

Jeremy Bentham's

Theory Of Punishment

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by

Anthony Jonathan Draper

University College London

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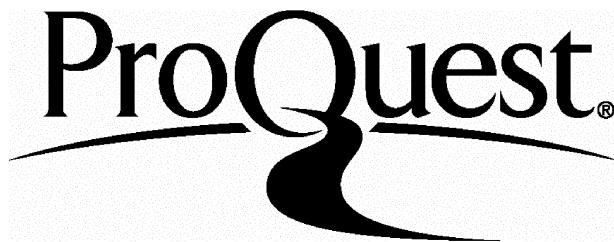
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ABSTRACT

The thesis examines the historical context in which Bentham's penal thought developed, it identifies the main elements of his theory, and assesses the support given for various modes of punishment.

The context of the debate is established via an analysis of the penal thought of contemporary British and European thinkers, stressing, in particular, the role of William Eden in the punishment debates of the 1770s. The similarities between Eden's and Bentham's approaches to punishment are explored.

An examination of the principle elements of Bentham's theory begins with a discussion of his understanding of the sources and nature of punishment. His approach to the distribution of pain is then considered in detail, and is found to inform his entire penal theory. The 'views' and 'shapes' of mischief are described, and the relevance of this analysis, in determining motives for future offending, is assessed.

Bentham's novel investigation into the distribution of pain provides a new basis for restraint in the infliction of punishment. It is argued that Bentham was intent on justifying only essential quantities of pain for the purposes of deterrence and reform, and via his development of the thirteen rules of proportion his theory is shown to provide the foundations for a general reduction in the application of legal pain.

Finally, the forms of punishment supported by Bentham are discussed. It is shown how his preferred punishments changed over the course of his lifetime; firstly, he recommended a variety of corporal punishments, next panopticon imprisonment, and finally he supported non-afflictive, complex punishments.

It is concluded that his innovative penal theory remained constant over the sixty years of its compilation and displays remarkable resilience and flexibility, accommodating successive changes in the forms of punishment preferred.

For

Katja, Anna, Nan and Tony

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A.J.D.

University College London

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ABBREVIATIONS

- UC Bentham manuscripts in the library of University College London.
- BL Add. MSS Additional Manuscripts, British Library, Bentham and Auckland Papers.
- Bowring The Works of Jeremy Bentham Published under the Superintendence of his Executor, John Bowring, 11 vols. (Edinburgh, 1838-43).
- CW The Collected Works of Jeremy Bentham, ed. J.H. Burns 1961-79, J.R. Dinwiddie 1977-83, F. Rosen 1983- , T.P. Schofield 1995- (London, 1968-1981; Oxford, 1982-).
- IPML Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, ed. J.H. Burns and H.L.A. Hart (London, 1970).

INTRODUCTION

Bentham's penal theory has yet to be fully examined.¹ Indeed, when his discussions on punishment are considered conventional commentaries have tended to focus on the architectural device of the panopticon penitentiary, rather than on any detailed assessment of the principles on which the idea was based.² Some critics have made the case for drawing his penal principles from the manner of the institution, others have followed the lead of Michel Foucault and used the panopticon as a focal point within

¹ Little substantial analysis exists on the detail of Bentham's penal theory. The work that has been done relies, for the most part, on older, general surveys provided by É. Halévy, La formation du radicalisme philosophique, 3 vols. (Paris, 1901-4), hereafter references are to the translation by M. Morris, The Growth of Philosophic Radicalism, (London, 1928; rept. 1972); and L. Radzinowicz, A History of English Criminal Law, 4 vols. (London, 1948-86), hereafter references are to vol. i.

Recently, more detailed work has been done by H.L.A. Hart, 'Bentham and Beccaria', Essays on Bentham: Studies in Jurisprudence and Political Theory, (Oxford, 1982); and F. Rosen, 'Utilitarianism and the Reform of the Criminal Law', Cambridge History of Eighteenth-Century Political thought, ed. R. Wokler and M. Goldie (Cambridge, forthcoming), and 'Introduction', IPML, (Oxford, 1996). On Bentham and the death penalty see H.A. Bedau, 'Bentham's Utilitarian Critique of the Death Penalty', The Journal of Criminal Law, 74 (1985), 1033-65; and J.E. Crimmins, 'Strictures on Paley's Net: Capital Punishment and the Power to Pardon', Bentham Newsletter, 11 (1987), 23-34. Generally, however, Bentham's theory is not well known.

² Since the publication of Michel Foucault's Surveiller et punir: Naissance de la prison, (Paris, 1975), trans. Discipline and Punish: The Birth of the Prison, (London, 1977), Bentham's panopticon has frequently been taken as evidence of a more coercive and regimented society. See also M. Ignatieff, A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850, 77-8. For a valuable refutation of Foucault's position see J. Semple, 'Foucault and Bentham: A Defence of Panopticism', in Utilitas, 4 (1992), 105-20.

their own broader philosophies.³ In the process such commentators have tended to ignore Bentham's own penal ideas in favour of one of his penal devices,⁴ and whilst his devices are of value, none of them ought to be allowed to supersede the ideas on which they were founded. Yet few attempts have been made either to relate the panopticon to general penal history,⁵ or the panopticon to Bentham's complete theory of punishment.⁶

The net result of the controversial interest surrounding the panopticon prison is that ideas of surveillance, control and regimentation, are now immediately, and erroneously, brought to mind with the

³ See Foucault, Discipline and Punish; G. Himmelfarb, 'The Haunted House of Jeremy Bentham', Victorian Minds, (London, 1968); and D.J. Manning, The Mind of Jeremy Bentham, (London, 1968). Such commentaries appear to exaggerate the relevance of the idea of the panopticon institution to give weight, it seems, to their own schemes. Professor Roy Porter has convincingly shown how the institution was not, in the eighteenth century, used by the British state for the purposes suggested by Foucault, i.e. as a means of regimentation and incarceration. See R. Porter, Mind Forg'd Manacles: A History of Madness in England from the Restoration to the Regency, (London, 1987), 141 and 168.

⁴ Bentham had many other suggestions for methods of punishment apart from the panopticon. See Ch. 6 below.

⁵ On the lack of scholarly interest in the relation between the panopticon and penal history see J. Semple, Bentham's Prison: A Study of the Panopticon Penitentiary, (Oxford, 1993), 8. Semple's work and S. McConville's, A History of English Prison Administration, (London, 1981), are two notable exceptions.

⁶ Semple, Bentham's Prison, makes a start at remedying this defect. Whilst her intention was not to examine penal theory her second chapter does much to connect the panopticon to Bentham's underlying penal theory.

mention of Bentham and punishment.⁷ It is important to stress, therefore, that before embarking upon a consideration of Bentham's penal theory, it is essential first to dissociate the pervasive ideas surrounding the panopticon prison from the underlying penal theory upon which the idea was based. Surveillance, control, and regimentation are not the inevitable products of Bentham's thinking on punishment, and this study will discuss the panopticon simply as one amongst many suggested forms of complex punishment.⁸

The aim of this study, then, is to analyse the historical context in which Bentham's penal theory developed, to identify some of its main elements, and to assess those specific parts of the theory used in support of various modes of punishment.

It is argued that Bentham's penal writings provide a

⁷ As Garland has shown, this is predominantly due to the influence of Foucault, 'whose... inflated rhetoric takes over and describes modern society as "the disciplinary society" - a "society of surveillance" in which we are all subjected to "infinite examination" in the "panoptic machine"'. D. Garland, Punishment and Modern Society: A Study in Social Theory, (Oxford, 1990), 146. Garland confronts the greatest excesses of Foucault in 'Beyond the Power Perspective: A Critique of Foucault on Punishment', *ibid.* Ch. 7.

⁸ Indeed, Garland stresses that the penal theory contained within Bentham's IPML (and this does not, by any means, represent a complete picture of Bentham's theory) is a vision of an ideal system of punishment, and is not, as Foucault imagines it to be, an actual description of eighteenth century punishment. Garland, Punishment and Modern Society, 163.

Even a brief examination of Bentham's penal writings indicates how other forms of punishment, apart from imprisonment, could satisfy the demands of his theory. Ch. 6 below goes into detail.

substantial, comprehensive and sophisticated justification for the infliction of legal punishment. In this respect they form a central part of the construct that Postema has described as 'a jurisprudential debate of historic dimensions and fundamental philosophical significance'.⁹ Individual human motivation is given prominence throughout the process of re-affirming the value of legal systems as a means of ensuring fair treatment and security for the entire citizen body. In displaying the complexities and subtleties required in the accounting of individual circumstances and sensibilities, Bentham is seen to underline the primary role of legislation as a defender of the liberty of the individual.¹⁰

The premise from which he started was that no two people are the same, no two crimes are the same, and it is the duty of the law to accommodate such variabilities before inflicting pain in the name of the state for the protection of itself and other citizen members of that state. As Sir Leon Radzinowicz has put it,

... thus the subjective approach to criminal acts led

⁹ G.J. Postema, Bentham and the Common Law Tradition, (Oxford, 1986), p. vii. A penal code was envisaged as one of the four codes making up Bentham's *Pannomion*, the complete code of laws. See Constitutional Code, i. eds. F. Rosen and J.H. Burns (Oxford, 1983), (CW), p. xi.

¹⁰ Several commentators have suggested that the focus Bentham's thinking was security rather than liberty. See, for example, D.G. Long, Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to his Utilitarianism, (Toronto, 1981); C.F. Bahmueller, The National Charity Company: Jeremy Bentham's Silent Revolution, (California, 1981); and the older but still valuable work by Halévy, The Growth of Philosophic Radicalism.

Bentham to an equally subjective approach to punishment. He urged the adoption of a principle which in modern French criminal science has been called *le principe de l'individualisation de la peine*.¹¹

By returning to the historical context within which Bentham's theory was developed it can be shown that whilst initially drawing from contemporary penal debate his own analysis struck out in a radical new direction. From the starting point of Beccaria's On Crimes and Punishments which provided an extension of Montesquieu's early comments, a more rational explanation was found for punishment than the simple notion of the 'vengeance of the state', on which many governments in Europe relied.¹² In dramatically redirecting the search for a new interpretation of the basis of punishment, Beccaria's coherently presented mixture of Helvétian utilitarian thought and Rousseauean contractarian thinking inceptively stated the need for penal theory to pursue more directly the welfare of all those in society.¹³

¹¹ Radzinowicz, English Criminal Law, 376. Radzinowicz shows how this principle, established in R. Saleilles's book L'individualisation de la peine, (Paris, 1898), had been earlier emphasised in Austria with W.E. Wahlberg's essay Das Prinzip der Individualisierung in der Strafrechtfpflege, (Vienna, 1869), rendered in English as 'The Necessity of Individualising'. See ibid. 14 n.

¹² Foucault is clearly correct in saying that change occurred, though he overemphasises the role of new institutions by regarding them as 'the most visible aspect of various, more profound processes'. See Foucault, Discipline and Punish, 210.

¹³ After a careful reading of Montesquieu's and Beccaria's works on punishment the content and organisation of Bentham's own IPML becomes substantially clearer to the modern reader.

To these ends Beccaria's prime text advocated the protection of the liberties of those who adhered to the law; he emphasised the need to establish certainty and celerity of punishment for those who transgressed the law; and he encouraged respect for the law by advocating a new mildness in apportioning punishment upon those who broke the law.¹⁴ These humane and liberal principles were rapidly adopted by reform minded men and women across Europe.¹⁵

In England also, they were received with enthusiasm and admiration, although it has been argued that many men of status and wealth regarded Beccaria's complaints as more appropriate to continental penal systems than to Britain's.¹⁶ This interpretation does not reflect, however, anything of the substantial interest shown towards Beccaria's short treatise in England, especially in the years 1769-1777;¹⁷ an early theme of this study

¹⁴ See Young's, Introduction, in C. Beccaria, On Crimes and Punishments: Translated from the Italian in the Author's Original Order, trans. D. Young (Indianapolis, 1986).

¹⁵ On the strength of Beccaria's reception see 'Cesare Beccaria: The Influence of Dei Delitti e delle Pene', Radzinowicz, English Criminal Law, 277-80.

¹⁶ Douglas Hay suggests that 'the rhetoric of Whiggism denied that arbitrary measures existed and claimed that the criminal law was already fixed and determinate', in 'Property, Authority and the Criminal Law', Albion's Fatal Tree, Crime and Society in Eighteenth-Century England, ed. D. Hay, P. Linebaugh, C. Winslow, J. Rule, E.P. Thompson (London, 1975). (London, 1975), 58.

¹⁷ Between, that is, the publication of volume four of William Blackstone's, Commentaries on the Laws of England, 4 vols. (Oxford, 1765-9), in 1769, and the construction of Bentham's penal theory during 1776-8.

will be to gauge the impact created by On Crimes and Punishments. In particular, it will be argued that Bentham used the penal principles inherent in Beccaria's approach to connect his own justifications for legal punishment firmly to a utilitarian base, which, ultimately, drew on the work of Helvétius and Hume.¹⁸ And, although stretching back to the powerful, everpresent influence of Montesquieu, Bentham's use of the catalytic thinking of Beccaria, combined with his own rejection of the traditional concepts of common law and social contract,¹⁹ produced a profound break with the prevalent English understanding of law and punishment with which he was surrounded.

This new direction in English penal thinking will be emphasised via a comparison with the work of William Eden, a thinker widely respected at the time.²⁰ Whilst

¹⁸ On recent analysis of the penal thought of David Hume see, A. Wesley Cragg, 'Hume on Punishment', Law and Enlightenment in Britain, ed. T.D. Campbell (Aberdeen, 1990).

¹⁹ On Bentham's critique of the common law (or, more specifically, judge-made law) see Postema, Bentham and the Common Law Tradition, D. Lieberman, The Province of Legislation Determined, (Cambridge, 1989), and T.P. Schofield, 'Professing Liberal Opinions: The Common Law, Adjudication and Security in Recent Bentham Scholarship', Legal History, 16 (1995), 350-367.

