objective of the greatest happiness in view, the legislator's first priority was to protect the security of the person, security of ownership of property, and the security of legitimate expectations. The freedom thus guaranteed the individual would go a long way to assisting the person in the enjoyment of life, and add to the overall aggregate happiness of the community. On these utilitarian grounds Bentham constructed his theory of punishment. Punishments for the violation of the security of individuals and the security of the community as a whole were justified as a means of enhancing the greatest happiness. Existing English law, as was the case with much European law, was ill designed to serve this purpose. Bentham found it inconsistent in its principles, and unduly harsh and arbitrary in execution. His aim was to begin anew by setting down the basic principles upon which penal law ought to be based, with utility functioning as both the "end in view" and the underlying standard of critical assessment.

Bentham's theory of punishment was developed in 1776–78, and made its first appearance in print in the Introduction, in which he laid down the principles upon which a rational and systematic legal system ought to be based and, more particularly, the principles and appropriate characteristics of penal law. The utility principle is introduced at the outset as the foundation of morals and law. Bentham then criticized the principles opposed to utility, and examined the sources of pleasure and pain, their different kinds, and how they were to be measured. Next he considered the circumstances influencing sensibility, and the "intentionality" and motives of actions. In the lengthy core chapters devoted to punishment he reviewed the consequences of mischievous acts, stipulated which cases were "unmeet for punishment," analyzed the appropriate "proportion between punishments and offenses," determined "the properties to be given to a lot of punishment," and laid down a comprehensive classification of offenses. We need not follow Bentham through this exhaustive treatment. He spent a good deal of time on the clarification of terms and concepts, and in the process referred everything back to the underlying objective of utility. However, certain elements must be noted.

The general view of punishment in eighteenth-century penalology was that punishment fulfilled the desire of vengeance and in this respect was regarded as "good." By contrast, for Bentham, pain is an "evil," and since punishment
caused pain it too must be considered an evil. Punishment ought only to be employed, therefore, "in so far as it promises to exclude some greater evil." But punishment was not a pain like other pains, it was a particular category of pain that came about as a consequence of a legal process. In contrast to "natural" pain, Bentham styled it an "artificial" pain "annexed by political authority to an offensive act." Ideally, the utilitarian prescribes actions to maximize pleasure and eliminate pain whenever possible, but it is recognized that the ideal is not realizable. Neither a pain-free society nor a crime-free society is possible. Consequently, failing to inflict punishment on those who cause harm to others leads to further harm, and this compounds the subtraction from the general happiness. The "artificial" pain of punishment administered by the state, then, is a necessary "evil" aimed at limiting the suffering caused by the harmful actions of individuals who do not respect the interests of others. But this does not mean that there are no limits on punishment. The tone of restraint that Bentham employed in considering this necessary "evil" reflects the fact that unnecessary pain ought not to be sanctioned by the state—offenses can be punished too severely. Moreover, the caution that is warranted in the application of "artificial" pain marks the difference between Bentham's theory and non-consequentialist theories of punishment; it is designed to avoid "greater evil" by preventing crime and securing public safety.

Bentham deliberately applied the language of political economy to the relationship between crimes and punishments. In this respect, as Rosen has pointed out, he regarded the pain of punishment as "capital which was invested with the expectation of profit"; profit is construed in terms of the prevention of crime, while loss is the increase in crime. The economic dimension of punishment is achieved by producing the desired effect at the least possible cost in pain. In making this calculation several interests of a physical, psychological, or pecuniary kind enter the picture—the interests of the offender who profited from the offense, the interests of the victim(s) of the crime who thereby had a personal interest in the punishment, and the public at large who had an interest both in the prevention of crime and in the punishment of offenders. All such interests could be rendered in terms of pleasures and pains, with appropriate weights assigned to calculate profit and loss.

To what sorts of actions should punishment be applied? The short answer is to actions that cause harm. Beccaria had discussed crime in terms of the pain and suffering caused to an individual and to the community. Bentham's focus on the meaning of "mischief" went deeper and constituted several layers, enabling him to provide a richer classification of offenses requiring proscription and the sorts and quantities of punishments necessary to deter offenders. Initially he distinguished between "self-regarding" and "extra-regarding" mischief, but expressed ambivalence as to how far this would assist in structuring a system of punishments to deter individuals from offenses against the self. This was an issue that Mill was to tackle in more determined fashion in the context of his theory of liberty. Bentham asked, "What acts are productive of a mischief of this stamp? and, among such as are, which it may, and which it may not, be worth while to treat upon the footing of offenses?" But he concluded that the matter is "too unsettled, and too open to controversy" to be included in a system of punishment. This would appear to leave it open whether or not there are at least certain self-regarding offenses appropriately dealt with by legislation. Bentham included such acts in his classification of offenses on the grounds that some "self-regarding" acts may indirectly cause harm to others, though he passed over the question whether or not such acts are properly styled self-regarding at all. He then drew a distinction between primary and secondary mischiefs. Primary mischiefs, whether original or derivative mischiefs, are suffered by particular individuals, while secondary mischiefs, either in the form of public alarm or danger, are suffered by people in general as a result of a primary mischievous act. The alarm and danger caused by such acts consisted in the pain of apprehension that lives and possessions were threatened. Both primary and secondary mischiefs were to be punished in proportion necessary to deter from commission of the offense. Bentham then categorized offenses according to who is harmed by them. First, there are acts of mischief assignable to individuals other than the offender (private offenses). Second, there are acts that cause mischief in the first instance to the offender and not to others, unless by a consequence of the harm one does to oneself (personal offenses or offenses against oneself). Third, there are acts of mischief to non-assignable individuals constituting a portion of the community (semi-public offenses). Finally, there are acts that threaten a danger and cause alarm more or less distant to an indeterminate number of non-assignable persons (public offenses or offenses against the state). All such "offenses" deserve punishment, with the possible exception of acts that only cause mischief to the offender.

