

## 2. The Utility of Punishment: Bentham

### 1. The Principle of Utility

The utilitarian theory of punishment is but the result of applying utilitarianism as a general ethical theory to the issue of the morality of punishment. It is therefore to be expected that whatever is seen as an advantage of the latter should be thought to accrue to the former as well. Utilitarianism certainly has a number of features that, at least on the face of it, present it in a very attractive light. First, there is a certain immediate plausibility to the view that human actions ought to be evaluated in the light of their consequences, together with the accompanying belief that only this consequentialist approach will enable us to deal with moral issues in a rational, objective, clear, and precise manner, while any other approach would be plagued by dogmatism, subjectivism, and sentimentalism, and would only lead to confusion. "Whether happiness be or be not the end to which morality should be referred," wrote Mill, "that it be referred to an *end* of some sort, and not left in the dominion of vague feeling or inexplicable internal conviction, that it be made a matter of reason and calculation, and not merely of sentiment, is essential to the very idea of moral philosophy; is, in fact, what renders argument or discussion on moral questions possible."<sup>1</sup> This consequentialist outlook seems to open up the possibility of constructing a theory that is comprehensive yet has a very simple structure: a theory which encompasses the whole realm of moral experience within a system based on a single fundamental principle, makes no concessions to other ethical views, and submits all moral concepts, rules, values, to a uniform interpretation, notwithstanding their *prima facie* diversity and incommensurability. A universal moral currency seems to have been found in the consequences of our actions, and the possibility of cashing all moral considerations in this currency seems to clear the way for applying a single approach to all moral issues. If all such issues come down to questions of the consequences of alternative courses of action, that is, questions of fact, such issues may and ought to be approached empirically; those among them

that are of public concern will be best dealt with by social science. Thus the old dream of many a philosopher, of making ethics a science, finally seems to be coming true. Last but not least, since the utilitarian calculus of consequences takes into account the interests of all those concerned, including the agent, on an equal footing, it has been claimed that utilitarianism secures a reasonable and morally proper balance between the agent's good and that of others. This theory thus transcends the conflict between egoism and altruism, individualism and collectivism, and provides a solid foundation for social ethics and political and legal philosophy.

These, then, are the main reasons for the wide influence utilitarianism has exerted; they also seem to strongly recommend a utilitarian view of punishment. The most thoroughgoing and elaborate formulation of that view is still the theory of punishment expounded in the writings of Bentham. In his teachings on the purpose and justification of punishment, Bentham took into account and systematized all the desirable effects of punishment, and then went on to consider in great detail more specific, but no less important, questions posed by the practice of punishing: What are its proper limits? What should be the criteria for determining the severity of punishment? What are its desirable traits? Greatly impressed both by the system and the details, Mill wrote that Bentham had brought the theory of punishment almost to perfection;<sup>2</sup> with regard to the utilitarian theory of punishment, I think, this is not too much of an overstatement.

This theory of punishment, together with the rest of Bentham's moral, legal, and political philosophy, is based on the principle of utility. Bentham opens his *Introduction to the Principles of Morals and Legislation* by announcing this principle and pointing to its psychological foundations:

Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. . . . The *principle of utility* recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law.<sup>3</sup>

Utility is "that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness (all this in the present

case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered." Thus the principle of utility is "that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question . . . to promote or to oppose that happiness."<sup>4</sup> Since the concept of utility is defined in terms of happiness, this principle is also called "the greatest happiness principle." Happiness, in turn, is defined in terms of pleasure, as nothing but "enjoyment of pleasures, security from pains."<sup>5</sup>

Two clarifications are in order at this point. First, the utility, happiness, and pleasure referred to are those of all persons affected by the consequences of the act being judged; sometimes it is just one person, at other times several, or even the whole community. Second, the phrase "every action whatsoever" is meant to include not only actions of individuals pure and simple, but also measures undertaken by governments, laws passed by legislators, and in general any social rule and institution. (A methodological individualist, Bentham believes that all these can be analyzed in terms of actions of individuals.) Thus the principle of utility is the supreme law of morality and at the same time the fundamental principle of legal and political philosophy.