²⁰ William Eden, 1st Baron Auckland (1744-1814). He published Principles of Penal Law, (London, 1771), held office as Under-Secretary of State for the Northern Department, 1772-8, and was MP for New Woodstock 1774-84. Eden was raised to the peerage in 1793.

displaying a more traditional approach,²¹ Eden was highly influential in the development of Bentham's theory, and it is apparent that the full value of his work has yet to be recognised.²²

Eden's work is believed to be relevant to Bentham in two ways. Firstly, Eden was a forerunner of Bentham in emphasising the effectiveness of leniency in punishment; this being based on the principle that general, severe punishments were wholly inadequate for achieving their stated purpose of reducing the levels of offending.²³ Secondly, it is argued that Eden's actions, as a junior minister under Lord North between 1775-8, were crucial for the development of key aspects of Bentham's penal theory, and particularly for his lasting interest in national imprisonment as an appropriate form of punishment.

Eden's highly purposeful use of Beccaria's claims for mildness in punishment is shown to be of more substantial significance to the development of the punishment debate

²¹ Eden can be seen as a supporter of the established legal system in England, which depended greatly on the interplay between patronage and deferential respect. See Hay, 'Property, Authority and the Criminal Law', 17-63.

²² The argument is that Eden's emphasis on leniency has been overlooked, though his Principles of Penal Law has been considered in some degree by most commentators. See for example Radzinowicz, English Criminal Law, 390, Lieberman, Province of Legislation, 204, and Semple, Bentham's Prison, Ch. 3. Though see also his omission from important works such as Postema, Bentham and the Common Law Tradition.

²³ Blackstone's estimate that approximately 160 offence could be capitally punished in 1769 emphasised the growing severity of the English penal code. See Blackstone, Commentaries, iv. 18.

in the late eighteenth century than was Blackstone's, slightly earlier, employment of Beccaria. David Lieberman has suggested that Blackstone was the first to use Beccaria's work effectively in England and demand legal reform;²⁴ yet, in fact, Blackstone appears only to have identified problem areas in the law's practice. Whilst he undoubtedly did this job better than anyone before, and was praised even by Bentham for his efforts in the methodical and coherent presentation of English law,²⁵ significant distinctions can be found in the approaches of Eden and Blackstone in the wake of Beccaria, and these distinctions were fundamental for Bentham.

During the later 1770s and 1780s Eden and Bentham displayed something of a general consensus regarding the purpose and forms of punishment. The immediate end of punishment was, they both agreed, to deter future crime; and, on a wider scale, they concurred that punishment ought to protect the liberties of law-abiding citizens.²⁶

²⁴ Lieberman, Province of Legislation, 209. Lieberman finds no sense of innovation in the work of Eden. *Ibid.* 19.

²⁵ During his comprehensive attack on Blackstone Bentham is found to say of him, 'among the most difficult and the most important of the functions of the demonstrator is the business of arrangement. In this our Author has been thought, and not, I conceive, without justice, to excel; at least in comparison of any thing in that way that has hitherto appeared. 'Tis to him we owe such an arrangement of the elements of Jurisprudence, as wants little, perhaps, of being the best that a technical nomenclature will admit of'. See A Fragment on Government, ed. J.H. Burns and H.L.A. Hart (Cambridge, 1988), 25.

²⁶ This is not to deny, however, that on many points they stood in stark disagreement.

Whilst their earlier thinking showed a distaste for imprisonment as a punishment, by 1778 they both came to place great value on the possibilities offered by imprisonment as a means of achieving their theoretical ends. It has been well established that the penitentiary idea of imprisonment had its roots both in the utilitarian thought exemplified in Bentham, and in the concepts of natural justice and natural religion permeating the thought of William Eden.²⁷ Bentham's interest in such punishment was undoubtedly stimulated by Eden's policy for prison development, and the correspondence of 1778 shows their connection on this point to be considerable. It must be remembered, however, that Bentham went further than panopticism. His interest in forms of punishment did not stop with imprisonment, but was developed into support for other complex methods, and is exemplified in a discussion of privative punishments of banishment and fining to which he is shown to return in the 1820s.

The variety of forms of punishment that Bentham is found to discuss was a direct consequence of his development of the notion that various sources of motivation were involved in the encouragement of law-abiding behaviour.²⁸ He placed emphasis on the variety of

²⁷ See Ignatieff, A Just Measure of Pain, Ch. 3, 'Cords of Love, Fetters of Iron: The Ideological Origins of the Penitentiary'; and Semple, Bentham's Prison, Ch. 2, 'Jeremy Bentham and the Origins of the Penitentiary'.

²⁸ On the sanctions as forms of social motivation see D. Baumgardt, Bentham and the Ethics of Today, (Princeton, 1952), 218-21.

directing sanctions, and carefully detailed the effective restraints on behaviour derived from any of four sources of pain and pleasure, these being termed the physical, religious, moral and political sanctions. This aspect of his thought introduced a subtle and sophisticated element to the debate which has proved to be of profound importance both for Bentham's, and for later, penal discussion. These central points within his general political thought have yet to be related to his specific ideas on punishment. In one sense, this variety of motivational factors explains Bentham's desire to reduce the involvement of litigants, prosecutors, magistrates and judges in the maintenance of lawful behaviour, since it would be unreasonable to expect the range of individual motivation to be satisfactorily influenced solely by legal means.²⁹ Whilst his dislike of lawyers, magistrates and judges has been frequently observed, it still remains necessary to clarify how Bentham envisaged the role of the various sanctions as operating to reduce the domination of the legal profession in the control of social behaviour.

Bentham's detestation of the systems of English law, and his frequent denunciations of the principles of common law on which it was based, culminated in his demand for the establishment of a new body of codified positive

²⁹ Whilst Bentham sought a reduction in the influence of judges he ultimately concluded that their discretionary assessment was an essential requirement for a utilitarian, legal system. See Postema, Bentham and the Common Law Tradition, 349.

legislation.³⁰ It follows that from the flawed theory of the English legal system Bentham found only flawed applications of penal pain in the form of grossly severe punishments. With this fundamental concern central to his penal thinking it can be argued that he was committed to increasing leniency in the English practice of punishment. This was based not on any sentimental or sympathetic concern for those punished, but on an application of his utilitarian theory of proportion which particularly considered the disposition of an offender.³¹ In this way Bentham's discussion of disposition, and his understanding of beneficially intended conduct as almost a synonym for virtue, provides a link with the more vaguely defined concept of public virtue as discussed in Eden's work.

The debate regarding the influences on Bentham, and the nature of legal reform throughout the whole period from Locke to Bentham, has been the focus of much attention.³² In particular, David Lieberman has carefully noted how the competing trends may be considered in

³⁰ See, for example, Lieberman, Province of Legislation, 219, and Postema, Bentham and the Common Law Tradition, *passim*.

³¹ In contrast to the theories of both Beccaria and Eden which were based on natural sentiment.

³² Various interpretations have been presented by L. Stephen, History of English Thought in the Eighteenth Century, 2 vols. (London, 1876); J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition, (Princeton, 1975); I. Kramnick, 'Religion and Radicalism: 'English Political Theory in the Age of Revolution'', Political Theory, 5 (1977), 505-34, and 'Republican Revisionism Revisited', American Historical Review 87 (1982), 629-66; and Lieberman, Province of Legislation.

relation to two independent concepts labelled by Pocock 'the paradigm of virtue and corruption' and the 'law-centred paradigm'.³³ In Lieberman's discussion he concludes that,

Bentham's legislative science should be regarded not as the definitive ideology of law reform produced in eighteenth-century England, but rather as one among several approaches to legislation and legal improvement elaborated at this time.³⁴

This general approach will be maintained here, in that Bentham is indeed found to be very much a part of his contemporary, intellectual environment, and his thought was complementary to, and dependent upon, the ideas of his fellow theorists.

Yet, with his production of thirteen, entirely new rules of proportion, Bentham introduced a comprehensive base, by which utilitarian, teleological penal theory became able to adopt the traditionally retributive call for proportion.³⁵ Bentham found it possible to turn demands for better proportioning between punishments and offences into, what he regarded as, a scientific process for the establishment of correct quantities of pain to be

³³ Ibid. 9. Here Lieberman analyses Pocock's interpretation that in the eighteenth century, 'the confrontation of "virtue" with "corruption" is seen to have been a vital problem in social and historical philosophy during that era, and its humanist and Machiavellian vocabulary is shown to have been the vehicle of a basically hostile perception of early modern capitalism'. Compare Pocock, The Machiavellian Moment, p. ix.

³⁴ Lieberman, Province of Legislation, 3.

³⁵ On the analysis of this 'mixed' concept of punishment see H.L.A. Hart, Punishment and Responsibility. Essays in the Philosophy of Law, (Oxford, 1968), 5-6.

issued in response to quantities of pain suffered by an offence.

In the development of this 'scientific' approach to punishment, Bentham went to considerable lengths to discover the action of pain as it was inflicted on society, either by an offence or a punishment. With an analysis of his views on the distributions of pain Bentham is found to have provided a quite extraordinary theory, which has never been examined in detail and which seeks to distinguish, quite clearly, between offences that imply the possibility of further future offending and those which do not.³⁶ Bentham believed he had provided a mechanism whereby the quantity of pain inflicted by an offence could be established and an appropriate punishment be better selected.³⁷ Whilst the question of precise quantities of pain distributed always remained a problem for Bentham's theory,³⁸ an alternative way of explaining his concentration on mathematical calculation is offered

³⁶ A brief analysis of Bentham's views of the results of painful acts can be found at Halévy, Philosophic Radicalism, 61-7.

³⁷ Thus suiting punishments to perform either 'particular prevention, applying to the delinquent himself, and a general prevention, applying to all members of society'. See Radzinowicz, English Criminal law, 382.

³⁸ Although 'the felicific calculus of Bentham's Introduction does not present a fully satisfactory solution of the difficulties in question', Baumgardt concludes that, 'the foundations of consistent hedonism are not endangered to any greater extent than the foundations of medicine by the insight that medicine is not a science of the same precision as physics or inorganic chemistry'. See Baumgardt, Bentham and the Ethics of Today, 235.

by this theory of the distribution of pains. The suggestion is presented here that Bentham's calculation was more concerned with the many directions in which pains operated throughout society, rather than with any gauging of precise quantities which might be said to exist.³⁹

Nevertheless, the precision of analysis that Bentham attempted to incorporate into his theory is quite striking, and clearly, one of the main points of this work must be to emphasize the contrast with Beccaria, where mathematical calculation was suggested but barely attempted, and with Eden, where precision was not thought to be possible however theoretically desirable.

In assessing the utility of punishments before infliction Bentham introduced a seminal idea to penal theory, namely, that punishments should ultimately produce a surfeit of pleasure over pain in order to be justifiable. This substantial adjustment to penal theory meant that each and every punishment, regardless of any category to which it might belong, had the potential of becoming, on each new occasion, unjustifiable.⁴⁰ That is to say, in Bentham's terms, any offence might be found

³⁹ In this sense, the assessment of Bentham's theory of the distribution of pain discussed here underlines Baumgardt's belief in the value of "intuitive estimates" of the intensities of feelings and the influence of joy and grief'. *Ibid.*

⁴⁰ This appears to link with the 'classic liberal doctrine that non-restriction of liberty needs no defence but intrusion on it always requires justification'. See Introduction to 'Jeremy Bentham and J.S. Mill', Modern Political Theory from Hobbes to Marx, ed. J. Lively and A. Reeve, (London, 1989), 191.

'unmeet for punishment'.

The grounds cited as the foundations for this theory formed a substantial attack on conventional, eighteenth-century theories of retribution, since they focused solely on the directing of future action away from further offending. Notions of retributive threats were almost wholly removed from Bentham's theory of punishment.⁴¹ If it could be known for sure that a similar offence would never again be committed, then from his utilitarian standpoint, he could find no justification for the infliction of any punishment. For Bentham pain, and thus punishment, was always a social negative, unless it produced greater pleasure in future.⁴²

TEXTUAL NOTE

Bentham's penal writings are contained within his manuscripts, his own published works,⁴³ and other texts

⁴¹ A retributive threat being the provision to the state of both the right and the duty to inflict 'good' punishment, as a desert, for a past offence. This also includes the modern, derived concept of 'weak retributivism... which regards desert of unpleasant treatment as a necessary but not a sufficient condition for punishment'. See N. Lacey, State Punishment: Political Principles and Community Values, (London, 1988), 53.

⁴² 'For pain is an evil, and punishment essentially involves pain, so its use must always be justified. The only justification possible is that greater pain can be prevented or that greater happiness can be purchased'. See D. Lyons, In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law, (Oxford, 1973), 23.

⁴³ Apart from IPML two further works, published by Bentham himself, have been widely used: A View of the Hard-Labour Bill, (London, 1778), and Jer. Bentham to his fellow citizens of France on death punishment, (London,

constructed and edited by Étienne Dumont, Richard Smith and John Bowring.⁴⁴ This study treats the edited texts with great care, relying, wherever possible on manuscript evidence or works seen through the press by Bentham himself. The most important of the printed works is IPML, and substantial and profitable use has been made of this well-known work. Much that relates to penal theory, has been missed in this work, and, as an introduction to a penal code and companion volume to Bentham's projected work on 'Punishments', IPML provides insights into Bentham's theory of punishment which have remained largely unexplored.⁴⁵ The value of the work became more apparent as this study progressed, and it has proved to be a rich source of explanation for the analysis of punishment provided in the manuscripts and other texts.⁴⁶

1831).

⁴⁴ The edited Bentham works discussed here are Traité de législation civile et pénale, ed. E. Dumont, 3 vols. (Paris, 1802); Théorie des peines et des récompenses, ed. E. Dumont, 2 vols. (London, 1811); The Rationale of Punishment, ed. R. Smith (London, 1830); 'Principles of Penal Law', The Works of Jeremy Bentham, ed. J. Bowring, 11 vols. (Edinburgh, 1838-43), i, 336-580.

⁴⁵ IPML was largely complete by 1780, incorporating his penal theory developed during the writing of 'Punishments' 1776-8; not published until 1789, when it appears to have then attracted little attention. On its poor reception see IPML (CW), ed. J.H. Burns (London, 1970), p. xli, note 3. On the most recent interpretation of IPML, see F. Rosen's new Introduction to IPML, (Oxford, 1996), pp. xxxi-lxxviii.