Bentham was concerned to limit the cases in which punishment was applied by law to those in which public utility was clearly served. Public utility was most evidently served by minimizing offenses and thus deterrence or example ought to be the first order of business in penal law. Unlike retributionists, first and foremost utilitarians were in the business of crime reduction. The perniciousness of an act is measured by "the sum total of its consequences: that is, according to the difference between the sum of such as are good, and the sum of such as are evil." This calculation determines which acts the law should seek to deter. Where deterrence failed in a particular instance, punishment was applied, thereby reinforcing the general deterrent effect of the punishment on the public at large. Effective legal deterrence requires that the community know what activities are illegal, and what punishments they bring. Otherwise the law
force of the irascible affections." For example, where the offense consists in "an obstinate refusal... to do something which is lawfully required... and in which the obstinacy is in great measure kept up by [the offender's] resentment against those who have an interest in forcing him to compliance, the most efficacious punishment seems to be that of confinement to spare diet." Where the offense is caused by "the joint influence of indolence and pecuniary interest," the punishment that possesses the strongest reforming tendency is the one "best calculated to weaken the force of the former of those dispositions." Likewise in the case of theft, embezzlement, and other such crimes, "the mode of punishment best adapted to this purpose seems, in most cases, to be that of penal labour." 56

The efficacy of a punishment with respect to the "disability" of the criminal can be calculated with greater certainty than the "property of subserviency to reformation." The existing tendency of law to apply excessive punishment to achieve this goal is an unnecessary and unwarranted cost entailed by the punishment. As such, it is not well calculated to serve the other ends of punishment. To justify the application of a major penalty, such as imprisonment with hard labor; the mischief caused by the offense must be of such a magnitude "as to demand a very considerable lot of punishment, for the purpose of example, before it can warrant the application of a punishment equal to that which is necessary for the purpose of disablement." 78 Clearly, the death penalty serves this purpose in the most certain manner, but it is a punishment that "is in an eminent degree unfrugal; which forms one among the many objections there are against the use of it, in any but very extraordinary cases." The objective of "disablement" is served in nearly every instance by the lesser penalties of banishment or confinement: "For when an offence is so circumstances that it cannot be committed but in a certain place, as is the case, for the most part, with offences against the person, all the law has to do is, in order to enable the offender from committing it, is to prevent his being in that place." 79

In discussing the variety of punishments and their appropriateness, Bentham demonstrated an acute sensitivity to the circumstances of the convicted and how this should determine the "equality" of penalties. 80 Punishments must fit the criminal as well as the crime. What might be fitting in England may be neither required nor effective in other countries and cultures. By the same measure, to fine a wealthy aristocrat £100 would be meaningless, but the same penalty might ruin a farm laborer; to sentence a laborer to ten lashes might be bearable but the same punishment for an aristocrat would incur unbearable disgrace. The judicial discretion this permitted runs contrary to Bentham's general critique of the common law and the vagaries of judicial reasoning, but it must have appeared a minor deviation when measured against the objective of instituting a penal law that took "equality" seriously as a guiding principle.
Given the objectives laid down for penal law, Bentham recognized that he had burdened the legislator with a vastly complex task—the calculation of the correct quantity and quality of pain needed to achieve the desired ends, in particular the objective of deterrence. To guide the legislator in proportioning punishments to offenses (and the judge in assessing appropriate penalties where latitude was permitted in particular cases), he stipulated thirteen rules or "canons" to determine the proportion of punishments: (1) the punishment or "canon" to determine the proportion of punishments; (2) "venture more against a great evil to get the profit of the offence," (3) "cause the least of two offences to be preferred" by adjusting the punishment sufficiently "to induce a man to prefer the less," (4) "punish for each particle of the mischief" (e.g., punish for both the theft and the assault) on the grounds that "for every part of the mischief there may be a motive to restrain the offender from giving birth to it," (5) "punish in no degree without special reason" (aimed at limiting unnecessary and unduly severe penalties), (6) and "attend to circumstances influencing sensibility" (intended as advice to guide a judge in the selection of a suitable penalty where the law allows discretion); further, (7) "want of certainty must be made up in magnitude" of the punishment or, in other words, the punishment must be increased in proportion to the uncertainty of its being applied; (8) want of certainty must also be made up in the same way, in point of magnitude; (9) "for acts indicative of a habit punish as for habit," meaning that punishment ought to be applied for all the instances of offenses that constitute the pattern of criminal behavior (again designed to ensure that the punishment would be greater than the profit to be gained by the criminal from each offense); (10) "for the sake of quality increase in quantity," but only if strictly necessary; (11) such an increase in quantity may be considered, "particularly necessary for a moral lesson"; (12) "attend to circumstances which may render punishment unprofitable"; and (13) "for simplicity's sake, small disproportions may be neglected."

These guidelines were indicative of Bentham's attempt to be as comprehensive and as exact as possible while attending to practicalities, but the primary objective was to protect against excessive punishments while ensuring that the primary end of punishment—deterrence. Bentham was also aware that critics might object that rules of this sort involve the legislator and judge in unnecessary labor, since the people are ignorant about the minutiae of the laws and their application. To this objection he responded that "the evil of ignorance admits of cure" through publicizing the law, its attendant penalties and their rationale, and making public the reports of cases in which punishment had been inflicted according to the law. And, to the objection that "passion does not calculate," making the sorts of rules he recommended of little consequence to the people, he responded:

When matters of such importance as pain and pleasure are at stake, and these in the highest degree (the only matters, in short that can be of importance) who is there that does not calculate? Men calculate, some with less exactness, indeed, some with more: but all men calculate. I would not say, that even a madman does not calculate. Passion calculates, more or less, in every man, in different men, according to the warmth or coolness of their dispositions: according to the firmness or instability of their minds: according to the nature of the motives by which they are acted upon.

The awareness that punishment of a particular sort and quantity will be applied for offenses is part and parcel of the motivational context in which potential offenders calculate the risks involved. This position was central to Mill's dismissal of the critics of punishment who based their argument on the "necesitarian" view that human character is merely the result of social conditions.