The principle of utility being the only basic principle of ethics, all ethical concepts are to be interpreted in terms of utility; whatever is being judged morally is to be judged from the point of view of its utility: "Strictly speaking, nothing can be said to be good or bad, but either in itself; which is the case only with pain or pleasure: or on account of its effects; which is the case only with things that are the causes or preventatives of pain and pleasure."<sup>6</sup> No actions are intrinsically right or wrong, obligatory or prohibited; no motives or dispositions are good or bad in themselves — it is only their consequences with regard to pleasure and pain, happiness and misery, that give them their moral status. "When thus interpreted, the words *ought*, and *right* and *wrong*, and others of that stamp, have a meaning: when otherwise, they have none."<sup>7</sup>

As for various nonutilitarian approaches in ethics and social philosophy, Bentham has an extremely low opinion. He believes that they are but variations of one of the three "principles": the theological principle, the principle of asceticism, or that of sympathy and antipathy. The will of God is not an independent principle, for whenever we refer to it, we actually refer to what we presume to be his will; and such presumptions are always made in accordance with some other principle.

The principle of asceticism, according to Bentham, is but a perversion of the utility principle. It cannot possibly be taken as a guide in moral matters in any consistent way; in particular, it cannot be applied in politics or legislation: "Let but one tenth part of the inhabitants of this earth pursue it consistently, and in a day's time they will have turned it into a hell."<sup>8</sup> There is, finally, the principle of sympathy and antipathy, which

approves or disapproves of certain actions, not on account of their tending to augment the happiness, nor yet on account of their tending to diminish the happiness of the party whose interest is in question, but merely because a man finds himself disposed to approve or disapprove of them: holding up that approbation or disapprobation as a sufficient reason for itself, and disclaiming the necessity of looking out for any extrinsic ground.<sup>9</sup>

It is Bentham's view that a large part of traditional moral and social philosophy can be reduced to this principle — that theories as diverse as those of natural law, moral sense, or rational intuition are "so many contrivances for avoiding the obligation of appealing to any external standard, and for prevailing upon the reader to accept of the author's sentiment or opinion as a reason for itself. The phrases different, but the principle the same."<sup>10</sup> Or rather, since a principle is by definition a standard external to our feelings and attitudes, which enables us to justify, criticize, revise them, not a principle, but a negation of all principle.

## 2. The Aims of Punishment

Bentham believes that the "principle" of sympathy and antipathy is the real source of the retributive theory of punishment: "It is the principle of antipathy which leads us to speak of offences as *deserving* punishment. It is the corresponding principle of sympathy which leads us to speak of certain actions as *meriting* reward. This word *merit* can only lead to passion and to error. It is *effects*, good or bad, which we ought alone to consider."<sup>11</sup>

The effects of punishment on the person punished are painful, harmful, undesirable. Accordingly, "upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."<sup>12</sup> A punishment well chosen and appropriately measured carries such a promise with it.

If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all. That punishment which, considered in itself, appeared base and repugnant to all generous sentiments, is elevated to the first rank of benefits, when it is regarded not as an act of wrath or of vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety.<sup>13</sup>

Various desirable consequences of punishment — of a particular punishment and of the whole institution — outweigh by far the evil it consists of, and therefore provide its justification. They can be listed systematically in the following way:

- (I) prevention
  - (1) particular
    - (a) disablement
    - (b) reformation
    - (c) deterrence
  - (2) general
- (II) satisfaction
  - (1) material compensation
  - (2) vindictive satisfaction

(I) The offense committed is but an act of the past, while the future is endless; the offense has affected (directly) only the victim, while similar misdeeds in the future can affect anyone; the evil inflicted by the offense often cannot be rectified, while future offenses, in Bentham's view, can always be prevented. For these reasons the *prevention* of future offenses is the principal end of punishment and its main justification.

(1) The prevention of future offenses is achieved, on the one hand, by influencing the behavior of the actual offender, so as to get her to desist from repeating her misdeed. This is *particular prevention*. We can prevent her from offending against the law again in three ways: by disabling her from doing that, by eliminating her desire to do that, and by deterring her through fear from doing that.

(a) With many offenses, to *disable* the offender from repeating the

offense means to deprive her of the physical ability of doing that. This can be done temporarily, by a prison term, or for good, by a conviction for life, mutilation, or execution. With other offenses, e.g. embezzlement, disablement is secured by less severe measures: by dismissal or debarring from holding public office. Of all the objectives of punishment, disablement is the most easily achieved; its drawback is that by disabling the offender from doing evil, we often at the same time disable her from doing good, both for herself and for others.