⁴⁶ Most commentaries concentrate on IPML's rules of proportion and avoid any discussion of his highly relevant theory of motivational psychology. This is beginning to be remedied. See F. Rosen, Introduction, IPML, (Oxford, 1996), pp. xxxi-lxxviii.

Many of the most valuable insights into the development of Bentham's theory comes directly from an exploration of his manuscripts. Many hundreds of pages of text exist covering every aspect of penal theory from initial principles to two attempts at complete penal codes.⁴⁷ The difficulties presented by this source are numerous. They are in a jumbled and confused state; there is much re-working of the same themes; sometimes texts have been so heavily amended that neither the original nor the revised meanings are clear. Add to this the standard problem of uncertain dating for early Bentham texts, and deteriorating script for later text and the problems faced in the reconstruction of Bentham's intended penal thought are great. Nevertheless, the quantity of extant material allows progress to be made, and a coherent picture of his fundamental concerns and specific proposals in relation to punishment does emerge.

With further evidence gleaned from the archives the published works compiled by his editors can be re-appraised. Two were compiled in French by Dumont his Genevan Editor, with the second of these being most important for penal theory and used by Richard Smith for

⁴⁷ Over 1500 folios are catalogued as containing material on penal theory. Several thousand more are related to his Penal Codes. See A. Taylor Milne, The Catalogue of the Manuscripts of Jeremy Bentham in the Library of University College, London, (London, 1962).

Bentham had great plans for his 'Punishments', hoping they would successively be published in England, translated into French, and perhaps even used in Poland. See Correspondence, ii (1752-80), ed. T.L.S. Sprigge (London, 1968) (CW), letter 198, to his brother Samuel, (19 January, 1777), 11.

his recensions back into English. There are problems, however, for not only did Dumont publish selectively from Bentham's manuscripts, but those manuscripts titled 'Theory of Punishment' were originally written in English. Thus, this key work, believed to contain the essence of Bentham's penal theory, was selectively translated and published in French in 1811, then retranslated back into English by Richard Smith in 1830, again with further changes being made, then incorporated in Bowring's edition, with further changes, in 1838.⁴⁸

Whilst the value of Dumont as an editor is appreciated, so too are the limitations of his volumes.⁴⁹ There can be little doubt that much important material has been omitted from his Théorie des peines et récompenses.⁵⁰ Inevitably, recourse must be made to the manuscripts to fill some of the gaps left by Dumont's necessary but dramatic omissions.⁵¹

⁴⁸ See J.H. Burns's discussion on the dating of Bentham's 'Punishment' manuscripts on which Dumont based his edition, IPML (CW), pp. xxxviii-xli.

⁴⁹ For a discussion of this see Lieberman, Province of Legislation, 288-90; R. Harrison, Bentham, (London, 1983), pp. ix-xiv, 138-40; and, C. Blamires, 'Etienne Dumont: Genevan Apostle of Utility', Utilitas, 2 (1990), 55-70.

⁵⁰ See, for example, the significant analysis, absent from Dumont and Smith, in Bentham's manuscript fragment, UC cxlii. 1. Discussed below in Ch. 2.

⁵¹ Necessary omissions since Dumont was seeking to produce a volume that would be readily understood.

A further question concerns whether manuscripts can actually be found to compare Dumont's work with. As Blamires says in his discussion of the interaction between Bentham and Dumont, 'the problem is that where these particular parts of the Benthamic corpus are concerned, the originals on which Dumont based his versions have

Not only has much been omitted, but text has also been added. It has not always been possible to trace views expressed in Dumont back to the manuscripts, or elsewhere in Bentham's own published work. By Dumont's own admission he treated the manuscripts very freely,⁵² and where concepts and ideas expressed in Dumont and Smith have not been found in Bentham's own material, they have not been used.

Previous commentators have faced similar problems, though despite the difficulties with Dumont's work it has been concluded, by Harrison in particular, that his texts ought to be accepted as representative of Bentham's thought, even though he believes the frequent brevity and polemical nature of Dumont's editing means that 'for philosophical purposes it is certain that Dumont should be bypassed as much as possible'.⁵³ Harrison ultimately concludes that the use of Dumont's texts is justifiable because Bentham himself accepted them.⁵⁴ Whilst both Harrison's, and the present study, has found Bentham's

largely disappeared'. See Blamires, 'Étienne Dumont: Genevan Apostle of Utility', 55-70.

⁵² 'These manuscripts, though much more voluminous than the work I have presented to the public, are very incomplete... I have freely used the rights of an Editor - according to the nature of the text and the occasion, I have translated, commented, abridged, or supplied, but... this co-operation on my part has had reference to the details only,... it is not my work... it is, as faithfully as the nature of things will permit, the work of Mr. Bentham'. See É. Dumont's 'Advertisement', translated in Smith's, Rationale of Punishment, 4-5.

⁵³ R. Harrison, Bentham, p. xii.

⁵⁴ Ibid. pp. xii and xiv.

views on Dumont's work to be ambiguous, Bentham's basic satisfaction with the Traité de législation and the Théories des peines et récompenses has been accepted in this thesis. Negative comments have been found from Bentham; for instance, Romilly reported to Dumont that Bentham had remarked, '... he has a great curiosity to know what his own opinions are on the subjects you treat of'.⁵⁵ And in Bowring Bentham similarly said of the Traité, 'as to Dumont's book, it is not mine,'.⁵⁶ Yet during this study further manuscript evidence has been uncovered which supports Bentham's essential acceptance of Dumont's work.⁵⁷ Indeed, in the second edition of IPML, published in 1823, a note was added by Bentham stressing that Dumont's Théorie des peines et des récompenses was indeed published from Bentham's papers.⁵⁸ The note went on to say, in a highly supportive manner, that it was contemplated that both the works, on punishments and rewards, were to be published in English, with the

⁵⁵ S. Romilly, Memoirs, ii. 75. Also discussed in Halévy, Philosophic Radicalism, 181.

⁵⁶ Bowring, x. 387. In Bentham's correspondence there are many occasions where he can be seen to supply Dumont with material and provide copious instructions for its use. See especially Correspondence, vii (1802-8), ed. J.R. Dinwiddie (Oxford, 1988), *passim*. Yet Bentham insisted that in the preface to the work Dumont should '... exonerate me [Bentham] from the responsibility attached to opinions which are not mine'. See *ibid.*, letter 1698, 24-8.

⁵⁷ In the archive Bentham appears to accept Dumont's work as a basis for his second attempt at the construction of a Penal Code. See UC lxv. 1-19.

⁵⁸ IPML (CW), 158.

'benefit' of any amendments made by Dumont.⁵⁹

On the texts used in this study, it is concluded, therefore, that the recensions of Dumont and Smith, whilst being limited extractions from Bentham's larger penal writings, can generally be regarded as valid representations of his thought. Even so, the work of Dumont and Smith has been used here only when a version of the sentiments, arguments and positions expressed has been either located in Bentham's hand in the archive, or found in works seen through the press by Bentham himself.

STRUCTURE OF THE THESIS

The thesis is constructed in three parts. The first, containing chapters one and two, looks at the origins of Bentham's penal theory; the second, chapters three to five, examines some of the principal components of his theory; and finally, a third part examines the application of his theory in the form of support for particular types of punishment.

In chapter one the historical context of the debate is established and an analysis made of the penal thought of Cesare Beccaria, William Eden and those thinkers found to be influential in the development of Bentham's own

⁵⁹ What actually happened, was that Richard Smith simply re-translated Dumont's French text back into English, making use of relatively few additional pieces from the manuscript archive. Interleaved amongst Smith's own text in the UCL archive are manuscripts in Bentham's hand, implying that Smith did at least refer to some new manuscripts before re-translating Dumont's work. See UC cxli. 1-141.

penal thinking. The contemporary debate in England around 1770 is assessed via an examination of discussions relating to punishment in the London journals of the period. Chapter two examines, in detail, the similarities between Eden's and Bentham's approaches to punishment. Some time is spent assessing the nature of the influence of Eden's practical measures introduced in the 1776 and 1778 Hard-Labour Bills, and relating this emerging interest in national imprisonment at hard labour to Bentham's developing ideas.

In chapters three to five some principle elements of Bentham's theory are analysed. Firstly his understanding of the sources of punishment is discussed, and it is noted that he introduced a specific and fundamental distinction between the origins of pains that could be described as punishment. Each of the four origins, or sanctions, are commented on, and close attention is paid to Bentham's discussion of the moral sanction for which interesting new manuscript evidence has been found.

In chapter four Bentham's analysis of the distributions of pain is examined. This is taken from IPML, and is discussed in detail for the first time. The understanding of the nature of pain introduced to society via the political, or legal, sanction is found to inform Bentham's entire penal theory and is essential to a full appreciation of his thinking on punishment. The 'views' and 'shapes' of mischief, and the relevance of this analysis to the determining of motives for future

offending is assessed. This original appreciation of the diffusion of the pain of punishment provided the justification for Bentham's attack on common, or judge-made, law. Since he believed contemporary theories entirely misunderstood the action of pain provided by legal punishment, he concluded that a new system of positive law was required and he envisaged his penal code as a substantial part of this new system.

Related to his concept of the distributions of pain are his thirteen rules of proportion, and these are discussed in chapter five. It is argued that these rules continue Bentham's interest in providing only essential quantities of pain, for the purposes of deterrence, reform, restraint and compensation. In this sense his theory of proportion is presented as a foundation for a general reduction in pain from the legal sanction, and hence provides grounds for increased penal leniency.

In the final chapter, the forms of punishment supported by Bentham are discussed, and it is shown that his preferred punishments changed over the course of his lifelong study of punishment. In his earlier writings a variety of corporal punishments were recommended;⁶⁰ in his middle years the panopticon penitentiary was his prime interest; finally, in the 1820s, evidence is found for an increased attachment to non-afflictive, though still complex, punishments, and Bentham gave examples such as

⁶⁰ Some were conventional, others were not. See Radzinowicz, English Criminal Law, 384 n, and 388 n.

banishment and fining. Thus, whilst his penal theory remained remarkably constant over the sixty years during which his manuscripts were compiled, Bentham's preferred forms of punishment are seen to change, emphasising the resilience and flexibility of his theory compared with his doctrinaire, impractical, and frequently severe suggestions for penal devices.⁶¹

⁶¹ His ideas for devices and contrivances included, apart from the panopticon, other elaborate torments such as the thin-backed, iron-horse for the punishment of highwaymen, and the iron frame for the half-roasting of those guilty of fire-raising. And various suggestions for elaborate displays, supposed to ridicule offenders, succeed only in descending into black comedy. For example, he suggests piercing the hand of forgers with a pin - but arranged in imitation of a pen; and of setting the deserter of children on a pedestal, garlanded with life-size figures of his offspring, and with an inscription comparing him to an ostrich which 'droppeth her egg in the sand and careth not what becometh of her young'. UC cxliii. 28. All of these outlandish suggestions come from his earliest manuscripts. For a lively discussion see Semple, Bentham's Prison, 36-38.

PART I

THE DEVELOPMENT OF EIGHTEENTH-CENTURY

PENAL DISCUSSION TO 1778

CHAPTER ONE

INFLUENCES ON ENGLISH PENAL THOUGHT, 1748-76¹

A. The Context of the Debate

During the eighteenth century social and political discussion was conducted on a cosmopolitan level, where thinkers self-consciously sought international contact and inspiration.² Men of the Enlightenment operated, in theory and in practice, in an environment where their terms of reference were sought in the universal rather than the national sphere. The unifying element, and impetus, for such interaction was the existence of a European nobility which shared a knowledge of French language and culture, and actively promoted a common code of honour.³ Whilst it can be said that the political structure of Britain was 'quite original and different from those of other European countries' during this

¹ From the publication of Montesquieu's De l'esprit des lois, in 1748, to Bentham's earliest writings on punishment in 1776.

² N. Hampson, The Enlightenment, (London, 1968), 243.

³ It is no coincidence that many of the works discussed here were produced by titled men or their sons - Baron de la Brède et de Montesquieu, Marchese di Beccaria, William Eden, 3rd son of Sir Robert Eden, Baronet, created 1st Baron Auckland, 1793. Those who were not of noble birth required aristocratic support, thus Bentham found encouragement when he gained the patronage of Lord Shelburne and was drawn into the Bowood House circle.

period,⁴ British intellectual discussion was as deeply connected with the international arena as it was in any continental community.⁵

On the subject of punishment in particular, English debate was intimately linked with the international domain. Revisions in punishment thinking had begun with Montesquieu's seminal discussions early in the century,⁶ and he was followed in France by Voltaire, Condillac, Helvétius and Brissot, amongst many other figures of the French Enlightenment and post-revolutionary period.⁷ Yet, despite the prominence of French thinkers, the most dramatic development was made in Lombardy by Cesare Beccaria,⁸ and the acceptance and use of his work in

⁴ F. Venturi, The End of the Old Regime in Europe, 1768-1776: The First Crisis, trans. R. Burr Litchfield, (Princeton, N.J., 1989), 377.

⁵ In the London journals of the 1770s the reforms of Catherine II of Russia and Frederick of Prussia are discussed alongside the works of all the major European thinkers. It is clear that English discussion was firmly connected with continental attempts at penal reform. See, for example, London Magazine, 39 (August, 1770), 407, and (September, 1770), 446-9.

⁶ Charles de Secondat, Baron de Montesquieu, Les lettres persanes, (Holland, 1721); and De l'esprit des lois, in Oeuvres complètes, (Paris, 1964). The translation used hereafter is A. Cohler, B. Miller, H. Stone, The Spirit of the Laws, (Cambridge, 1989).

⁷ François Marie Arouet de Voltaire, Correspondence, ed. T. Besterman, (Geneva, 1960), lix. Étienne Bonnet de Mably de Condillac, Traité des systèmes, (Paris, 1754). Claude Adrien Helvétius, De l'esprit, (Paris, 1758). Jacques Pierre Brissot de Warville, Bibliothèque philosophique du législateur, 10 vols. (Berlin, 1782).