IV. Mill on Harm and Punishment

Mill did not develop a systematic analysis of punishment, presumably because he believed that Bentham had developed a theory that was "nearly complete" and had done "almost all that remained to perfect the theory of punishment." Though Mill did not say what Bentham had left undone, there are several of his writings in which he made his own contribution to the theory, and which provide a clue to what more a utilitarian might say about punishment, most notably On Liberty (1859), and An Examination of Sir William Hamilton's Philosophy (1865). In the first he developed and gave application to the "harm" principle, whereby harm to another provides the justification for interference with an agent's actions. In the second he provided a justification for punishment in the context of his criticisms of the "necesitarian" doctrine of free will. In both cases Mill's aim was to elaborate on the utilitarian theory of punishment laid down by Bentham. Where he differed from Bentham was in stressing that, in addition to its role in protecting the community through deterring crimes, and its potential to aid the reform of those convicted of crimes, punishment also served a general moral and educative function. The application of punishment taught people what was right and wrong by impressing upon the mind the association between responsibility and punishment. This line of thought occasionally led Mill to consider the reproaches of conscience as a form of internalized punishment. In addition, Mill was not in entire agreement
with Bentham on the issue of capital punishment, at least in his later years, arguing that it ought to be retained for the worse crimes.

Bentham rarely used the term "harm" in the context of his theory of punishment; as we have seen, he most often employed the concept of "mischiefs" to signal an action that justified the intervention of law. Mill, on the other hand, made "harm" the conceptual epicenter of his theory of liberty, upon it rests both the justification for state interference and the limits to that interference.

The objective of On Liberty, he famously explained, "is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control:... That principle is, that the sole end for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." According to Mill, actions deemed harmful to others could be punished by society through either legal or moral means. What determines which of these approaches is warranted? Actions which cause harm of the sort that is justifiably punishable by law are actions which are prejudicial, damaging, or detrimental to, or risk having this effect on, another individual's "permanent interests," by which Mill means "constituted [positive] rights," or what ought to be constituted as rights, namely security of life, liberty, property, and individuality, and the institutions of justice that protect these interests. Mill's objective is the preservation of as wide a scope of individual liberty as is consistent with such rights being secured equally to all. Thus, with the notable exception of delinquent children who may be punished by parents or magistrates for their own good, "there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like it (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases there should be perfect freedom, legal and social to do the action and stand the consequences." Among the consequences, of course, may be "the unfavourable judgement of others," but in no other way ought the agent be held accountable for his or her actions. When a person neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom." Clearly exempting the good of the agent—an agent who may cause harm to himself or herself but not to others—from the reach of legal punishment, Mill introduced a conceptual clarity that eluded Bentham, who hesitated between recommending that the law be used to prevent actions which are harmful to the agent alone, on the one hand, and protecting the agent's freedom to engage in such actions free from legal intervention, on the other.

Actions hurtful or injurious to another person but which are not damaging to their "constituted rights" may be punishable by opinion though not by law, according to Mill. This is consistent with Bentham's views on the role of the "moral" or "popular" sanction, a "spontaneous disposition" expressed in the form of public opinion but which does not operate "according to any settled or concerted rule." In these instances moral disapproval, censure, or avoidance are the only acceptable responses. Interference beyond the level of the expression of an adverse opinion is entirely ruled out by Mill—it remains the choice of the agent whether or not to desist from offensive conduct.

The " reproaches" of conscience constitute a third form of punishment in Mill's theory, a biblical notion (Matthew 14:2) admirably articulated by Thomas Aquinas. For Mill, the reproach of conscience is a painful, though "disinterested feeling" in the mind, "more or less intense, attendant on violation of duty, which in properly cultivated moral natures rises, in the more serious cases, into shrinking from it as a impossibility." In a similar fashion to social condemnation, one is admonished by the self when part of a person speaks internally to say that an act is reprehensible and ought not to be done. The act runs contrary to a person's moral principles, and is rightly condemned by the self as unjust. In this sense, the feeling that an action performed or about to be performed is wrong supplies the "ultimate sanction" of morality. This feeling is "natural" to us in the same way that it is natural for one to speak and to work to supply one's needs. Just as this are acquired faculties, so the dictates of conscience are acquired as a result of our upbringing and the teachings of parents, tutors, and religion. In Mill's account, an important part of this educative process is the consciousness that punishment will be incurred if we offend against the moral code and laws of society. In this way the implicit relationship between the external and internal sanctions of morality is underscored, but for those who do not possess the required "conscious feelings" only the external sanctions will apply.

Clearly, while such feelings may have the effect of deterring a person from actions deemed wrong or unjust, either in the present or in the future, it is a form of punishment unlike the legal or moral sanction. Certainly the disquiet one feels over one's conduct may act as a form of personal condemnation and thereby provide a motive not to engage in the conduct, but the condemnatory feeling lacks one of the characteristics normally associated with the idea of punishment: that it emanates from an external source, usually another person or persons acting in an official or unofficial capacity, that possesses the right, or assumes the right, to harm a person for actions detrimental to others, Bentham's view of punishment conforms to the standard view, in which punishment is "an evil resulting to a person from the direct intention of another, on account of some act that has been done or omitted." By contrast, self-condemnation is imposed by the agent upon himself or herself.
In other respects, however, Mill's theory is in complete accord with Bentham—the justification for punishment is public utility, understood in terms of the greatest happiness. Though he occasionally used the term retribution in relation to punishment, he generally employed it as a synonym for punishment rather than a justification for it. That retribution is not an acceptable justification for punishment is signaled in Mill's Examination of Sir William Hamilton's Philosophy:

If anyone thinks that there is justice in the infliction of purposeless suffering, that there is a natural affinity between the two ideas of guilt and punishment, which makes it intrinsically fitting that wherever there has been guilt, pain should be inflicted by way of retribution. I acknowledge I can find no argument to justify punishment inflicted on this principle. ... The merely retributive view of punishment derives no justification from the doctrine I support.84

The legitimate ends of punishment, according to the doctrine that Mill supports, are the protection of society, specifically the defense of "permanent interests" in the form of "constituted rights," deterrence, reform of the criminal, and moral education of the community.85