(b) The *reformation* of the offender is a result more difficult to achieve, but also more worthy of effort. To "reform" or "amend" the offender means to effect a change of her inclinations, motives, habits, character. If an offender wanted to repeat the offense, but desisted under the influence of fear of punishment, we should not say that she has been successfully reformed; we should say that she is no better than before, but has been efficiently deterred by fear. An offender truly reformed is one who does not desist from breaking the law again out of fear, but one who no longer wants to do that, who is free from criminal inclinations and habits. She will not break the law even when she has reason to believe that she will not be discovered and need not fear punishment.

(c) The third method of particular prevention is *deterrence*. In contrast to the bad example of the offense committed, which, if it goes unpunished, induces the offender to repeat the misdeed, and encourages potential offenders in the public to do the same, the punishment offers a frightening example of an evil inflicted for the offense committed, both to the actual offender and to those others who might be tempted to do what she has done, and thereby induces them to desist. Thus the method of deterrence is common to particular and general prevention.

(2) Bentham sees *general prevention* almost exclusively as the method of deterring potential offenders from violating the law by displaying to them the frightening example of the evil of punishment. He believes that such prevention is always feasible, for "how great soever the advantage of the offence may be, the evil of the punishment may be made to surpass it."<sup>14</sup>

In describing this mechanism of prevention, Bentham applies his hedonistic account of motivation. "Pain and pleasure are the great springs of human action," he says. "When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act. If the apparent magnitude, or rather value of that pain be greater than the apparent magnitude or value of the

pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it."<sup>15</sup>

This analysis of the motivation of a potential offender is not only hedonistic, it is also extremely rationalistic. Is this not its weak point? Is it not a onesided, exaggerated, and hence implausible view to hold that every offender, before committing his misdeed, performs a sober and detailed calculation of harm and benefit to be brought about by it, carefully and accurately calculating its hedonic value and then deciding exclusively on the basis of the result of this calculation? What of the role of irrational factors in criminal behavior, of affects and passions? Bentham is aware of this objection but finds it unconvincing. The claim that passion does not calculate, he says,

like most of these very general and oracular propositions, is not true. 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 . . .<sup>16</sup>

The prevention of offenses, in Bentham's view, is the immediate and most important end of punishment. The offender punished is but one, while there are many of those who have not committed such an offense but might do so in the future; accordingly, general prevention is much more important than particular: "General prevention ought to be the chief end of punishment, as it is its real justification."<sup>17</sup>

(II) In addition to the prevention of future offenses, which is its chief objective, punishment can also have a consequence unrelated to possible violations of the law in the future: it can give *satisfaction*. Satisfaction through punishment can be of two kinds: material compensation and vindictive satisfaction.

(1) Punishment can be made to serve as *material compensation* to the victim, and thus do away with the bad consequences of the offense which have affected him. This, of course, is not always possible; still, Bentham emphasizes that it can be done in many cases: "the means of procuring almost all pleasures, money is an efficacious compensation for many evils."<sup>18</sup> This is especially appropriate and called-for in cases when the harm done to the victim and the benefit the offender secured for herself by her misdeed are material, such as theft or embezzlement.

(2) Another kind of satisfaction attainable by punishment is *vindictive*.

Any pain, any evil inflicted on the offender can be a source of such satisfaction, first for the victim, and then for all those who, for whatever reason, feel indignation at the offense committed and want its perpetrator punished. Taken by itself, such pleasure is as good as any other. Certain moralists, deluded by mere words and given to prejudice, do not understand that "it is not vengeance which is to be regarded as the most malignant and dangerous passion of the human heart; it is antipathy, it is intolerance — the hatreds of pride, of prejudice, of religion, of politics. The enmity which is dangerous is not that which is well founded, but that which springs up without any substantial cause." Moreover,

useful to the individual, this motive is also useful to the public; indeed, it is necessary. It is this vindictive satisfaction which sets the tongues of witnesses in motion; it is this which animates the accuser and engages him in the public service, in spite of the embarrassments, the expenses, the enmities to which it exposes him; it is this, too, which surmounts the public pity in the punishment of criminals. Take away this resource, and the power of the laws will be very limited; or, at all events, the tribunals will not obtain assistance, except for money — a means not only burdensome to society, but exposed to other very serious objections.<sup>19</sup>

Therefore, when determining punishments, we should not only think of the aims of prevention and, wherever possible, those of material compensation, but should take into account the vindictive satisfaction attainable by punishment as well. But this refers only to such modifications of punishment which do not aggravate it, over and above what is needed for reasons of prevention, general and particular; no penalty is to be meted out or made more severe for the purpose of satisfying the pleasure of vengeance. Such pleasure, however great in itself, is always outweighed by the suffering which causes it.<sup>20</sup> Therefore, punishments determined primarily with this end in view would be very uneconomical: they would make us pay for the good secured by a disproportionately high amount of evil.