⁸ Cesare Beccaria, Dei delitti e delle pene, (Leghorn, false imprint Haarlem, 1764). Hereafter, references are to On Crimes and Punishments, trans. D. Young, (Indianapolis, 1986). A re-arranged French translation was produced by

Russia, Prussia, the Holy Roman Empire and the American Colonies emphasised the extent of the international environment in which ideas on punishment were created and dispersed. It was within this ferment that English thinkers worked in their own fashion, and it is here that this study must begin.

i) *Montesquieu's Discussion of Punishment*

In 1748 Montesquieu's most complete analysis of punishment appeared in The Spirit of the Laws, and set the tone for much of the work on punishment that was to follow later in the century.⁹ Of fundamental importance to Montesquieu's view of punishment was the new role he gave it as defender of the liberty of the individual citizen. He stated that, 'the citizen's liberty depends principally on the goodness of the criminal laws'.¹⁰ This matter of protecting the liberty of the citizen both supported, and was a direct consequence of, a momentum towards the definition of crime as an infringement against specifically secular authority. Montesquieu's presentation effectively signalled the raising of punishment to an issue of new importance.

Yet Montesquieu's incisive treatment of punishment

Morellet in 1766, and an English edition published in 1767.

⁹ Montesquieu previously mentioned penal questions in his Les lettres persanes, (Holland, 1721).

¹⁰ Montesquieu, The Spirit of the Laws, 188.

was woven into his work in a manner which, in many ways, hampered its rapid adoption by contemporary thinkers. It was not until sixteen years after the publication of The Spirit of the Laws that his views on the theory of punishment were effectively recognised for their full value. With the publication of Beccaria's On Crimes and Punishments in 1764, great use was made of Montesquieu's discussion. But, whilst it will be shown that Beccaria's treatise was widely read and exceptionally influential, there can be no doubt that throughout the century Montesquieu continued to be relied upon extensively, and especially so in England.¹¹

Montesquieu was of particular importance because of his concern with the proportioning of punishments to offences. Yet it cannot be claimed that those early ideas regarding the proportioning of the severity of punishment to the seriousness of the crime, inherent in Montesquieu's thinking, led inexorably to a utilitarian understanding of deterrence as the overwhelming end of punishment.¹² Deterrence was a key feature of Montesquieu's view of punishment, but for his fourth, and most important class of crimes - those that attack security - he conceived of punishment as being a 'kind of retaliation'. For

¹¹ Ideas from Montesquieu on crimes and punishment are found in journal articles throughout the 1770s. For an example see, Critical Review, 32 (1771), 321.

¹² Since Hobbes, for instance, had already discussed a form of proportioning in pursuit of deterrence. See, Thomas Hobbes, Leviathan..., ed. M. Oakeshott (Oxford, 1955), 204. See also Ch. 5 below.

Montesquieu, legal penalties were 'derived from the nature of the thing', and, 'drawn from reason and from the sources of good and evil'.¹³ The implication here, was that analogous punishment should be proportioned not on the basis of calculation but rather on the basis of some 'just desert'. Thus, for example, from the nature of the crime of murder, the extinguishing of a life, i.e. the death of the offender, might be a right response. And similarly, for the crime of theft, the offender might justifiably be deprived of his own property equivalent to the value of the property stolen. Such implications of analogous punishment not only tended towards the idea of assessing a scale of punishments against offences, as was later pursued by Beccaria, but also seemed to contain a more retributive reading. Retaliation did appear to hold some credence in Montesquieu's approach.¹⁴ Deterrence was not the primary end of punishment, rather, its essential purpose was regarded as being 'the reestablishment of order'.¹⁵ Montesquieu wanted to remove the cruelties and extremes of violence prevalent in the system of justice with which he was familiar as a practising, regional

¹³ Montesquieu, The Spirit of the Laws, 191.

¹⁴ Montesquieu believed some retaliatory element should be retained if serving a useful purpose. In particular, he approved of certain ancient laws based on retaliation provided they were the only way for the plaintiff to gain full satisfaction, and that it would obviate the need for enforcing corporal punishment. See Radzinowicz, English Criminal Law, 270 n.

¹⁵ Montesquieu, The Spirit of the Laws, Bk. XII, Ch. 14, 200.

magistrate.¹⁶ Yet from his seminal arguments it can be shown that different views of the purpose of punishment could be developed.

Justifications for the deterrent value of punishment in the eighteenth century were also commonly provided by theories based on the concept of the social contract. Some of these were derived from Hobbes, others, however, expressed more encompassing ideas, as represented, for example, in Rousseau's notion of the 'General Will'. Later in the century, in direct opposition to the strength of any utilitarian argument, a retributive position was also promoted which declared that every political society had a duty to enforce retributive justice.¹⁷ Indeed, it is important to recognise that alongside newer, predominantly secular theories older retributive concepts of punishment continued to carry much weight. Support for severe punishments, often linked with retributive theories, retained their importance throughout much of Europe during the eighteenth century. Yet in England, where extreme severity was often demanded, the continued popularity of harsh penalties was generally based on arguments that severity provided a more effective

¹⁶ Time and again, throughout his works, Montesquieu insists that in the interest of the citizen, punishments ought to be moderate. Montesquieu studied law at Bordeaux and Paris and was a counsellor of the Bordeaux parlement before inheriting the présidence in 1716. Cohler et al., have noted that, 'he served as the commissioner of prisons, was... charged with overseeing... those condemned to the galleys, and could not have avoided participating in interrogations that relied upon torture'. Ibid. p. xiv.

¹⁷ As in the work of Kant for example.

deterrent rather than a better satisfaction of justice.¹⁸

Undeniably, however, despite the use of contractarian principles, Montesquieu's work was crucial in the development of penal thinking, and especially so in England. Of great importance for English writers was Montesquieu's portrayal of punishment as a refusal of society to provide security for a citizen who had deprived another of it.¹⁹ With a focus on the degree to which victims were deprived of their security Montesquieu introduced the notion that severe penalties ought to be threatened only against more severe deprivations of security. Thus he argued that the law should encourage the avoidance of greater crimes before lesser crimes. Here we find the immediate origins of the concept of proportioning punishments against offences which was to become central not only to the utilitarian view of punishment pursued by Helvétius, Beccaria and Bentham, but also to contractarians such as Blackstone and Eden.²⁰

¹⁸ In Britain severity was advocated as a means of deterrence in the anonymously published pamphlet, Hanging not punishment enough, (London, 1701). Vigorous support for severe punishments was continued into the 1780s where both the Rev. Martin Madan and Dr. William Paley advocated the wide use of non-aggravated capital punishment for the deterrence of crime. See Radzinowicz, English Criminal Law, 232-59.

¹⁹ 'They [punishments] are a kind of retaliation, which causes the society to refuse to give security to a citizen who has deprived or has wanted to deprive another of it', Montesquieu, The Spirit of the Laws, 191.

²⁰ Ibid. Bk. VI, Ch. 16, 91-2. The source for such thinking was Locke, who said the purpose of punishment must be, 'only to retribute... what is proportionate to his transgression, which is so much as may serve for reparation and restraint', Two Treatises of Government,

ii) Beccaria and Penal Reform, 1764-69

Montesquieu's thought was taken up in Beccaria where it was stated that,

... the purpose of punishment, then, is nothing other than to dissuade the criminal from doing fresh harm to his compatriots and to keep other people from doing the same. Therefore, punishments and the method of inflicting them should be chosen that, mindful of the proportion between crime and punishment, will make the most effective and lasting impression on men's minds and inflict the least torment on the body of the criminal.²¹

As well as supporting the value of punishments as a deterrent and the need for them to be proportioned, Beccaria was also highly effective in pursuing Montesquieu's arguments for certainty and moderation:²²

One of the greatest checks on crime is not the cruelty of punishments but their inevitability... The certainty of chastisement, even if it be moderate, will always make a greater impression than the fear of a more terrible punishment that is united with the hope of impunity.²³

Once again, Montesquieu's ideas are found represented with persuasive clarity, and a re-emphasis on the value of mild but certain punishment.

Beccaria's work was immediately popular, both in his native Lombardy and within a year throughout Europe. And although it received vehement condemnation as well as

Bk. II, Chap. 2, section 8.

²¹ Beccaria, On Crimes and Punishments, 23.

²² Beccaria says of Montesquieu: 'Indivisible truth has compelled me to follow the shining footsteps of this great man'. Ibid. 4.

²³ Ibid. 46, in the chapter titled, 'Mildness of Punishments'.

praise, it rapidly became a prominent text on punishment.²⁴ In Beccaria's lifetime his proposals were variously adopted in the revised penal codes of Russia, Prussia, Sweden, Austria, Tuscany and France.²⁵

The influence of Beccaria in England is clearly found in Blackstone's Commentaries on the Laws of England,²⁶ but there is also evidence to suggest that William Eden might, in fact, have been introduced to the work of Beccaria considerably before Blackstone. During the period 1764-65 Eden was in close correspondence with a friend from his time at Oxford, Sir James Macdonald of Sleat, who had become acquainted with Beccaria's work while on a Grand

²⁴ Amongst others, the book was opposed by the Dominican monk Facchini, who, in 1765, accused Beccaria of sedition and irreligion; and by Jousse, in the Traité de la Justice Criminelle de France, (Paris, 1771), who claimed that Beccaria's was a dangerous system which, if propagated, would reverse the traditional beliefs of nations.

²⁵ Catherine the Great of Russia, Joseph II as Holy Roman Emperor, Leopold of Tuscany and Frederick II of Prussia all made use of Beccaria. But limits to their reforms are noted in Radzinowicz, English Criminal Law, 279 n.

An attempt to revise Russian criminal law was made in 1767 when the Empress Catherine drafted her famous Instruction de Sa Majesté impériale Catherine II... A commission of 1500 members representing various sections of the Russian community was entrusted with evolving these codes, and the convocation of this body heralded the beginning of the parliamentary system in Russia and created a sensation throughout Europe. In the section on the criminal law, the influence of Beccaria and Montesquieu is striking. The Instruction proclaims that punishments should be moderate, proportionate and should serve a social purpose.

²⁶ Blackstone, Commentaries, iv (Oxford, 1769).

Tour of the continent.²⁷ Macdonald is known to have introduced Beccaria's work to Voltaire late in 1765, and is likely to have discussed Beccaria's theory with Eden when they met in London just a few weeks earlier.²⁸ It is possible, therefore, that Eden obtained an important reading of On Crimes and Punishment before ever seeing Blackstone's own treatment of Beccaria in the fourth volume of the Commentaries, which appeared in 1769. From the tone of Eden's discussion concerning the need for moderation it is clear that he in no way followed Blackstone in his interpretation of Beccaria's work. In fact Eden, who was generally a sure supporter of the views of Blackstone was, as will be shown below, most critical of Blackstone's use of Beccaria.²⁹

It is a central contention of this work that Beccaria's treatise stimulated two disparate strands of thinking on punishment in England. The first was Eden's contractarian, duty-orientated, civic humanitarian version, which owed something to Blackstone, but was ultimately quite distinct; the second was Bentham's theory with its emphasis almost solely on utilitarian

²⁷ For the best description of Eden's activities and acquaintances in the 1770s see, G.C. Bolton, 'William Eden and the Convicts', Australian Journal of Politics and History, 26 (1980), 30-44.

²⁸ Macdonald to Eden (16 August, 1765), BL Add. MSS 34412, fo. 96; Voltaire, Correspondence, lix, 131-3, 151. Bolton believes it was Macdonald who awoke Voltaire's interest in penal theory. See, Bolton, 'William Eden and the Convicts', 31.

²⁹ See Section B below.

calculation.

Beccaria's work was able to be used in such differing ways largely because of the numerous strands of thought it contained. From Helvétius came the essence of the utilitarian element, characterised by an emphasis on the role of calculation in the proportioning of punishments to crimes. Thus we find the belief prevalent in Beccaria that,

... it is the task of the observer of public life to establish the relationships of political justice and injustice, that is, of what is useful or harmful to society.³⁰

But, elsewhere, Beccaria drew also from Rousseau's contractarian view of society, and emphasised three classes of virtue and vice: religious, natural, and political, none of which should be stood in contradiction to the other. Beccaria's thesis could, therefore, be summed up as follows:

In order that any punishment should not be an act of violence committed by one person or many against a private citizen, it is essential that it should be public, prompt, necessary, the minimum possible under the given circumstances, proportionate to the crimes, and established by law.³¹

This approach proved to be of great significance for Eden's argument that punishment should not offend against 'natural justice', which Eden, like David Hume, linked

³⁰ Beccaria, On Crimes and Punishments, 14, 'in political arithmetic, one must substitute the calculation of probability for mathematical exactitude'.

³¹ Ibid. 81. It will be seen later how Blackstone used this passage for his emphasis on promptness, or celerity, in punishment, whereas Eden concentrated on the phrase 'minimum possible' punishment, and Bentham went farthest in seeking proportionate punishments.

with human compassion or sympathy.³² The idea of an excess of punishment being an act of violence against a citizen is highly relevant when assessing Eden's pursuit of public virtue, which he defined in the sense of admiration for the law because it would not, and should not, offend against natural compassion.

iii) Penal Debate in England, 1769-1770³³

In England, before 1769, when reforms were called for it was often in the fashion of consolidation of the statute law along lines previously proposed by Francis Bacon over a hundred and thirty years earlier. This movement reached a peak with Barrington's famous Observations on the Statutes, a work consistently valued by later writers including both Blackstone and Bentham.³⁴ Alongside major authors such as Barrington, there were numerous other less familiar writers who produced works ranging from legal antiquarianism to practical manuals of law.³⁵ From 1765 widespread interest in the condition of

³² For the comparison between Eden and Hume on the role of sympathy and benevolence, and the question of natural virtue, see below.

³³ That is, the period immediately following the publication of volume four of Blackstone's Commentaries.

³⁴ Daines Barrington, Observations on the More Ancient Statutes... with an Appendix being a proposal for new modelling the Statutes, (London, 1766). See also Lieberman's discussion in, The Province of Legislation Determined, 179 ff.