One of the points of argument Mill was at pains to disprove in the essay on Hamilton is the necessitarian claim that because violations are the effects of causes, the idea of moral responsibility is eroded, and therefore the application of punishment is not warranted.84 The reasoning behind this position is that since actions are the result of a person's character, and no one chooses one's own character, so there is no justice in punishing people for what they cannot help doing. Persuasion and education to attempt to reform offenders' habits and dispositions are encouraged in the way of introducing other external "causes" that may alter offenders' character and thus conduct, but where there is no responsibility there ought not to be punishment.85 Mill argues that the necessitarian perspective rests on a confusion of ideas "which makes the subjection of human volitions to the law of Causation seem inconsistent with accountability."86 Punishment functions by leaving an imprint on the criminal's mind that one's disposition to offend is an object of the "active dislike" of one's fellow creatures, that their taking precautions against the criminal to defend themselves is necessary, and thereby signaling that one is to be held accountable for one's actions. In this way "the practical expectation of being called to account" will invariably produce the "internal feeling of being accountable."87 Mills point is that the ends of punishment—self-protection, deterrence, and moral reformation—are well served in this process. Moreover, the association between offenses, guilt, and responsibility is brought most clearly to the mind of the general public by the application and expectation of punishment. Punishment generates a motive acting on the will alongside other motives, and plays its role among the causes that determine a person's character and conduct. If this were not the case, if punishment had no power to act on the will, then it would be illegitimate to inflict it.86 The issue is brought into sharp relief in the debate over the appropriate punishment for murder.88

V. The Death Penalty

Beccaria presented three arguments against the death penalty, though he suggested it might be retained when the continued existence of the offender, even when imprisoned, posed a threat to the survival of the state.89 The first argument stems from the idea that civil society was based on a contract, and brought into question whether people could be said to give up their right to self-preservation. Individuals entered into the contract to protect their lives and property, but it did not follow that the sovereign could take lives in order to provide that protection. The second argument is based on considerations of utility, and involves demonstrating that other forms of punishment are sufficient to deter people from committing the worst offenses. Beccaria maintained that the pain felt by an executed criminal had a less powerful effect on those who witnessed the punishment than observing the continuous pain that attended a criminal suffering imprisonment and hard labor. Servitude in place of the death penalty "has in it what suffices to deter any determined spirit."90 Third, the barbarity of executions often produced effects contrary to their intended objective. One such effect is to arouse compassion for criminals in their moment of dying rather than the terror intended. By comparison, penal servitude produced only terror. The encouragement given to the taking of life by degrading the humanity of the spectators at an execution is another unintended outcome. In both respects the deterrent value of capital punishment is significantly undermined.91

Bentham rejected the first of Beccaria's arguments as without basis in fact. This was a prime instance of that "reasoning drawn from false sources" Bentham detected in Beccaria's otherwise exemplary exercise in critical jurisprudence.92 However, he agreed with the general utilitarian position enunciated by the Italian (borrowed, in turn, from Montesquieu): punishments that were not based on the necessity of defending the security of the people were tyrannical and should not be permitted.93 Neither torture nor the death penalty could be justified on these grounds.94

Given the critical attention lavished by Bentham on England's penal code, it is hardly surprising that he should have paid particular attention to capital punishment. Nowhere in Europe during his lifetime was the sentence of death so freely imposed as in England, where its apologists were notoriously quicker
to urge an increase in the number of capital offenses than to listen to arguments for a reduction. By 1765, according to Sir William Blackstone in his famous Commentaries on the Laws of England (1765–69), there were 165 capital felonies upon the statute books of England. Sixty years later the number had grown to over two hundred. In the absence of a consensus on alternative modes of punishment, England’s legislators routinely enacted the death penalty whenever a new offense presented itself for punishment. In addition to the inordinate number of capital offenses, Bentham seethed with outrage when he turned to the inequities, uncertainties, and arbitrariness fostered by the death penalty in the judicial process. Frequently it was the case that the infliction of punishment, instead of being defined by rational utilitarian considerations, was left to the subjective reasoning of the judge, and this was nowhere more apparent than in capital cases, providing further evidence of the arbitrary nature of the administration of English law against which he waged a life-long battle.

Bentham first examined the utility of capital punishment in the 1770s when he first elaborated the principles of penal law, and he followed this with an unpublished essay in 1809 in which he presented a critique of William Paley’s defense of the death penalty in Principles of Moral and Political Philosophy (1785) and a further short essay “On Death-Punishment” in 1830. Arguably, Bentham’s utilitarian analysis of the issues raised by the death penalty in the first of these essays stands as the most thoroughgoing examination of the question up to this time. In sum, it is a special application of his utilitarian theory of punishment, in which the framework of analysis is intended to be an objective, neutral exercise (the outcome of which is not predetermined), conducted in accordance with the utility principle. As such, it is an assessment of the benefits and costs of the death penalty in cases of murder when compared with the option of life imprisonment with hard labor. In favor of capital punishment for murder Bentham included the following commonly argued considerations: (1) it is "analogous" to the offense; (2) it is "populus," meaning that it is generally accepted as an appropriate punishment; (3) it acts as a general deterrent; and (4) it disables or incapacitates the criminal, preventing one from committing further crimes. Against these considerations he weighed the following: (1) the punishment is unprofitable in terms of compensation to the victim or victims’ family; (2) it is "defective in point of frugality," since the pain greatly outweighs the pleasure gained by it; (3) it is "inequitable" in the sense that death is a greater pain to some than to others; and (4) in the event of judicial error, the penalty is irremissible.

In the absence of precise factual evidence relating the rate of capital offenses to the penalty of death, the determinative elements of Bentham’s analysis turn around the following convictions. First, the "disability" or "incapacitation" of the offender can be achieved through imprisonment, and so taking the offender’s life is unnecessary. Second (and perhaps more compelling today when we consider contemporary reports of miscarriages of justice in capital cases in Western criminal systems), mistakes are frequently made in courts of law, and where death is the punishment it is entirely irremissible. There is no way to compensate a wrongfully executed person. Third, following Beccaria, Bentham argued that the anticipated pains of life imprisonment with hard labor have a greater deterrent effect than the threat of execution (an affair only of a few moments). Life imprisonment with suitable aggravations of labor and solitary confinement would have a more terrifying impact on prospective offenders than was currently the case, and more than did the threat of capital punishment which rarely figures in the imagination of the lower orders from whose ranks most criminals are drawn. Later, Bentham reconsidered the merits of solitary confinement in the context of panopticon imprisonment, but labor remained a principal means to both deterrence and moral reformation. All things considered, in the early essay the weight of the calculation worked against the death penalty, though Bentham thought it might reasonably be maintained for murderer with aggravating circumstances. To this exception, and in line with Beccaria, in the pages of the Introduction he added the possibility of retaining it for cases of treason "in which the name of the offender, so long as he lives, may be sufficient to keep a whole nation in a flame." By 1809 he abandoned both possible exceptions and argued that no offense warranted capital punishment.