### 3. The Limits

The ends of punishment enumerated in the preceding section are at the same time its justification: punishment is justified because it secures those ends, and in so far as it does so. The same ends determine the

limits of punishment: punishment is undesirable and unjustified whenever those ends cannot be attained by punishing, or cannot be attained in a rational, economical manner, or can be attained by some other method, without inflicting the evil of which punishment consists. In the first case, punishment will be (1) groundless or (2) inefficacious, in the second it will be (3) unprofitable, in the third it will be (4) needless.

(1) Punishment is *groundless* where there is no mischief, harm, or evil to be prevented, that is, where there are no good utilitarian reasons for prohibiting by law the act committed. It is no less groundless when a real offense has been committed, that is, an act which as a rule causes harm, pain, or mischief, but has caused none in the particular case at hand because those whose interests are concerned consented to it (*volenti non fit injuria*). Finally, punishment is groundless when a harmful action was necessary for preventing an even greater evil, or for securing an overriding good.

(2) We ought not to punish in cases when punishment is going to be *inefficacious*. Such are punishments meted out on the basis of retroactive laws, or for misdeeds committed unconsciously, unintentionally, without the knowledge of their being prohibited by the law, or under duress; finally, punishments of irresponsible persons — minors, drunkards, insane offenders. In none of these cases could punishment influence the will of the person punished, nor of others, so as to prevent them from offending in the future.

(3) Punishment is *unprofitable* and therefore unjustified if the evil it consists of is greater than the evil it prevents. This would be the case, for instance, if punishing an offender would (for whatever reason) cause great displeasure to the public or to a foreign power. Another characteristic example is the case of an offender who could render an important service to the community, if she were not made to undergo punishment.

(4) Finally, we ought not to punish if punishment is *needless* because its aims can be achieved by other, non-punitive means, such as various measures of social policy and education.

The limits of punishment is one of those specific issues which are directly related to the main issue of the justification of punishment. The way we deal with the latter will commit us to a corresponding solution of the former. Therefore, this issue helps bring into sharp relief some basic features of the opposing theories of punishment — the retributive and the utilitarian. For instance, retributivists would not agree with the utilitarian thesis that punishment is unjustified whenever it is unprofitable; in their view, punishment is justified insofar as it is deserved,

whatever its profitability might be. Another example: retributivists would agree with Bentham that we should not punish on the basis of retroactive laws, and that children and insane persons ought not to be punished. But they would not go along with the utilitarian rationale of these restrictions — the argument that such punishments are unjustified because they cannot efficiently prevent future offenses; they would insist that such punishments would be undeserved, and therefore unjust and unjustified. Precisely on account of this basic tenet of the retributive theory, that the offense committed and the consequent ill desert is the sole justification of punishment, which entails the view that the limits of desert are also the limits of justifiable punishment,<sup>21</sup> the difference between the two theories regarding the limits of punishment comes out in a most striking manner over the issue of punishment of the innocent.

For a retributivist, the line between guilt and innocence is the line between justified and unjustified punishment. For a utilitarian, on the other hand, the matter is not so simple.

When discussing the definition of legal punishment, Bentham emphasizes that it is (logically) possible to punish an innocent man:

But so it be on account of some act that has been done, it matters not by whom the act was done. The most common case is for the act to have been done by the same person by whom the evil is suffered. But the evil may light upon a different person, and still bear the name of punishment. In such case it may be styled punishment *in alienam personam*, in contradistinction to the more common case in which it may be styled punishment *in propriam personam*.<sup>22</sup>