³⁵ Antiquarians such as Francis Hargrave, manual writers such as Richard Burn, as noted in Lieberman, Province of Legislation, 2.

the law began to grow, due, in no small part, to the revelation brought about by Blackstone's new conceptualization of the English system of law as laid out in his Commentaries.³⁶

All of these authors contributed to the sense that law and jurisprudence were important, but essentially they sought to explain the law rather than to demand the reform of it. However, as David Lieberman maintains, when men such as Blackstone began to argue that the very severity of penal acts prevented the certainty of their execution, it becomes necessary to ask whether such penal 'reformers' had moved beyond the traditional programme calling for statute consolidation.³⁷ Indeed, even a conservative like Blackstone has now been included amongst the ranks of those seeking more than consolidatory reform. As Lieberman puts it,

... the law's most eloquent apologist [Blackstone] promptly noted that 'even with us in England,' where the criminal law had 'more nearly advanced to perfection, we shall occasionally find room to remark some particulars that seem to want revision and amendment'.³⁸

Blackstone was, claims Lieberman, for the first time in England, making use of ideas taken from Beccaria's highly influential treatise On Crimes and Punishments.

The question of Beccaria's influence is complicated, and no less so in England than on the continent.

³⁶ Ibid. 35 ff.

³⁷ Ibid. 209.

³⁸ Ibid. 208.

Lieberman suggests that Beccaria was, to a large extent, preaching to the converted in England, in that,

... those features of the legal system which Beccaria defended in the interest of legal certainty were already conventionally glorified in England as the guardians of liberty.³⁹

In as much as Beccaria's basic principle - that punishments should be designed for deterrence and not for retribution - was already common thinking in England this cannot be disputed.⁴⁰ Yet in the preface to the first English edition of Beccaria's work the translator stated that,⁴¹

It may however be objected, that a treatise of this kind is useless in England, where from the excellence of our laws and government, no examples of cruelty or oppression are to be found. But it must also be allowed that much is still wanting to perfect our system of legislation: the confinement of debtors, the filth and horror of our prisons, the cruelty of jailors and the extortion of the petty officers of justice, to all which may be added the melancholy reflection, that the number of criminals put to death in England is much greater than in any other part of

³⁹ Ibid. 207.

⁴⁰ This is certainly the view supported by Radzinowicz, when he concludes that, 'the English system of criminal justice was incomparably superior to that of any other leading European country', English Criminal Law, 268.

⁴¹ Beccaria Bonesana, An Essay on Crimes and Punishments, translated from the Italian; with a commentary, attributed to Mons. de Voltaire, translated from the French, (London, 1767). See, ibid. p. v, for the translator's statement that he followed the original Italian edition in the arrangement of the chapters. The attribution of the commentary to Voltaire was based only on 'the voice of the public'. See, ibid. vi. Between 1769 and 1807 there were seven further English editions of Beccaria's treatise.

Europe.⁴²

It appears to be far from the case that Beccaria's key tenets were already accepted in the English legal system. In many respects, such as equality before the law, leniency, certainty, celerity and a clear scale of punishment, Beccaria's thought was not at all reflected in any common English approach in 1767. Others have consequently argued that whilst Beccaria's work was apparently widely approved of in public, in private the principles on which it was founded, and which did not meet with approval, were conveniently ignored or even undermined.⁴³

Nevertheless, Lieberman concludes that it 'was not the novelty of Beccaria's principles, but the comprehensiveness and penetration of his analysis which made his work so useful and valued'.⁴⁴ It will be shown here that Eden, in particular, would have strongly disagreed with this interpretation. For while Beccaria's work was certainly comprehensive and penetrating Eden also saw it as being highly novel in its call for leniency in punishment above all else. The relentless infliction of

⁴² Ibid. 'Preface', vii-viii. The particular English concern with, and emphasis on, jails as a form of punishment can be noted from this extract.

⁴³ See D. Young, 'Let Us Content Ourselves with Praising the Work While Drawing a Veil Over its Principles: Eighteenth-Century Reactions to Beccaria's Crimes and Punishments', Justice Quarterly, 1 (1984), 155-69, and 'Property and Punishment in the Eighteenth Century: Beccaria and his Critics', American Journal of Jurisprudence, 31 (1989), 121-35.

⁴⁴ Lieberman, Province of Legislation, 207-8.

severe penalties was evidence, for Eden, of a dangerous neglect in English law, since such punishments rapidly came to be regarded as 'unjust', were no longer respected, and consequently became ineffective deterrents.

Can Blackstone, therefore, really have been seeking to 'reform' English law, or did he believe, as he frequently said, that the system was essentially functioning correctly?⁴⁵ Clearly he did say that crimes could not be punished with certainty when the penalty was death for a wide range of offences for which juries were often unwilling to convict.⁴⁶ However, he also continued to hold that severity had to be maintained in cases where the opportunity to commit an offence was strongest, such as in theft from shops. Blackstone was unable, therefore, to endorse Beccaria's attack on capital punishment, and he continued to support its continued use. Accordingly, we find him stressing other elements in On Crimes and Punishments, discussing, in particular, the value of proportion, certainty and celerity in punishments. Blackstone wanted to adopt such ideas but only in the form of an amendment to the existing English system. And even with the mention of the reformative potential of punishment, an aspect ignored by many more radical

⁴⁵ As the above quote from volume four of Blackstone's Commentaries shows, he sought only occasional 'revision and amendment' rather than wholesale reform.

⁴⁶ See Blackstone, Commentaries, iv. 16-9; and for his condemnation of the game laws, *ibid.* 174-5; and against smuggling, see *ibid.* 317.

reformers,⁴⁷ he essentially displayed an interest only in relatively minor adjustment rather than substantial reform.

Blackstone is, however, of special interest in relation to the encouragement of penal debate in England. It can be seen that only after 1770 did ideas contained within Beccaria's On Crimes and Punishments come under sustained discussion in the London journals.⁴⁸ The publication of volume four of Blackstone's Commentaries in 1769, which contained frequent mentions of On Crimes and Punishments, may well have introduced Beccaria's thought to many in England.

A prominent contributor, writing in the London Magazine under the pseudonym 'Philanthropos' in 1770, was particularly eloquent in showing how a changed approach to the criminal law was becoming apparent:

... nor indeed have I lately met with any attempt to justify our present laws, whereby thieves are doomed to remediless perdition... The sentiments of people... on this head, seem to be in some measure altered: particularly of those whose opinion is most regarded.⁴⁹

Such comments, must be treated with caution, yet the variety and number of similar contributions after 1770

⁴⁷ See Radzinowicz, English Criminal Law, 346 n.

⁴⁸ See, for example, London Magazine, 39 (August 1770), 407 ff; and Annual Register, 12 (1770), 151.

⁴⁹ This from 'Philanthropos', London Magazine, 39 (September 1770), 446-449. A variety of individuals commonly used the pseudonym 'Philanthropos', including Thomas Mortimer, 1761; John Fellows, 1770; John Dove, 1757/8. See, Cushing, Initials and Pseudonyms: a dictionary of literary disqueses, (New York, 1885).

identifies a change in public opinion where support for the perceived severity of English law became increasingly questioned.

When the anonymous 'Philanthropos' talked of 'those whose opinion is most regarded', the famous William Blackstone springs most immediately to mind. Yet might not the allusion have been directed at Beccaria himself?⁵⁰ Whilst recognition of Beccaria's work was definitely shown in the late 1760s, the number of contributions has been found to be fewer than after 1769,⁵¹ and it can be concluded that Blackstone's discussion of Beccaria's ideas significantly aided their general acceptance in England.

One of the most valuable pointers to Eden's importance is that he clearly did not take his lead from Blackstone, but went directly to Beccaria's work. His representation of the central principles of On Crimes and Punishments is correspondingly more faithful. Thus, for

⁵⁰ Beattie has concluded that with the English translation in 1767 of Beccaria's tract 'discussion was undoubtedly encouraged'. See J.M. Beattie, Crime and the Courts in England 1660-1800, (Oxford, 1989), 223. This is supported by contemporary journals where activity is found following the notification of this new translation. See the Annual Register, 9 (1767), 286, 316-20; and the Scots Magazine, 29 (1767), 210.

⁵¹ Before 1769 Beccaria was referred to directly by 'Philanthropos' at London Magazine, (May 1766), 222; (June 1767), 307-8, and (December 1768), 640. Rousseau was also used in the argument against frequent executions, at *ibid.*, (June 1967), 575-7. Voltaire was presented as an opponent of the suggestion for proportioning in punishment: 'Those who made the laws were not Geometers', taken from, Voltaire, L'Homme aux quarante écus, (Geneva, 1768), trans. by R. Urie, The Man of forty Crowns, (Glasgow, 1768), 67-8. See, London Magazine, (December 1768), 640. 'Philanthropos' appears as the only contributor discussing the detail in Beccaria before 1769.

example, Eden not only called for a large reduction in the number of capital offences but questioned the whole theory behind the death penalty, quite unlike Blackstone.⁵² Death was no longer one amongst a variety of equally acceptable legal punishments:

... the infliction of Death is not... to be considered, in any instance, as a mode of punishment, but *merely* as our last melancholy resource in the extermination of those from society, whose continuance among their fellow-citizens is become inconsistent with public safety.⁵³

Legal execution was therefore a last resort for Eden, separated in a way from the concept of punishment as an action beyond all justification except safety. This could not have been farther from Blackstone's view, which not only regarded the capital sentence as a punishment, but saw it as the one punishment which might effectively deter both serious and minor offences.

Yet Blackstone was a powerful establishment figure, and his selective incorporation of Beccaria's ideas into his own discussion of punishment seems to have had an effect in other arenas. In November 1770 the debate on matters of punishment reached the House of Commons when Sir William Meredith moved for an inquiry into the state of the criminal laws.⁵⁴ The committee, which included Meredith, Sir Charles Bunbury and Charles James Fox,

⁵² Whilst commentators such as 'Philanthropos' similarly attacked the excessive use of the death penalty, they failed to adopt Beccaria's alternative of leniency as Eden did.

⁵³ Eden, Principles of Penal Law, 25.

⁵⁴ Parliamentary History, xvi, cols. 1124-7.

eventually recommended that the death sentence should be abolished for eight penal offences.⁵⁵ The recommendation was never carried into practice but the influence of this committee can be seen in the work of Eden. His Principles of Penal Law contains a discussion of the offences under debate by the committee,⁵⁶ and although Eden was exceptional in his support for more than such piecemeal revision, he too clearly propounded a view that commanded wider acceptance than has hitherto been recognised.

B. William Eden and Leniency in Punishment

In 1937 Archbishop Eris O'Brien wrote, 'there has been no more neglected man in the history of English penal thought than William Eden',⁵⁷ and the value of Eden's Principles of Penal Law still remains only partially recognized. Radzinowicz has described it as 'the first attempt critically to examine the structure and principles of English criminal law and to evolve a comprehensive plan

⁵⁵ For the recommendations of the Committee of 1770 on criminal law see, Parliamentary History, xvii (1771-4), col. 448.

⁵⁶ Two recommendations, proscribing death as the penalty for both forcible abduction and the murder of bastard infants by their mothers, were rejected. The other six were lost in 1772 through the prorogation of parliament. Eden was in favour of abolishing not only all eight capital offences but also many more.

⁵⁷ E. O'Brien, The Foundation of Australia, (London, 1937), 102.

for its reform'.⁵⁸ Sir William Holdsworth similarly portrayed the work as a 'pioneer treatise', and a 'remarkable precursor of that new era of agitation for the reform of law'; though Holdsworth still regarded Bentham's work as the true beginning of that era 'which, under Bentham's leadership, was soon to begin...'.⁵⁹ Such commentators have appreciated that Eden's approach seemed inspired 'by a genuine desire to promote progress' in seeking coherent and substantial alterations to the law in favour of humanity and rationality,⁶⁰ but the Principles of Penal Law has yet to be noted for any substantial contribution to the analysis of punishment in England.⁶¹ One of the aims of this thesis, therefore, is to assess the full value of Eden's theory and to identify the importance it places on the application of leniency in the exercise of punishment. In practical terms Eden will be shown to have introduced a national scheme of imprisonment with hard labour into England, and to have profoundly affected the subsequent analysis of punishment, influencing, in particular, that of Jeremy Bentham.

⁵⁸ Radzinowicz, English Criminal Law, 301.

⁵⁹ Sir William Holdsworth, History of English Law, 12 vols. (1923-38), xii. 364-365.

⁶⁰ Radzinowicz, English Criminal Law, 302.

⁶¹ Bolton describes Eden's theory as 'enlightened humanitarianism', though he does not identify the importance Eden placed on leniency for the support of public virtue. Radzinowicz, Ignatieff and Semple all fail to find any distinctive contribution in Eden's theory.

Eden's Principles of Penal Law was highly popular. In the four years following its publication it ran to four editions and within months Eden's reputation had been boosted to the extent that he was noticed by those in government.⁶² Eden's book provoked a further round of debate in the popular journals, following the initial interest in Beccaria's and Blackstone's publications, and, since the importance and size of this reaction has been overlooked, it will be summarised here.

In May 1771 the Principles of Penal Law was reviewed very favourably in the London Magazine, and for the following two months the same journal printed major editorials which drew heavily on the arguments presented in the work.⁶³ Other magazines soon followed in the examination of Eden's work, and for well over a year his views on punishment were hotly discussed,⁶⁴ and it is clear that this enthusiasm was due principally to his

⁶² William Eden, Principles of Penal Law (London, 1771). A second edition appeared in the same year to which emendations and additions were made. A third edition appeared in Dublin in 1772, and a fourth in London in 1775. In 1772 Eden was appointed as Under-Secretary of State in the Northern Department, under Lord Suffolk, with whom he became a firm favourite. See, History of Parliament: The House of Commons 1754-1790, ed. L. Namier and J. Brooke, ii (London, 1964).

⁶³ London Magazine, 40 (May, 1771). Eden's book was first reviewed in May, and two substantial editorial articles followed: in June, an 'Essay on Crimes of positive institution'; and in July, 'An Essay on Rewards and Punishments'.