Bentham gave further detail to his position on the deterrent effect of the death penalty in his critique of Paley. In the Principles Paley set out a defense of the arbitrary manner in which the death penalty was applied in England’s courts; all capital offenders were caught in the legal "net," but a number escaped the ultimate penalty because juries were unwilling to convict, or because judges either commuted the sentence to transportation or arranged for a pardon. According to Paley “public safety” requires that only some capital felons suffer the death penalty. Bentham has two things to say in answer to this. First, as Paley himself seems to have acknowledged, deterrence depends upon the certainty of punishment for the breaking of a specific law, and in this respect the mode of administering justice in England manifestly failed, Paley argued that “legal description” (that is a general law) cannot encompass beforehand all the circumstances which may be relevant to the malignity of a crime. After an offense has been committed, however, they are relatively easy to perceive. But if the essential characteristics of a type of crime are incapable of being adequately described, then, asks Bentham, “by what means is it that for the purpose of a man’s being deterred from the commission of it, any conception of it can be lodged in his mind?” Again: “if there be a set of general terms which before this or that crime has been committed are capable of giving expression to the material circumstances of it. . . . why the same words should be incapable
of serving for the giving expression to those same circumstances before that same individual crime has been committed, remains to be explained. If the circumstances can be perceived after a crime is committed they can be expressed, and if they can be expressed then there is sufficient ground for constructing a law containing all the general characteristics necessary to distinguish capital from noncapital offenses. There should be no doubt in the mind of the potential offender either about the nature of the criminal act he is considering or of the penalty he should perform. Clarity of description and the certainty of punishment—both necessary for deterrence—are within the scope of a rationally grounded and well-administered penal law.

Second, it only makes sense to decide on an appropriate punishment by comparing it with the consequences of other possible penalties. Bentham's alternative to death in the earlier essay was "perpetual imprisonment," his choice being supported by a lengthy examination of the factors for and against these two punishments. Paley gave a second thought to the deterrent value of imprisonment, considering it a terror insufficient to make an impression upon the minds of potential offenders. But his analysis of the possibilities was hopelessly incomplete, not to say at times confused, as Bentham recognized. On several occasions Paley appeared to confuse two different aspects of deterrence—the specific prevention of further criminal acts by the convicted criminal and the general deterrence effect of punishment on the public at large. For Bentham this distinction is central to the consideration of the alternatives: by either punishment—death or life imprisonment—he argues, the offender is prevented from perpetrating further crimes, but the cruel prospect of the latter has the additional utility of serving as an example to deter others. What evidence did Bentham have to support the claim that capital punishment is not as effective a deterrent as imprisonment? His thirst for social data was well known and always in advance of the techniques for accumulating the matter he required. In this instance there was little evidence to draw upon, though he located one snippet of comparative evidence to support his position.

In the Grand Duchy of Tuscany under the Government of Leopold afterwards Emperor, for a course of years in no instance was this punishment inflicted and yet neither to any degree in point of mitigating nor to any great extent in point of frequency did the public security suffer [greater] violation than in the equal number of years under the influence of capital punishment in that same country during a former period or in other Countries and particularly in England.

The criminal code promulgated by Leopold in 1786 was constructed under the influence of Beccar's Dei delitti e delle pense, and has been described as "the crowning achievement of the Continental movement for the reform of criminal law." Admittedly, the suggested comparison between Tuscany under Leopold and England during the same period is unsophisticated by modern standards of empirical analysis, but had better evidence been available Bentham would certainly have employed it. Nor should it be forgotten that at the time he wrote it was hardly an established practice to enlist empirical evidence in support of arguments over penal policy (the pioneering efforts of John Howard aside). Paley certainly made no attempt to substantiate his view that imprisonment was not a deterrent by reference to anything that might pass for empirical proof.

When Bentham returned to the issue of capital punishment in 1830 his vexation over the discretionary use of pardons to lessen the severity of the penal law was the reason. Titled "On Death Punishment," the essay is addressed by Bentham "to his fellow citizens of France," and was written in response to the public outcry over the pardons given to the ministers responsible for the insurrection in Paris of that year. The English papers were full of the pros and cons of pardoning the French ministers, including Mill's contribution on the topic in the Examiner. Bentham's essay was intended to place the debate within the wider context of the failings of the English judicial system associated with the royal prerogative to pardon condemned criminals. The objective of Mill's essay was to clarify the issues at stake in the French debates, but it was clearly written from the perspective of a committed abolitionist.
Death is the appropriate penalty for the worst crimes based on two considerations: the irremovable character of the offense, and its potential deterrent value as "the most impressive" mode of punishment. Further, Mill states that his defense of the death penalty rests "on the very ground on which it is commonly attacked—on that of humanity to the criminal; as beyond comparison the least cruel mode in which it is possible adequately to deter from the crime." He asks, "can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviations or rewards—destitute from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily constraint, or a small improvement of diet?" Principally, however, it is the psychological impact of executions that recommended the death penalty to Mill. A life sentence appeared to be less painful because the suffering involved lacked the "terrifying intensity" of death, but in reality it contained the prospect of far greater suffering. Yet it is because of the appearance of severity that the deterrent objective of punishment is better achieved by execution. Like Bentham, Mill argued that the "practical power" of punishment "depends far less on what it is than on what it seems," but unlike Bentham (and Beccaria) he maintained that there is not "any human inflection which makes an impression on the imagination so entirely out of proportion to its real severity as the punishment of death." Therefore, capital punishment should be retained for the worst murders, because it achieves the objective of deterrence "at a lesse[r] cost of human suffering than any other."