Thus Bentham holds that it (logically) *can* be done.<sup>23</sup> *May* it be done, morally speaking? Bentham holds that the retributivist insistence on the illegitimacy of punishment of the innocent is untenable, and that it is only the utilitarian approach that can provide a rational and convincing solution. In his analysis of various types of such punishment, which he designates as “mis-seated,” “misapplied,” or “mistaken” punishment, the crucial role belongs to the distinction between the cases in which such punishment can be avoided and those in which it is unavoidable. The word “unavoidable,” however, is not taken in its usual, literal sense — for in that sense no punishment is unavoidable — but with an important qualification: “without preponderant inconvenience.” On account of this qualification, his distinction is actually a distinction

between cases in which punishment of the innocent cannot be avoided, except at the price of mischief, harm, pain, or evil greater than that which would affect the innocent person punished, and cases in which we can desist from such punishment without thereby opting for such an inconvenient result. In a word, the distinction comes down to the one between profitable and unprofitable punishment of the innocent.

Punishment of the innocent which can be avoided without preponderant inconvenience, that is, unprofitable punishment of the innocent, is unjustified and inadmissible precisely on account of its being unprofitable:

In so far as it is mis-seated, and is not unavoidably so, punishment, it is almost needless to observe, is, with reference to the person on whom it is thrown, *groundless*: as such it is thrown away; it is so much evil expended in waste: — reformation, determent, disablement — it contributes not anything to any one of the proper ends of punishment — not so much as to vindictive satisfaction for injury . . .<sup>24</sup>

On the other hand, when it comes to “unavoidable,” profitable punishment of the innocent, such punishment, in Bentham’s view, “not only may, but ought to be introduced.” Those who accept the principle of utility commit themselves, among other things, to punishing the innocent whenever that is the alternative with the best consequences attainable: “to say . . . of punishment so circumstanced that it ought not to be introduced, would be equivalent to a contradiction in terms.”<sup>25</sup>

Bentham is well aware that many a critic will object at this point, claiming that to punish an innocent person would mean to “violate one of the most important, and fundamental, and universally recognised principles of justice.” But he does not find this objection damaging; he sees it as but an invocation of one of those principles which are frequently referred to, but never clearly formulated and convincingly argued for, and which, therefore, cannot maintain themselves when they conflict with the clear, thoroughly thought-out, and solidly established principle upon which his theory of punishment is based — the principle of utility. Accordingly, he defines his stand on punishment of the innocent in the following way:

To inflict punishment when, without introducing preponderant inconvenience, the infliction of such punishment is avoidable, is, in the case of the innocent, contrary to the principle of utility. Admitted: — and so is it in the case of the guilty likewise. To punish where, without

introducing preponderant inconvenience, such punishment is unavoidable, is not in either case contrary to the principle of utility; — not in the case of the guilty: no, nor yet in the case of the innocent.<sup>26</sup>

This is entirely in line with Bentham's repudiation of the retributivist criterion of desert as a mere expression of sympathy and antipathy of the philosopher, the lawgiver, the judge. When one rejects the idea of desert, neither guilt nor innocence *in itself* can retain any real weight for one's decisions about punishment. Punishment is justified, and ought to be inflicted, when it is useful, whether the person punished be guilty or innocent; it is unjustified and inadmissible when it is not useful, whether we are dealing with an innocent or a guilty person.

When is punishment of the innocent useful? Bentham finds the criterion in the possibility of distinguishing between those guilty and those that are innocent of an offense committed. When the person guilty of an offense is known, so that the penalty required by the aims of punishment can be inflicted on her, there is no need to punish the innocent; to do so would be unprofitable. Sometimes, however, it cannot be established who is guilty and who is innocent. Then the aims of punishment cannot be attained by inflicting it exclusively upon the guilty, and therefore punishment of the innocent cannot be avoided "without preponderant inconvenience." In such cases the course of action with the best consequences attainable will not be to desist from punishing the innocent, but to punish them.

An example of punishment of the innocent which, in Bentham's view, can sometimes be useful, and thus also justified, is collective punishment. When it cannot be established who is the perpetrator of an offense, and therefore the guilty cannot be punished without the innocent being punished at the same time, and when the suffering thereby inflicted on the latter, together with the suffering that is inflicted on the former, is not greater than the good secured by such punishment, it will be useful, and therefore also justified, to punish the whole group which is known to include the unidentifiable offender or offenders.