⁶⁴ For this debate see: Scots Magazine, 33 (June 1771), 305 ff, and 34 (January 1772), 11-16; Monthly Review, 44 (1771), 444 ff; London Magazine, 41 (January 1772), 25 ff; Critical Review, 32 (November 1771), 321-9.

calls for leniency and moderation.⁶⁵

Yet the popularity of Eden's ideas was also related to the manner in which his theory sought to uphold the existing network of English judicial responsibilities whilst simultaneously calling for a rational adjustment in the means of applying legal pain.⁶⁶ For although Eden argued against legislation which was widely supported by the country gentry (such as the harsh game laws act of 1770 for instance), he did so with the intention of further securing the position of the local landowner, and of reinforcing the existing social bonds within English society.⁶⁷ Not only was Eden advancing a distinct new theory, but he sought to confront the prevalent feelings of insecurity in both town and country. In comparison Blackstone was unconvincing in his proclamation of the

⁶⁵ Eden's work had less success on the continent. No French translation has been found, although Principles of Penal Law was certainly used by Brissot in his Bibliotheque Philosophique du Législateur, (Berlin, 1782). Eden's friend, the Lord Chancellor Alexander Wedderburn, also wrote that Princess Dashkoff, a close acquaintance of the Empress Catherine of Russia, asked for a copy of the Principles when they met in Brussels. See BL Add. MSS 45730, fo. 4, (15 October 1771).

⁶⁶ On the patchwork of English judicial responsibilities see Hay, 'Property, Authority and the Criminal Law', Albion's Fatal Tree, (London, 1975).

⁶⁷ Eden also urged the repeal of almost the whole of the Waltham Black Act of 1723 and additional offences against property such as machine-breaking, the firing of crops and haystacks and shooting at a person without ensuing bodily harm of any sort. See Bolton, 'Eden and the Convicts', 33, where this is seen as an example of Eden going against his class and seeking to ease social control. It is argued here that Eden sought to retain social control and saw the maintained severity of these laws as an increasing threat to it.

benefits of Beccaria's work, whilst simultaneously continuing to support widespread capital punishment. Eden emphasised moderation in punishment as a method of restoring the social bonds that were thought to have existed before the great increase in the sanguinary nature of English punishments. His argument clearly followed Montesquieu and Beccaria in promoting moderate punishment as a sign of a 'just' constitution, and a source of personal security and liberty.⁶⁸

There are a wide variety of ideas expressed in Eden's Principles of Penal Law but all are fundamentally linked to his belief in the need for greater leniency in the execution of punishment. Thus a prominent claim concerning the benefits of certainty in punishment, for example, cannot be separated from his interest in leniency. Eden wholeheartedly supported Blackstone's view that an increase in certainty would deliver a more effective deterrent, but he tied his own interpretation to the element of leniency: 'the increase of human corruptions proceeds, not from the moderation of

⁶⁸ Eden stated his intention was to, 'promote just ideas of the Constitution & Government under which we live', and he believed support for frequent, severe punishments was incompatible with this stance. See BL Add. MSS 34412, Eden to George III (the date given, of 1772, is incorrect since Eden mentions sending the king a book on law some years earlier. It is likely that the volume sent with this letter was his Four Letters to the Earl of Carlisle, (London, 1779), which is closer to his description of the work as a 'Book of Politics').

On just punishments compare Beccaria, Crimes and Punishments, 8, 'the more just punishments are, the more sacred and inviolable is personal security, and the greater is the liberty that the sovereign preserves for his subjects'.

punishments, but from the impunity of criminals'.⁶⁹ Eden's emphasis on lenient punishments was founded on the belief that if the laws of a country were mild then they would be loved, the country itself would then be loved,⁷⁰ and this affection would in turn encourage a form of virtue in the citizen population which he believed was being lost amongst the rising crime, and penal severities, of his day.⁷¹

Thus, with leniency at the forefront of his discussion Eden stated that,

... the prevention of all crimes should be the great object of the Lawgiver; whose duty it is, to have a severe eye upon the offence, but a merciful inclination towards the offender.⁷²

Clearly, deterrence of crime was a significant goal for Eden, as was certainty in punishment, but the suggestion of a 'merciful inclination towards the offender' was quite at odds with established ideas on punishment. For Eden, if punishments were to protect the liberty of citizens effectively they could not rely on excessive severity. An important connection can therefore be established, in Eden's thought, between leniency of punishments and the

⁶⁹ Eden, Principles, 13. Compare Beccaria, Crimes and Punishments, 46.

⁷⁰ Ibid. 284, '... the love of the laws is followed by the love of our country, and is consequently productive both of rectitude of conduct, and purity of morals'.

⁷¹ Blackstone estimated the number of capital offences in 1769 to be 160 and rising, Commentaries, 18-19. See also Beattie, Crime and the Courts, 222, for a discussion of crime levels in 1760s, particularly after peace was declared in 1763.

⁷² Eden, Principles, 6.

protection of individual security:

... the wisdom of our law, having thus amply secured the property, and personal freedom of the subject, hath rarely thought it advisable to affix certain sums to specified crimes... The Excellence of the Penal system consists in the reasonable selection of the objects of its coercion, in the moderate and judicial application of its penalties.⁷³

Eden found much of value in his observation of the English penal system, but, as the above passage shows by stressing the danger of fixed penalties, he feared the loss of all that was still good. As the excessively severe and rigid penalty of death was progressively, and unwisely, fixed to an ever increasing number of offences Eden believed damage was being done to personal freedom and the security of property. He saw the result as an insidious but consistent undermining of public confidence in the law.

Eden's fundamental concern that individual freedom and confidence ought to be protected by the law encouraged a view of society that was plainly unconventional for a member of the English gentry.⁷⁴ Whilst maintaining that there were indeed different stations in society he expressed his ideas on punishment in dramatic egalitarian terms of 'being extended to All, by the common consent of All, for the benefit of All'.⁷⁵ The influence of Rousseau may be seen here, and the concept of portions of natural

⁷³ Ibid. 65.

⁷⁴ Eden was a conservative Whig who turned Pittite Tory in 1785.

⁷⁵ Ibid. 2. He later described the class system, however, as, 'That wise institution of our Ancestors', which protects and guarantees the good behaviour of all individuals, ibid. 67.

liberty being abandoned for the benefit of a new joint collective liberty can be found throughout Eden's writings.⁷⁶

In his concern to draw the disaffected poor back towards an appreciation of the law Eden's theory proposed that on the promulgation of each new offence the lawgiver should, 'expose himself to feel what wretches feel; and let him not seem to bear hardest on those crimes, which, in his elevated station, he is least likely to commit'.⁷⁷ Montesquieu's fear of tyranny was strongly reflected here. The potential tyranny in this case was oligarchical, of those who construct the laws over those who suffer under them. Once again, Eden expressed the view that although sharp social differences were acceptable, the law ought to be designed for the security, and hence the liberty, of all.

There is an awareness in Eden's work that those in the lower social orders might suffer from a necessity to

⁷⁶ At the beginning of his treatise Eden stated, 'civil liberty is the aggregate of those portions of natural liberty, which are given up by the constituent members of society', *ibid.* 2. Also, in a pamphlet written while Chief Secretary to the Irish viceroy, he said that a 'portion of his native liberty should be surrendered by each individual, for the advantage of the whole', Considerations submitted to the People of Ireland, (Dublin, 1781), 9. Eden found this view prominent in Beccaria's treatise. Compare Beccaria, On Crimes and Punishments, 8.

" Eden, Principles, 7. Perhaps Eden's social concern reflected the interests of his nephew, Sir Frederick Morton Eden, who produced an important work on the Poor Law in The State of the Poor..., 3 vols. (London, 1797), described as 'the first systematic student of poor relief history'. See P. Langford, A Polite and Commercial People: England 1723-1783, 152.

commit crime in order to survive. Certainly he acknowledged that the law was not experienced in the same way by those from the lowest and those from the highest social ranks. He called attention to the fact that, in practice, the law was applied mostly against poorer, less advantaged members of society. Consequently, he became a vigorous opponent of those Capital Acts aimed principally at the lower classes, such as the Waltham Black Act, for example, which was implemented as an emergency measure in 1723 to protect the property of landowners. Eden was followed in this respect by individuals such as Samuel Romilly who also emphasised the particular position of the poorer classes in relation to the law.⁷⁸ Indeed, as Bentham himself became increasingly radical in the early years of the nineteenth century he too was able to, 'readily sympathize with the view that the law "grinds" the poor, because it was made and enforced by the rich'.⁷⁹

Eden was thus aware of the condition of the least advantaged in society, although he accepted the distinct divisions that existed in the practice of English law. He concluded that if his, 'reasoning be founded in truth, it furnishes a mortifying inference, that men are naturally

⁷⁸ Radzinowicz portrays Romilly as attacking the harsh and excessive exercise of authority embodied by widespread capital sentences, and claiming this formed an obstacle to progress, English Criminal Law, 331.

⁷⁹ See Rosen, 'Utilitarianism and the Reform of the Criminal Law', (Cambridge, forthcoming). See also Bentham, 'Rationale of Judicial Evidence', Bowring, vi. 372, 'the poor... the great majority of the people, there is no regular justice for them at all, unless it be for hanging them, or something in that style'.

cruel, when they can be so with safety'.⁸⁰ It seems remarkable for a man of Eden's social status to be speaking in such terms, long before the philanthropic and social thinking which became popular in the following century. Bentham found much to admire in Eden's approach; and in calling for the equal application of a reformed statute law across the whole of society Bentham can be said to follow the application of Beccaria's principles to England, as re-expressed and popularised through the work of William Eden.

i) *Eden's Theory of Positive Moderation*

Natural law was the predominant support for Eden's theory of criminal jurisprudence. Throughout his work he expressed his understanding of it as being 'the unwritten law of God imprinted on the heart of Man... which forbids us to give unnecessary Pain to each other'.⁸¹ Here, using traditional interpretations of a deistic foundation of natural law, Eden concluded that it was unjust to 'extend the severity of punishments beyond what is essentially necessary to the preservation and morality of society'.

Deterrence was the main object of punishment, but linked as it was to a sense of natural justice Eden differed from thinkers such as Blackstone by propounding the idea of what Radzinowicz has termed a 'mitigated

⁸⁰ Eden, Principles, 7.

⁸¹ All quotes in this paragraph from Eden, Principles, Ch. 1.

deterrence'.⁸² Maximum severity was not an acceptable concept for Eden, as it was seen to be incompatible with any guarantee of individual liberty, even when arguments of communal security were offered in its defence.⁸³ Yet it is argued here that Eden went further than Radzinowicz suggests. Leniency was of paramount importance, and Eden's theory should not then be seen as one of 'mitigated severity', but rather as a demand for positive moderation.

Paraphrasing Montesquieu, Eden stated that, 'lenity should be the guardian of moderate governments', and, that 'severe penalties can only ever be regarded as the instruments of despotism... [which] hardens the sentiment of the people'.⁸⁴ In an enlightened and just society it was right, for Eden, that penal laws should be controlled firstly by 'natural justice' and only secondly by 'public utility'. Public utility, meant here simply in the sense of communal security, was consequently regarded as unattainable if people were hardened by constant, numbing exposure to the continual execution of severe punishments.

From the foundations of natural law the policy of maximum

⁸² Radzinowicz, English Criminal Law, 303.

⁸³ Blackstone, for instance, maintained that capital punishments were necessary for many offences since lesser threats would not only be ineffective but increase the insecurity of the community as a whole. Eden regarded this conception as both 'morally and politically false', Principles, (1775, 2nd ed.), 13.

⁸⁴ Eden, Principles, 11. In the second edition of the Principles of Penal Law Eden developed this idea, saying, 'when the rights of human nature are not respected, those of the citizen are gradually disregarded. Those areas are in history found fatal to Liberty, in which cruel punishments predominate', Principles, (1775, 2nd ed.), 13.

severity was seen to be an infringement of civil liberty since it necessarily inflicted undeserved suffering in the hope of deterring future offending behaviour. Eden was able, therefore, to reject that contemporary understanding, later forcefully reflected in Madan and Paley, which claimed that any degree of severity could be justified if deemed effective in preventing crime.⁸⁵

This emphasis on leniency brought Eden's thinking into direct conflict with Blackstone, who believed that the severity of punishments ought to be increased in proportion to the ease or temptation with which crimes could be committed. Eden thought this 'a cruel and mistaken policy';⁸⁶ a policy, in fact, which could be described as a, 'perversion of distributive justice'.⁸⁷

ii) The Scaling of Punishment to Offence

In a clear movement away from the English convention as espoused by Blackstone, Eden advocated that,

... punishment should be proportioned to the flagitiousness of the crime; but the flagitiousness of the crime diminishes in proportion to the facility

⁸⁵ Radzinowicz, English Criminal Law, 311. Madan called for the certain execution of all capital sentences, and the number of capital offences continued to rise until the end of the century. Radzinowicz has noted Eden's suggestions for reform, rightly emphasising his concern with leniency at a time when new capital offences were continually being created and their strict enforcement demanded, but he fails to remark on Eden's claim that mildness of punishments was conducive to public virtue.

⁸⁶ Eden, Principles, 7.

⁸⁷ Ibid. 8.

with which it may be committed.⁸⁸

He balanced this alongside a quote from Montesquieu, which stated:

It is the triumph of liberty when criminal laws draw each penalty from the particular nature of the crime. All arbitrariness ends; the penalty does not ensue from the legislator's capriciousness but from the nature of the thing, and man does not do violence to man.⁸⁹

Eden linked Montesquieu's concern, in relating punishments analogously to offences, directly with the issue of proportioning the punishment to the perceived offence. It was solely the nature of the crime, or in Eden's terms, its 'malignity', that determined the punishment.⁹⁰ Under the direct influence of both Montesquieu and Beccaria Eden claimed that without the proportioning of punishments to the gravity of the offence criminal laws were bound to inflict excessive and indiscriminately severe punishments. He was at his severest in his criticism of Blackstone on this point. By closely refuting Blackstone's claims of authoritative support from Cicero, Eden undermined the support produced by 'the learned Commentator' in justification of the theory that those crimes 'should be most severely punished, which a man has the most frequent,

⁸⁸ Ibid. The meaning of 'flagitious' is given in the O.E.D as 'deeply criminal, atrocious, heinous and villainous'.

⁸⁹ Montesquieu, Spirit of the Laws, Bk. XII, Ch. 4. Montesquieu's emphasis is clearly on analogy, though Eden takes this to be fundamental to proportion too.

⁹⁰ Eden, Principles, 10.

and easy opportunities of committing'.⁹¹ By raising the importance of proportionate leniency Eden made full use of the example provided by Beccaria, and offered a more restrained basis for the application of punishments in what he regarded as 'improved' civilization.⁹² In so doing he distinguished himself amongst English penal theorists by demanding reduced punishments for offences offering the greatest temptation to potential offenders.