Mill would appear to have the better of the argument here. Bentham's claim for the superior deterrent effect of incarceration for life is contradictory: death only appears to be the more dreadful punishment, while in fact imprisonment administers greater pain and is the greater deterrent. His explanation for the assertion rests on the shaky grounds that to the lower orders the terrors of an execution are only apparent, and actually are minimal in terms of pain when compared with the anticipated hardships of lengthy confinement. However, the real problem with this is that it is at odds with Bentham's own theory of punishment. Even if we allow the claim that the psychological impact of different penalties varies between individuals of different social rank, according to Bentham's theory the deterrent value of a punishment does not depend on the actual pain administered, but rather on the apparent pain the potential criminal expects to receive if apprehended for a crime. And, for Bentham it is the prospect of being executed that appears to be the most painful, rather than the penalty of life imprisonment. Ergo, he ought to have supported executions for the worst crimes, as Mill proposed.

However, there is another element in the debate on which Bentham's instincts were surely correct (and Mill was wrong)—the inescapable fact that miscarriages of justice in capital cases cannot be ruled out, and where errors occur there is no form of compensation that can rectify the injustice. Mill was decidedly more sanguine about the risks of judicial error. He allowed that miscarriages of justice rank among the most tragic occurrences in the whole round of human affairs," and in those countries in which the presumption of innocence is not a respected maxim of the law the judicial system ought not to be trusted in meting out death as the punishment for murder. But in England such "miserable mistakes" are extremely rare, he said. Rather, the defects of English judicial practice are the opposite, tending to be more favorable to the defendant, consistent with the adage that "it is better that ten guilty should escape than that one innocent person should suffer." In England the accused murderer has the benefit of the "merest shadow of a doubt," and in such cases the courts, mindful that the imposition of the punishment of death cannot be reversed or compensated for in the event of judicial error, are "more scrupulous in requiring the fullest evidence of guilt." It is perhaps needless to say that the history of sentencing in capital cases in Western democracies severely undercut Mill's argument that judicial errors are unlikely.

VI. The Panopticon Penitentiary

In discussions of the history of punishment Bentham's panopticon has occasioned a good deal of controversy. Appalled by the inefficiency and existing inhumane conditions in Britain's prisons and use of naval hulks for incarceration, and by the policy of transportation, in the late 1780s Bentham developed the idea of the panopticon penitentiary as a substitute penal system, in which convicted criminals would be subject to a disciplinary regime based on the maxim that "the more strictly we are watched, the better we behave." The circular architecture of the prison left each cell visible to the center, which was occupied by a watchtower from which the unseen warden might observe the activities of prisoners day and night. Michel Foucault famously took the perspective that "panopticism" defined a "new physics of power," an experimental
"laboratory of power" in which behavior could be modified, and viewed the panopticon—that "cruel, ingenuous cage"—as a symbol of the repressive, disciplinary society, the modern "society of surveillance."

This view of the panopticon has opened some interesting lines of discourse related to the encroaching methods of control and surveillance in contemporary liberal democracies. However, as a critique of Bentham's proposals it is less impressive. The panopticon prison was organized according to a range of principles: economy, since the prison should be a private self-sustaining operation not requiring financial assistance from the public purse; severity, because it was necessary for the offender to suffer to serve the ends of reformation and deterrence; and humanity, which prescribed that prisoners should be deprived only of liberty, not of health or life. In contrast with the cesspits of the existing jails and hulks in Britain, and the horrific experiment with the penal colony at Botany Bay, Bentham's prisoners were to be kept clean and their labor was to be productive and profitable, serve to develop skills that might be useful to them upon release, and assist in their moral reformation. Correct behavior was to be rewarded by the prison authorities. The aim was to teach the virtues of honest work and to motivate released prisoners to live according to social norms. In support of these objectives, Bentham invoked several devices to effect transparency and accountability. The chief mechanism intended to bring the interest of the manager-warden in line with his duty to be humane—to give effect to the "duty and interest junction principle"—is publicity. According to Bentham this would be "the most effectual means of applying the force of moral motives, in a direction tending to strengthen the union between his interest and the humane branch of his duty; by bringing to light, and thus exposing to the censure of the law and of public opinion — [every instance of] contravention."

In the panopticon the observation function worked in two directions: the seemingly constant surveillance of inmates by the warden, and the periodic observation of the warden and his subordinates by the public. The latter was the key to an age-old question: who guards the guards? Interested members of the public were to be guaranteed free access to the prison, making the panopticon subject to "the great open committee of the tribunal of the world."

The aim was to prevent abuses of power by prison officers and to enhance the security of the inmate. Once we recognize the significance of the principles that gave shape to the panopticon and the various devices built into its management, the arguments of critics who view it merely as a punitive and repressive institution are far less persuasive. What is truly interesting about the project is the care Bentham took in relating its structure and management to the principles of his theory of punishment, and the manner in which he later applied certain of its principles (economy, transparency, and accountability) to the functioning of the democratic polity.

Notes

In writing this chapter I have benefited from conversations with my son Dylan T. Criminis and his research into theories of punishment. I am also grateful for the thoughtful comments of Dr. John Turri and Dr. Douglas G. Long, my colleagues at Heron University College and the University of Western Ontario. Dale E. Miller, Old Dominion University, also graciously read the manuscript with an expert eye on my reading of Mill.

1. This is a variant on the definition offered by Anthony Quinton in Utilitarian Ethics (1973; 2nd ed., LaSalle, Illinois: Open Court, 1988), 1.

2. The principle of utility was the "fundamental axiom" of Bentham's theory—"the measure of right and wrong," "the test and measure of all virtue" A Comment on the Commentaries and A Fragment on Government, ed. J. H. Burns and H. L. A. Hart (London: Athlone Press, 1977), 393. An action that conforms to the principle is an action that "ought" to be done or "at least . . . it is not one that ought not to be done." An Introduction to the Principles of Morals and Legislation, ed. J. H. Burns and H. L. A. Hart (1970); with a new introduction by F. Rosen (Oxford: Oxford University Press, 1996), 13. Hereafter IPML.