#### 4. The Measure

The answer to the question of the appropriate measure of punishment depends on the answer given to the fundamental question: What is it that justifies punishment? For a utilitarian, who sees the justification of punishment in its good consequences, those consequences will at the

same time provide the standard for meting out punishments. He will hold that for each and every offense, the appropriate punishment is the one measured out so as to bring about those consequences which make up the purpose of punishment and its justification in the greatest degree possible. On the other hand, every punishment is an evil; therefore a utilitarian will also insist on the principle of economy, requiring that those effects be secured at the lowest price possible, that is, by the least amount of evil of which punishment consists.

This is Bentham's view on the subject. He develops it in great detail, and gives a long list of rules to be applied when measuring out punishments. I shall touch upon three of them only.

(1) A punishment must not be less severe than what is needed to outweigh the benefit secured by the offense. Otherwise the price to be paid for breaking the law in the form of punishment would be acceptable to the offender, and punishment could not prevent anyone from doing so. This is one of the two most important rules on the whole list, for it determines the lower limit of the severity of punishment, which cannot be crossed without making punishment inefficient. The benefit of an offense, of course, includes not only material profit, but "the pleasure or advantage, of whatever kind it be, which a man reaps, or expects to reap, from the gratification of the desire which prompted him to engage in the offence."<sup>27</sup>

In order not to be inefficient, punishment must also be the more severe, the greater the temptation to commit the offense. For temptation (in the wide sense of the word) is the factor making for the perpetration of the offense; if punishment is to prevent it, it has to be harsh enough to outweigh the temptation. Those who do not approach the question of the measure of punishment along utilitarian lines will not accept this; they will point out that, with regard to some types of temptation at least, the greater the temptation, the lesser the guilt, so that the punishment ought to be less severe as well. Accordingly, they will view punishments meted out in accordance with Bentham's thesis on the relation between punishment and temptation as too severe. Bentham, however, does not want to speak of punishments as intrinsically "mild" or "severe" at all; in his view, such assessments only evince prejudices toward certain penalties and contribute nothing to rational discussion of their appropriateness. To discuss this question in a rational and objective way means to talk of punishments exclusively as being efficient or inefficient, economical or uneconomical. As for the sympathy or benevolence to the

offender, which tends to reduce punishment below the line determined by the first of Bentham's rules as its lower limit, it

would counteract as well those purposes which such a motive would actually have in view, as those more extensive purposes which benevolence ought to have in view: it would be cruelty not only to the public, but to the very person in whose behalf it pleads: in its effects, I mean, however opposite in its intention. Cruelty to the public, that is cruelty to the innocent, by suffering them, for want of an adequate protection [through efficient punishment], to lie exposed to the mischief of the offence: cruelty even to the offender himself, by punishing him to no purpose, and without the chance of compassing that beneficial end, by which alone the introduction of the evil of punishment is to be justified.<sup>28</sup>

(2) The more mischievous an offense is, the more evil it inflicts, the more severe the punishment meted out for it ought to be. This rule, says Bentham, "is so obvious in itself, that to say any thing in proof of it would be needless"<sup>29</sup>; still, it is often disregarded. The most drastic example of this is the death penalty, which, in Bentham's times, was prescribed for numerous offenses of all kinds, some of which were not at all very serious.

(3) The first of Bentham's rules determines the lower limit of the severity of punishment; as to its upper limit, the rule is to punish in an economical manner. Punishment must not be more severe than what is necessary for the attainment of its purposes.

## 5. The Properties

Another subject discussed in Bentham's writings in great detail is that of the desirable properties of punishment. Out of a long list of such properties, I shall mention only three, which are particularly significant for a critical understanding of his theory. They are exemplarity, popularity, and remissibility.

(1) Each punishment has a *real value* — the amount of pain, suffering, evil which is in fact inflicted on the person punished, and an *apparent value* — the idea of its real value in the minds of others, the value it appears to have to them. Punishment accomplishes its main task, which is the deterrence of potential offenders, by its apparent value. With regard to this function of punishment, which is the main one, all that is good comes from its apparent facet; real punishment, taken by itself, produces only the evil that affects the convict. Thus real punishment is,

as a rule, needed and justified in order to produce the apparent effect of punishment. A punishment really inflicted but without any apparent effect would be useless, and therefore unjustified and inadmissible, at least from the point of view of the most important function of punishment and its basic justification:

Ought any real punishment to be inflicted? most certainly. Why? for the sake of producing the *appearance* of it. Upon the principle of utility, except as to so much as is necessary for reformation and compensation, for this reason, and for no other whatever. Every particle of real punishment that is produced, more than what is necessary for the production of the requisite quantity of apparent punishment, is just so much misery run to waste. . . . If delinquents were constantly punished for their offences, and nobody else knew of it, it is evident that, excepting the inconsiderable benefit which might result in the way of disablement, or reformation, there would be a great deal of mischief done, and not the least particle of good. The *real* punishment would be as great as ever, and the *apparent* would be nothing. The punishment would befall every offender as an unforeseen evil. It would never have been present to his mind to deter him from the commission of crime. It would serve as an example to no one.<sup>30</sup>

In view of this, when punishing, we should always strive to make the apparent value of punishment as great as possible, that is, to make the punishment as *exemplary* as it can be. How is this to be accomplished? The simplest way is to increase the real punishment; by increasing the latter, we automatically increase the former. But the same aim can be achieved by other methods: by careful choice of the type of punishment, without increasing its severity; or by carrying out punishments in a dignified, solemn way, with a ritual calculated to impress the spectators and to frighten them as much as possible. In this respect, in Bentham's opinion, there is much to be learned from the Inquisition; for instance, "the *auto-da-fé* would be one of the most useful inventions of jurisprudence, if instead of being an act of faith it were an act of justice."<sup>31</sup> In general, we ought to strive to make the proportion between the real and apparent punishment as much in favor of the latter as possible: "the real punishment ought to be as small, and the apparent punishment as great as possible. If hanging a man *in effigy* would produce the same salutary impression of terror upon the minds of the people, it would be folly or cruelty ever to hang a man *in person*."<sup>32</sup>

(2) Punishment ought to be *popular*, or, rather, it should not be unpopular: it should not cause the aversion, revulsion, or opposition of



the public. The consequences of an unpopular punishment are analogous to those of an uneconomical one, with the difference that the latter causes unnecessary suffering of the offender, while the former causes equally unnecessary suffering of innocent people, whose moral and religious beliefs, feelings, or traditions cannot be reconciled to the infliction of certain penalties. A further consequence of unpopular punishment is the weakening of the legal order; instead of giving assistance to the law, people turn into its passive, or even active opponents; they help the guilty escape the hand of the law, will not prosecute and give testimony, and even obstruct inquiry and the carrying out of sentences.

To be sure, the requirement that punishment should not be unpopular is necessitated by the fact that people are prone to prejudice, that is, to nonutilitarian views, feelings and habits:

This property . . . necessarily supposes, on the part of the people, some prejudice or other, which it is the business of the legislator to endeavour to correct. For if the aversion to the punishment in question were grounded on the principle of utility, the punishment would be such as, on other accounts, ought not to be employed: in which case its popularity or unpopularity would never be worth drawing into question. It is properly therefore a property not so much of the punishment as of the people: a disposition to entertain an unreasonable dislike against an object which merits their approbation. . . . Be this as it may, so long as any such dissatisfaction subsists, it behoves the legislator to have an eye to it, as much as if it were ever so well grounded. Every nation is liable to have its prejudices and its caprices, which it is the business of the legislator to look out for, to study, and to cure.<sup>33</sup>

(3) Since judges and jurors are no more infallible than anyone else, it occasionally happens that a person who should not be punished does get punished. Accordingly, the evil inflicted by punishment ought not to be completely irreparable. Punishment ought to be *remissible*, so that, in cases when it turns out that it has been meted out by mistake, it can be remitted or, if that is impossible, at least the person mistakenly punished can be somehow compensated. One of the greatest disadvantages of capital punishment is its absolute irremissibility and irreparability.

Discussions of judicial errors usually concern, first and foremost, the possibility of punishment of the innocent. Bentham also points out the possibility, and adduces it as a reason for punishments to be remissible.

We have seen, however, that he does not take innocence in itself to be a limit to legitimate punishment. For him it is only the ground for a utilitarian presumption against punishing: punishment of the innocent is *generally* unprofitable, and therefore *generally* unjustified.<sup>34</sup> Thus his demand that punishment be remissible is not based simply on the fact that an innocent person can be punished by mistake; it is based on the fact that an innocent person can be punished by mistake *and* without a good utilitarian justification for punishing her, her innocence notwithstanding. More generally, remissibility of punishments is required in view of the possibility that any kind of punishment which is not the one with the best consequences attainable under the circumstances might be meted out as a result of mistaken beliefs about the facts of the case.