Eden obviously agreed with Montesquieu that it was not enough to discuss political liberty only in relation to the constitution - it had also to be assessed in relation to the citizen. And this could only be possible when penal laws, the prime contact between state and individual, recognized, almost with a sense of the 'kind of retaliation' spoken of in The Spirit of the Laws, that only those guilty of the worst crimes should suffer the worst punishments. Hence Eden said:

The political liberty of a state consists in the security of the people; that security bears a proportion to the justice, and wisdom of the penal code, which protects innocence by the chastisement of

⁹¹ See Eden, Principles, 10-13; Blackstone, Commentaries, iv. 241; and Cicero, 'The Second Speech Against Gaius Verres', Verrine Orations, (Loeb Classics, 1928), II, 1, 14, §.39. Blackstone quoted Cicero to show that a servant who kills his master should be punished more severely than if he killed a stranger, because he had greater opportunity and the master could not protect himself against it. Eden showed that Blackstone ignored the context of the discussion. Cicero's point was that the crime should be punished more severely because there was an additional abuse of domestic confidence, not because the servant had frequent opportunity.

⁹² Eden, Principles, (London, 1775, 2nd edn.), 3.

guilt.⁹³

Yet, as impressed as Eden was with Montesquieu's analysis, he was dissatisfied with the establishment of only four broad classes of offences, saying, 'this division seems liable to objections'.⁹⁴ Eden's view was that it is not sufficient to state only the, 'right of punishment, and the different classes of punishments', but, it is also necessary to consider the 'several species of crimes, their definitions and gradations'.⁹⁵ A more sophisticated concept of the nature of crimes is presented, and although he seemed to be moving in the direction of Beccaria, who called for a 'scale' of offences to be established, Eden recognized the difficulties in achieving the 'mathematical' precision that Beccaria's formulation implied. 'It is impossible', he said, 'to delineate any systematic or graduated scale of crimes, applicable to every legislation; for crimes are of temporal creation, and to be estimated in proportion to their pernicious effects on society'.⁹⁶ Eden was convinced that the liberty of the individual would be in great danger if a rigid code with fixed classes of offence were introduced simply because of this consummate difficulty in adequately

⁹³ Eden, Principles, 73.

⁹⁴ Ibid. 81. For Montesquieu's four classes see The Spirit of the Laws, Bk. XII, Ch. 4, 189.

⁹⁵ Eden, Principles, 74.

⁹⁶ Ibid. 79. It can also be noted here that Eden made an unambiguous division between crimes and sins, with his suggestion that men must only be concerned with temporal offences.

defining the variety of crimes:

It is one of the unavoidable imperfections of legislatures, that they are necessitated to assign the same name and penalty to whole classes of crimes, each of which differs from the other by an infinite variety of unsearchable circumstances. Yet some offences are so intimately, and so undistinguishably classed in their nature, that it is difficult to conceive any possible reason for a diversity in their punishment.⁹⁷

With this summing-up Eden expressed the dilemma regarding the categorization of punishments. And, though he proposed that the lawgiver should be induced 'carefully to discuss the different modes of punishment, as applicable to the different degrees of moral and political guilt', he ultimately found no solution to the demand for a scale of punishments. He returned to the necessity of judicial discretion - but this was conceived as discretion to reduce, not to increase, the sentence.⁹⁸

C. Punishment as the Encouragement of Virtue

The significance that Eden attached to the issues of leniency, certainty, proportion and judicial discretion combine to show the ultimate goal of his distinctive view of punishment. Anxious as he was to establish the 'natural and most inalienable rights of humanity',⁹⁹ on

⁹⁷ Ibid. 10.

⁹⁸ An important continuation of this idea can be found in the thought of Bentham. See Ch. 2 below.

⁹⁹ BL Add. MSS 34412, fo. 165.

the principles of reason and benevolence he closed his analysis by expressing the view that public virtue is the only true end of government.¹⁰⁰ He was explicit regarding the role the criminal laws had to play in this regard. He believed that, 'on the promulgation of every new law, it should not escape the attention of the lawgiver, that *public virtue is the love of the laws*'.¹⁰¹ Eden suggested that this 'love of the laws' could be achieved not only by governments instigating a new drive towards more lenient penalties, but also by providing a surer protection of innocence. For he said no-one knew when they might find themselves accused of a crime.¹⁰² Indeed, Eden was so convinced that without this protection public virtue, or love of the laws, would be lost, that he was prepared to see the guilty released unpunished if the evidence against them was doubtful.¹⁰³ He claimed it to be, 'a political truth, that, *when the penal laws are good, those, who deserve punishment, rarely escape the arm of Justice*'.¹⁰⁴ Clearly, he accepted that some guilty offenders must go unpunished in order that the innocent remain protected. For Eden, as with Bentham later, punishment was the

¹⁰⁰ Eden, Principles, 284.

¹⁰¹ Ibid.

¹⁰² Ibid. 281.

¹⁰³ 'If the proof be doubtful, let the wretch be left, if guilty, to be his own punisher; to the censure of that internal tribunal, whose judgment is incapable of corruption, and whose terrors cannot be evaded by cunning, or collusion', ibid. 281.

¹⁰⁴ Ibid. 281.

infliction of pain, and the laws could not be 'good' if the innocent were ever punished. His discussion regarding the 'goodness' of the penal laws was therefore vital to his understanding of the nature of punishment in general and the development of social virtue in an increasingly commercialised and materialistic society.

The analysis pursued by J.G.A. Pocock in terms of a debate related to civic humanism in eighteenth-century England is obviously of relevance when examining the work of Eden.¹⁰⁵ The Principles of Penal Law can be linked to Pocock's reading of early-modern republican ideology since it was centred on a moral ideal of citizenship conceived as the exercise of civic virtue and a joint participation in the common good. By active participation the individual citizen was said to be able to achieve his full moral capacity, and the community was supported in its maintenance of 'republican' self-government. In the eighteenth-century context Pocock has identified this as involving a preoccupation with the preservation of constitutional balance and parliamentary independence, in the face of a perceived corrupting influence from luxury and new commercial prosperity.¹⁰⁶ Civic virtue was placed in opposition to commercialism. When Eden wrote his treatise on penal law he adhered to an increasingly outdated mercantilist outlook, and appears to have shunned

¹⁰⁵ See J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition, (Princeton, 1975).

¹⁰⁶ Ibid. 493.

involvement with the commercial aspirations of the political economists of his day.¹⁰⁷ Eden's concern with public virtue does seem to place his legal and political theory at odds with the potentially corrupting effects of early-modern capitalism; especially since the benefits of the new commercialism in England were channelled directly to the propertied and landed classes. Without doubt, Eden felt society to be in danger of self-destruction if the sanguinary laws he wrote against, and which protected the propertied classes, continued to multiply and impose their severities on a subordinated population of lower orders.¹⁰⁸

Eden made great use of the work of many English thinkers but, regarding the issue of public virtue, David Hume has been found to have been an important and respected figure. Hume's presentation of sympathy and benevolence as a natural virtue can be seen to be

¹⁰⁷ In 1771, Eden gave relatively old-fashioned mercantilist arguments for his opposition to penal transportation; and although he was a long standing friend of Adam Smith, Eden does not appear to have developed any liking for commercialism, which is surprising considering his later success during the negotiation of Pitt's trade treaty with France in 1785-6. See Journal and Correspondence, 64. Bolton notes that in 1787, by which time Eden was recognised as a politician with a talent for trade and finance, he remained oblivious to the commercial opportunities offered by the founding of the Australian colony at Botany Bay. See Bolton, 'Eden and the Convicts', 42. Adam Smith did not think highly of Eden as an economist, describing him as, 'but a man of detail'. See Sir James Mackintosh, Miscellaneous Works, 3 (1846), 17 n.

¹⁰⁸ Eden detested both tyrannies and 'abused' aristocracies which sought 'the gratification of the few in the desolation of the many', Principles, 283.

comparable with Eden's understanding of human compassion as a virtue possessed prior to the existence of any legal sanction.

Hume never wrote at length on the subject of criminal punishment, but, by 1770, he held a brilliant reputation as an historian, philosopher and economist, and was revered by the writers of Eden's generation.¹⁰⁹ That the young William Eden and his circle of acquaintances stood in awe of Hume is shown by a letter sent in October 1764 from Fontainebleau, from where Eden's friend James Macdonald excitedly wrote:

... at present I have put myself under the management of David Hume, the most gallant man in France, & expect to reap true benefit from his instructions.¹¹⁰

Eden clearly hoped to receive Hume's approval, for he sent him a copy of his Principles of Penal Law. Hume replied that he found the work, 'very ingenious and judicious', but he continued:

I did not imagine, however, that so ingenious a man would in this age have had so much weak superstition as appears in many passages. But these perhaps were inserted only from decency and prudence; and so the world goes on, perpetually deceiving themselves and one another.¹¹¹

¹⁰⁹ Hume's Political Discourses, (Edinburgh, 1752), was immediately successful and gave him, in France, a reputation as an economist greater than that of Adam Smith. See Leslie Stephen, 'David Hume', Dictionary of National Biography, ed. Sidney Lee, 28 (London, 1891), 218.

¹¹⁰ To Eden from Macdonald of Sleat at Fontainebleau, October 13th 1764, BL Add. MSS 34412, fo. 80. Hume had been in Paris since 1763 as Secretary to the Ambassador.

¹¹¹ The Letters of David Hume, ed. J.Y.T. Grieg, 2 vols. (Oxford, 1932), ii, 247-8.

It is likely that this 'weak superstition' was a reference to Eden's discussion of the social contract justified by concepts of natural law, or perhaps it stood as criticism of Eden's emphasis on religion which appeared throughout the treatise. Nevertheless, Hume still described Eden's work as 'ingenious and judicious', indicating a certain degree of approval, and whilst the connections between the two thinkers ought not to be taken too far it seems constructive to make a few comparisons.

Hume's ideas on punishment are widely scattered, but in a recent article it has been argued that he regarded respect for the law as being established by a combination of experience, force, education and habituation.¹¹² The essential understanding within this interpretation is that co-operation was of overriding importance for Hume, and that justice was presented as a virtue derived necessarily, but artificially, from education and human convention.¹¹³ However, whilst justice was the artificial virtue which established 'right' social behaviour, and thereby defined criminal offences, could it be said that Hume's natural virtue of sympathy and benevolence sought to ensure that any punishments applied were moderate? If severe punishments offended against natural sympathy, by inflicting great pain, they must accordingly have offended against natural virtue. They could not, therefore, be

¹¹² A. Wesley Cragg, 'Hume on Punishment', Law and Enlightenment in Britain, ed. T.D. Campbell (Aberdeen, 1990), 67.

¹¹³ *Ibid.* 58.

morally justifiable. From this, severe punishments could be said to undermine public virtue and the case was made for moderate inflictions of pain as punishment.

For Eden, justice itself was natural, based ultimately on a belief in the innate influence of God; but an essential role for natural justice was in the encouragement of compassion, that is sympathy, for others. For Eden, as with Hume, natural virtue could be represented as sympathy for others, and this was ignored if excessively severe penalties were applied. In this sense Hume's and Eden's conceptions of natural virtue are comparable.

For both thinkers public virtue was inherently dependent upon co-operation in the creation of, and obedience to, moderate laws and conventions. Whilst Eden, therefore, did not reflect the value of education as displayed in Hume, which emphasised the importance of social habituation and experience over natural law,¹¹⁴ he did assign a similar role to the value of co-operation in the encouragement of public virtue.

It has been further suggested that Hume regarded penal coercion as ineffective if it undermined or impeded, 'the development of a sense of the moral value of acting justly'.¹¹⁵ Hence Hume viewed physical coercion as being of value only if it helped, 'to refocus attention on the

¹¹⁴ For he promoted contract theory based on natural law which allowed little room for the value Hume placed on education from the family and local acquaintances.

¹¹⁵ Cragg, 'Hume on Punishment', 68.

value of justice thus reshaping attitudes'.¹¹⁶ Indeed, Hume showed considerable interest in the use of fining as a punishment, as an alternative to physical inflictions of pain. This position certainly coincided with Eden's suggestions that fines were, ideally, the best form of punishment.¹¹⁷ There does appear, therefore, to be similarities between Hume's view of punishment as a means of 'reshaping [the] attitudes' of those punished, and Eden's claim that punishment had the potential to reform. It can be concluded that moderate, but compassionate, physical coercion was acceptable to both thinkers since such punishment simultaneously provided a means of reinforcing public virtue and the justice of the law.

D. Imprisonment as an Appropriate Form of Punishment

There had been, since 1750, a steadily growing rediscovery of the possibilities offered by imprisonment, not only for the punishment of criminals but also for

¹¹⁶ Ibid. 69.

¹¹⁷ Both Hume and Eden discussed fining at length, both using the example of Anglo-Saxon England where most punishments were fines. See D. Hume, The History of England, from the Invasion of Julius Caesar to the Revolution in 1688, 6 vols. (London, 1762), i. Ch. 1, 136-140. Compare, Eden, Principles, 60-3, 'Pecuniary penalties form the last, and best class of those salutary restraints of the law', although he stresses that the major drawback of fining is the unevenness of the punishment between rich and poor.

their reform and rehabilitation.¹¹⁸ George Berkeley has been identified as an early advocate of the value of hard labour with his suggestions for the establishment of corrective institutions, on the model of the Amsterdam Houses of Correction, aiming at the reform of young offenders.¹¹⁹ But this discussion of imprisonment as a form of punishment, reemerging alongside a loss of faith in transportation, took a different turn in the early 1770s. This presented itself as the development, by religiously inspired reformers, of the notion that imprisonment might be used as a means of restoring Christian morality to offenders.

One of the earliest works seeking this type of religious, penitential reform was that of the Reverend Samuel Denne which claimed, in 1771, that criminals could find repentance and reform if subjected to solitary confinement.¹²⁰ The arguments shown here were taken up and extended by Jonas Hanway in 1776, with the publication of another major treatise on the benefits of solitary confinement. Here Hanway combined discussion of solitude in imprisonment with suggestions on the most suitable forms of 'profitable' labour, and the benefits of a 'spare

¹¹⁸ See Beattie, Crime and the Courts, 552-4. Beattie also argues that discussion of the reformatory potential of imprisonment with hard labour stretched back, in some respects, right through the century. See, *ibid.* 548-550.