3. There are two aspects to the role of pleasure and pain in relation to utility. First, pleasures and pains are the ultimate matter to which all social constructs and human activity could be reduced and thereby explained. They were the "real entities" of individual experience, acting both as the final cause of individual action, and the efficient causes and means to individual happiness. Since each person's happiness is constituted of these elements—the net aggregate balance of pleasures over pains—this is "the sole end which the legislator ought to have in view: the sole standard in conformity to which each individual ought, as far as depends upon the legislator, to be made to fashion his behaviour" (IPML, 34). Second, Bentham meant to refer to a feeling or sentiment that approved the utility of an action: "The principle here in question may be taken from an act of the mind; a sentiment; a sentiment of approbation; a sentiment which, when applied to an action, approves of its utility, as that quality of it by which the measure of approbation or disapprobation bestowed upon it ought to be governed" (IPML, 12). A person ought to approve of an action or law (attach it to the "sentiment of approbation") to the degree to which the happiness of all the individuals affected by it was likely to be advanced. Bentham refers to pleasures and pains as "real entities" in the unpublished Critica[il] Jure[spudence] Crimin[al], probably dating from 1776-78, in the Bentham Papers at University College London, box clx, fol. 267. Heron UC box and folio number (e.g., Bentham Mas., UC clx. 267). I am grateful to Douglas G. Long for allowing me access to his transcriptions of these important manuscripts.


5. IPML, 38-39.


7. Ibid., 40.

10. The neglect of this aspect of utilitarian theory has led the red herring of “punishment of the innocent” to gain unwarranted prominence in the attacks of critics. It never occurred to Bentham that he needed to defend the theory against this objection, and Mill dismissed the proposition as unworthy of serious consideration; see An Examination of Sir William Hamilton’s Philosophy and of the Principal Philosophical Questions Discussed in His Writings (1865), in Collected Works, 9:460n. For an extensive list of contributions to this debate, see Guyonnon Brinder, “Punishment Theory: Moral or Political?” Buffalo Criminal Law Review 5 (2002), 323–25. The most effective response to the criticism is made by Rosen, Classical Utilitarianism from Hume to Mill, chap. 12.


15. In one form or another, the “disappointment-preventing principle” had existed in Bentham’s legal lexicon since his earliest writings on civil law in the 1780s. It appeared for the first time in print in this precise form in Bentham’s A Commentary on Mr Humphrey’s Real Property Code (1826), in The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring (hereafter Bowring) (Edinburgh: William Tait, 1838–43), 3:416. Beyond the essential protection of basic interests, both Bentham and Mill saw a positive benefit in other equalizing or redistributive policies, where their implementation could be conducted without nullifying the security of life, liberty, and property or disappointing the legitimate expectations enjoyed by each and every member of society. According to the “disappointment-preventing principle,” breaches of the security of expectation could be justified in times of emergency, while such breaches in times of peace ought to be avoided save where necessity determined otherwise, and then only with appropriate compensation payable to the “disappointed.”


17. Bentham’s reasoning is that, measure for measure, the value of pleasures is not commensurable with pains. The unhappiness created by the loss of something will usually have a greater impact on a person than the happiness brought about by its gain to someone else. Of course, if the loser is a wealthy person and the gainer a poor man, this will not hold. But in the normal run of things, this is why the protection of property by law is given a high priority, and why it is that the alleviation of suffering is given more immediate attention than plans to produce wealth.


21. See John C. Korsinsky, “Thomas Hobbes, Punishment and the Limits of the Social Contract,” chap. 5 in this volume. However, there is no textual evidence to support the claim that Hobbes was a direct influence on Beccaria.


23. Beccaria does not mention Helvétius in De Delitti e delle Pene, but there are too many points of similarity to seriously doubt the connection.


25. Ibid., 63.

26. Ibid., 135.

27. Ibid., 124–25.

28. Ibid., 185.

29. Ibid., 120.


31. Ibid., 325.

32. Bentham Ms., UC xxi, 158.


36. Ibid., 58.

37. Ibid., 64.

38. Bentham Ms., UC bxx. 17.

39. Ibid., UC xxvii. 34. I am grateful to Douglas Long for drawing my attention to this passage.

40. IPML, 74.


42. The French translation of Beccaria by André Morellet, which Bentham cited in IPML, 166n, was published in 1766 as Traité des délits et des peines.

44. Excellent discussions of these aspects of Bentham's thought can be found in Douglas G. Long, *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to His Utilitarianism* (Toronto: Toronto University Press, 1977), and Kelly, *Utilitarianism and Distributive Justice*.

45. In the Bentham Papers at University College London there are over a thousand manuscript folios on penal law dating from the 1770s, but which have never appeared in print; see the account of the extant sources for Bentham's theory of punishment in Hugo Bedau, "Bentham's Theory of Punishment: Origin and Content," *Journal of Bentham Studies* 7 (2004), 1-2. The other major source for Bentham's ideas on punishment is *The Rationale of Punishment*, trans. and ed. Richard Smith (London: R. Heyward, 1830), in Bowring, 1:388-532. However, it has been used sparingly in the present chapter, for the following reason. In 1811, Bentham's Geneva friend and editor, Etienne Dumont, published Bentham's *Théorie des peines et des recompenses* in two volumes. This was one of several reductions of Bentham's original writings published by Dumont, including the widely praised *Traité de législation civile et pénale* (1802), a work which launched Bentham's international reputation as a legal philosopher. Dumont was no mere translator; by his own account he "translated, commented, abridged, or supplied" additional text (Advertisement to *The Rationale of Punishment*, 5), all in the effort to render Bentham's ideas more complete and accessible. In doing so he occasionally reinterpreted these ideas, and not always in ways consistent with their source. Both volumes of Dumont's *Théorie des peines et des recompenses* were later translated into English by Richard Smith with additional manuscript material (*The Rationale of Reward* was published in 1825). Thus, from Bentham's original manuscripts we have a publication in French which is part translation and partly a rewriting by Dumont, which was then translated back into English by Smith, together with the integration of additional manuscript material, and published under Bentham's name. The process of the text makes it difficult to be confident about its authenticity as a work of Bentham. This has not prevented several recent reprint editions of *The Rationale of Punishment*: Elbrou Classic (2003), University Press of the Pacific (2004), Kessinger Publishing (2007), and Prometheus Books (2008)—and a digitized version is available online. At the very least these publications bear witness to the degree of contemporary interest in Bentham's theory of punishment.

46. *IPML*, chaps. 1-5.

47. Ibid., chaps. 6-11.


50. *IPML*, 158.

51. Ibid., 157.


55. *IPML*, 148.

56. What constitutes a self-regarding offence is discussed in *IPML*, 187-89, with a listing of illustrative examples at 232-33n, and 257n.

57. Ibid., 195.

58. In the "Key" mss. from the 1770s Bentham wrote, "It may admit of controversy whether the Law would do right to coerce a man merely for his own good. But what admits of no controversy is that it does right in coercing him for the good of others" (Bentham Mss., UC clic. 44). I am grateful to Douglas G. Long for bringing this passage to my attention.

59. *IPML*, 143-44.

60. Ibid., 188-90.

61. Ibid., 74.

62. Ibid., 178-79.

63. Ibid., 161.

64. Ibid., 180. Earlier in *IPML* Bentham had stated the ends of punishment differently: the principal end of punishment is to "control action," and this is achieved by reformation, disablement, and example. At this point in the text he considered compensation to be "a collateral end" of punishment. Ibid., 156n.

65. Ibid., 179.

66. Ibid., 182.

67. *Critical Jurisprudence* [Crime(s)]al, Bentham Mss., UC clic. 267. There are other relevant remarks on compensation in these manuscripts, in which Bentham recognized that a certain amount of discretion in setting pecuniary penalties was unavoidable. He advised that the appropriate compensation should be calculated according to the intentions of the offender, the "punitory circumstances" of the parties involved, and the nature of the mischief (whether it be to property, person, or reputation). Ibid., 265-67, and UC cd. 10,15-16.

68. *IPML*, 181.

69. Ibid.

70. Ibid., 182.

71. Ibid., 175-76.

72. Ibid., 167-71. Rosen has analyzed these rules in *Classical Utilitarianism from Hume to Mill*, 153-56, and Bedau, in "Bentham's Theory of Punishment: Origin and Content," 6, considers them "one of the most important contributions to the utilitarian theory of punishment, [they] carry that theory well beyond what any of Bentham's predecessors had to offer."

73. *IPML*, 172-74.

74. "Remarks on Bentham's Philosophy" (1833), in *Collected Works*, 1611, and "Death of Jeremy Bentham" (1832), Ibid., 23-471.

75. I am grateful to Dale E. Miller for guiding me to the appropriate sources in Mill.


78. The point is made by Mill in a lengthy footnote to *Examination of Sir William Hamilton's Philosophy*, in *Collected Works*, 9:459n.
80. Ibid., 278.
81. Ibid., 282.
82. *IPML*, 35.
84. Mindful of his cautionary remarks on the dangers of the tyranny of the majority, exercised both formally and informally, it is doubtful that Mill would have accepted the legitimacy of mobilizing mass public opinion to combat the harm of offensive actions if this meant direct constraints on an individual's freedoms.
85. See Peter Koritsansky, "Christianity, Punishment, and Natural Law: Thomas Aquinas' Premodern Retributivists", chap. 4 in this volume.
86. Mill, Utilitarianism, in Collected Works, 10-224, 246. See also "Remarks on Bentham's Philosophy," ibid., 12.
87. Ibid., 229. See also Mill to William George Ward (Nov. 28, 1809), ibid., 15-649.
88. Examination of Sir William Hamilton's Philosophy, ibid., 9-454-55, 454-60 and note.
89. Utilitarianism, ibid., 10-229.
90. Bowring, J.391.
94. Mill had in mind, Robert Owen's *An Address to the Inhabitants of New Lanark* (London, 1816), in which Owen advocated in thepower of education to shape character and make good citizens, but a prerequisite to this was providing an environment in which their better natures would be allowed to grow. Mill addressed the free will versus determinism debate in "Liberty and Necessity," in *A System of Logic Ratiocinative and Inductive* (1843), pl. 2, bk. 6, chap. 2, in Collected Works, 8:380-43.
96. Ibid.
97. Ibid., 455.
98. Ibid., 458.
101. Ibid., 46-47.
121. See the tables of penal statistics from Howard in Montagu, The Opinions of Different Authors, 1233–51.

122. Bedau judged the discussion of the Crown's prerogative to pardon in the 1830 essay (Browning, 1:292–30) a "peculiar addition" to Bentham's argument and was at a loss to explain why he devoted so much time to it, arguing that "Bentham's preoccupation with the whole theme is bound to strike even the sympathetic observer today as tedious, eccentric, and unmotivated." See Bedau, "Bentham's Utilitarian Critique of the Death Penalty," 1035, 1058.

123. Bentham, Jr., UC exilid. 77–85. Bentham was made an honorary French citizen in 1792, along with Priez, Wilberforce, Paine, Washington, and others.


125. Ibid., 165.


128. Ibid., 267.

129. Ibid., 268.

130. Ibid., 268.

131. Ibid., 165.


134. Ibid., 272.


136. Bentham, Jr., UC cit. 332–33. Bentham's panopticon writings include Panopticon, on The Inspection-house (1794), Panopticon versus New South Wales (1802), and Second Letter to Lord Pelham (1802), in Browning, 4:37–248. The title page of Panopticon announced Bentham's intention that the panopticon idea was amenable to adoption in any institutional context requiring a high level of supervision, including schools, hospitals, factories, and poorhouses. Ultimately, he devised a plan for a National Charity Company to replace the old poor law system with 250 profit-making pauper panopticons equidistantly spaced throughout Britain. See Writings on the Poor Laws, vol. 1, ed. Michael Quinn (Oxford: Clarendon Press, 2001).

137. Foucault, Discipline and Punish, 208. According to Foucault, the economy and efficiency with which the panopticon exercised power was achieved in several ways: (1) reduction of the number who exercise power, while increasing the number over whom it is exercised; (2) the spontaneous exercise of power without noise, of