¹¹⁹ See Radzinowicz, English Criminal Law, 262-3.

¹²⁰ S. Denne, A letter... to Shew the good Effects... from the Confinement of Criminals in Separate Apartments, (London, 1771).

diet'.¹²¹

The influence of Hanway, and of the great campaigner for prison reform John Howard, has been well established.¹²² By the mid-1770s imprisonment was once again beginning to be thought of as a principal form of punishment and the writings of Denne, Hanway and Howard were instrumental in making those new claims for the reformatory effects of imprisonment believable.¹²³ Their vision of imprisonment offered a less violent alternative for a society in which popular sentiment found public inflictions of simple physical violence increasingly unacceptable. Yet it has recently been suggested that,

... it is unclear how much the development of imprisonment over the 1770s was the result of a conviction that it was a valuable punishment in its own right, and how much it was simply the acceptable alternative to transportation when that... was entirely disrupted.¹²⁴

Beattie suggests that the latter was nearer the truth, that the reintroduction of imprisonment was an emergency measure hastily implemented.

¹²¹ Jonas Hanway, Solitude in Imprisonment..., (London, 1776), *passim*.

¹²² See Ignatieff, A Just Measure of Pain, *passim*; J.M. Beattie, Crime and the Courts, 568-71 and *passim*; and Semple, Bentham's Prison, Ch. 4.

¹²³ See Beattie, Crime and the Courts, 568, 614. John Howard's The State of the Prisons in England and Wales..., (Warrington, 1777), was immediately influential. Howard began his investigations into prison conditions in 1773. As a result of his early efforts the 'Popham' Acts of 1774 were passed providing firstly, for fixed salaries to gaolers, and secondly, for the enforcement of cleanliness. See Langford, A Polite and Commercial People..., 492-3.

¹²⁴ Beattie, Crime and the Courts, 568.

However, it will be shown here that Eden, both before and during his crucial involvement with the ending of transportation in 1775-6, did in fact come to see imprisonment at hard labour as a valuable punishment in itself. Eden eventually expressed his revised views on the means of achieving a lenient, more effective punishment in both the Hulks and House of Correction Bills of 1776 and later in the Hard Labour Bill of 1778. This significant movement in Eden's thinking during 1771-5, and before the works of Hanway and Howard were published, has remained veiled by his statement ardently opposing the value of imprisonment in his earlier Principles of Penal Law. Few have seen beyond this position and noted Eden's claim, even in 1771, that imprisonment at hard labour might have held a value for certain lesser classes of criminals.¹²⁵

i) *Eden's Conversion to the Idea of Imprisonment, 1771-76*

Eden wrote only one work specifically on the theory of punishment, but throughout the early 1770s he continued to examine the alternatives to widespread capital sanctions. His private papers have been found to contain several copies of regulations relating to the organisation

¹²⁵ See ibid. 559, where he quotes from Eden, that for minor offenders imprisonment at hard labour may induce, 'a habit of industry, and by the effects of that habit, would be equally beneficial to the criminal and the public'. Compare Eden, Principles, 264. Beattie also shows that as early as 1769 Blackstone discussed the use of imprisonment as a means of amending the behaviour of offenders. See Beattie, Crime and the Courts, 557.

and administration of a variety of institutions providing both for the restraint and punishment of offenders, and for the institutional treatment and rehabilitation of the sick.¹²⁶

Clearly, Eden was actively collecting and investigating evidence concerning current practices and methods of large scale cure and reform. It is interesting to note the inclusion in these papers of the regulations for St. George's Hospital alongside regulations for continental houses of correction. The concept of the criminal's mind as being in need of a 'cure' was at this period in its infancy, and there is little to suggest that Eden agreed with this view.¹²⁷ However, after 1775 Eden went to some lengths to establish the effectiveness of various institutions in amending their inmates behaviour as an alternative to, and remedy for, the failed threat of capital sentencing as a deterrent punishment.

Eden can be seen as the key draughtsman of the first policy of wide-scale imprisonment undertaken in the eighteenth century, making his contribution some years after being appointed Under-Secretary of State in the

¹²⁶ See, for example, BL Add. MSS 34412, fo. 198, An Account of the Proceedings of the Governors of St. George's Hospital near Hyde-Park-Corner, from its First Institution, the 19th of October 1733. to the 30th of December 1772, (London, 1773); and, ibid., fo. 375, Réglement Pour la Maison de force de Gand, du 19. Juillet 1775, additionnel à celui du 18. Février 1773, (Ghent, 1775).

¹²⁷ Bentham, however, was certainly influenced by this line of thought in his later study of the subject.

Northern Department.¹²⁸ Throughout 1775 the political situation in the American colonies deteriorated, and with the prospective loss of the prime destination for the heavily used secondary punishment of transportation, alternatives to capital sentences became desperately required.¹²⁹ The Northern Department's functions included the control of public order in London and the home counties and it fell to Eden to deal with this loss of transportation. Bolton has described how Eden was involved with the arrangements to place transportees on hulks moored in the Thames, initially as a holding operation.¹³⁰ Such arrangements were clearly inadequate and Eden soon gained Lord Suffolk's consent, and the active backing of Lord North, the First Lord of the Treasury, to apply himself to finding a long-term solution. From a memorandum of 16 January 1776 Eden's approach can clearly be seen; he stated that already he had,

... drawn out the Heads of an Act of Parl^t, which L^d. Mansfield & Lord North have seen & which they have approved so far as to desire me to send it to Mr. Justice Blackstone to be put

¹²⁸ Coincidentally, David Hume also held the office of Under-Secretary of State, Northern Department, 1767-9. See D. Miller, Hume's Political Thought, (Oxford, 1981), 4.

¹²⁹ Secondary punishment refers to any non-capital punishment. Other frequently used secondary punishments included, whipping, fining, branding, etc., see Beattie, Crimes and the Courts, 450-554.

¹³⁰ Eden to Recorder of London, State Papers, 44/91, (29th November 1775).

into form - .¹³¹

As we have seen, Eden's papers indicate that he became familiar with continental penal solutions during 1772-5. This goes some way to explaining the speed with which he produced a scheme for the replacement of transportation. In 1776 he introduced two bills. The first was a measure which sought to set male convicts to hard labour on the Thames under the direction of an overseer; and in April this bill became law after Eden fought it through the house in the face of strong opposition.¹³² The second measure was introduced by Eden in May 1776, and made provision for women and old or infirm men, who would previously have been transported, to be confined in houses of correction, housed separately from other inmates and kept to hard labour. Magistrates

¹³¹ Eden to North, BL Add. MSS 34413 fos. 11-12. Eden drew up this memorandum on behalf of Lord Suffolk who was prevented from leaving his Charlton residence and reaching London because of severe winter weather. Eden, in effect, handled the immediate crisis as the convicts on the Thames suffered in the harsh weather.

¹³² Eden was greatly assisted in his efforts by gaining the support of Edmund Burke, an Opposition MP. Burke was on good terms with Eden and although preferring transportation, said of Eden's scheme, 'it is indeed an happy exchange, if there be no other, for the Butchery which we call justice'. See The Correspondence of Edmund Burke 1774-1778, ed. G.H. Guttridge (Cambridge, 1961), iii. 251-3, (17 March 1776).

Sir John Fielding wrote to Eden in 1776, expressing the concerns of many who opposed the bill and urging the return of transportation for the worst offenders, 'I begin to fear that collecting the Rogues of different counties into one Ship may instead of begetting Reformation occasion Friendships and Connexions which would be cemented by their fellow-sufferings and make them unite when discharged', BL Add. MSS 34413, fo. 20, 1776 (probably December).

were urged to build new houses of correction or to enlarge present facilities in every town which held quarter sessions and assize courts. Surely this first attempt at a national programme shows a resolute conviction of the value of imprisonment as a justifiable punishment in its own right, and goes far beyond the vision of imprisonment as a forced remedy for the loss of transportation. Obviously some major shift had taken place, for Eden's Principles of Penal Law gave little support to general imprisonment, which he described as a punishment of low value:

Imprisonment, inflicted by law as a punishment, is not according to the principles of wise legislation. It sinks useful subjects into burdens on the community, and has always a bad effect on their morals: nor can it communicate the benefit of example, being in its nature secluded from the eye of the people.¹³³

If Eden had wanted a 'quick fix' for the problem of the loss of transportation, why did he not introduce an alternative which he did favour in 1771 - punishments of branding or whipping?¹³⁴ Or, alternatively, why did he not attempt to broaden the use of fines, another punishment recommended in 1771? The answer lay, firstly, in the fact that capital sentences were not easily

¹³³ Eden, Principles, 44. Here Eden indicated the value in observation of punishment by the general public.

¹³⁴ Both methods had a long history in English penal practice and were immediate, cheap and popular alternatives. See Beattie, Crime and the Courts, 456-68, where he concludes, 'in property crimes convicted offenders were being imprisoned or transported by the end of the eighteenth century, when they would have been branded or whipped and released a hundred years earlier'.

replaced by such punishments, for if transportation as an alternative to execution failed to deter, lesser corporal or financial penalties were even less likely to deter.¹³⁵ But secondly, and more importantly, there was no implied reform of the offender in Eden's preferred punishments of 1771. By 1775 the idea of reform of the individual character of the criminal had become a factor of some importance when assessing the value of penal options available.¹³⁶ In addition, imprisonment fitted well with Eden's desire for more humanity to be shown in the infliction of punishment. The concept of imprisonment at hard labour was given a new and vibrant lease of life. Forced work was to reform the criminal character. With support from the evidence gathered between 1772-5 on continental houses of correction, Eden had plainly been persuaded that the theory of institutional reform justified the experiment of imprisonment. His new theory, as stated in the Houses of Correction Bill, was that hard labour would not only deter offenders from committing

¹³⁵ It must be remembered that those transported had often been convicted under capital laws and leniency exercised. See Beattie, Crime and the Courts, Table 10.1, 'Capital punishment in Surrey, 1771-1775', of 101 men and women sentenced to death, 72 were pardoned and transported.

¹³⁶ Sir William Meredith, for instance, a Rockingham Whig of liberal political and religious views, urged the need in 1770 to revamp the criminal laws so that punishments might be made more moderate and thus be more uniformly applied. He summed up what was becoming the conventional wisdom of critics of the law by urging the adoption of penalties that would render prisoners once again useful to the community. See also Beattie Crime and the Courts, 550 and 558 ff, on the influence of Amsterdam Rasp Houses on English theory in 1735.

further crime, but would also be 'the means of reforming many offenders, and of rendering them useful members of the community'.¹³⁷ Unfortunately for Eden, his legislation was lost with the end of the Parliamentary session, but its value as the first application of a theory of reformatory punishment should be recognised.¹³⁸ The way in which Eden developed this adjustment to his theory will be examined in the next chapter where he will also be shown to have contributed significantly, during 1778, to the production of Bentham's ideas on suitable forms of punishment.

Eden, therefore, played a major role in carrying the English debate onto a more abstract level, seeking, as instinctively as Blackstone, the preservation of existing social and legal frameworks, but incorporating a doctrine of penal leniency that was influenced by Montesquieu and Hume, but most substantially by Beccaria's emphasis on mildness in punishment.¹³⁹ Eden presented a demand not just for wide reform of the penal laws, but for a reconstruction of the whole basis on which state-controlled punishment should be inflicted:

¹³⁷ For Beattie's discussion of the uncertainty over imprisonment as a valuable punishment see, *ibid*, 567-8.

¹³⁸ For the text of this legislation see, Parliamentary Papers, 1731-1800, ix, 286-7; and Bolton, 'Eden and the Convicts', 37.

¹³⁹ Eden was not entirely uncritical of Beccaria. He believed, for instance, that Beccaria's call for celerity, or speed, in punishment was excessive. See Eden, Principles, 296-7.

State-punishments are to be considered then as founded on, and limited by, first, natural Justice; secondly, public utility: and... in the pursuit of those great ends, Wisdom and Mercy should go hand in hand.¹⁴⁰

Natural justice and public utility were two vital concepts in the history of eighteenth-century thought. In applying both to penal reform Eden moved the debate on in England considerably. He saw damage done by an accumulation of emergency measures which unintentionally extended the severity of the law, and he plainly expressed the need for a reduction in the use of the threat of execution. For not only had the capital sanction failed to deter, but by 1771, he claimed it had become so widespread that it could never be fully applied.

He saw himself at the very beginning of a reform movement, and was sincerely convinced that he influenced later developments. In an unpublished copy of a letter, now preserved in the Bentham archive, Eden wrote to Sir Charles Bunbury on Christmas Day, 1791:

I am flattered by your recollection of an old associate in this Vanguard of Penitentiary Police, in which we labour'd without attaining our Object, tho' not unprofitably, for I have long been convinced that our earnestness in the business contributed to awaken the humanity & attention of others, & that much good in the penal system is gradually working itself into effect...

It is no small merit in our enterprize to have given rise to such a Work as M^r. Bentham's; I shall proceed immediately to a careful perusal of it.¹⁴¹

¹⁴⁰ Eden, Principles, 6.

¹⁴¹ UC ix. 15, (25 December, 1791). Although the letter was catalogued by Bentham as part of the Panopticon papers it is believed his work referred to here is An Introduction to the Principles of Morals and Legislation, published with limited distribution in 1789. Bentham did

Clearly, Eden thought his own contributions to the discussions on punishment and imprisonment were both considerable and original. The sense of pride in pursuing the goal of reformed imprisonment can clearly be felt from the above text, as can the belief that attitudes were changing and that eventually his 'Object', the establishment of a national scheme of imprisonment with hard labour, would be attained. The distance Eden's theory had moved from its origins twenty years earlier is plainly displayed. Thus, his criticisms of imprisonment in 1771 were of unreformed incarceration. By 1791 he was a full convert to the potential of the penitential prison, believing it offered a humane alternative to the wide-scale extinguishing of life in the name of justice, and could restore compassion to the necessary infliction of punishment.

Mercy should be shown towards offenders, as they were simultaneously punished and reformed, and severity shown to the offence as punishment was certainly applied. To maintain the safety of society an impression had to be left on the mind of the criminal, and on others aware of the sentence, that the offender had been certainly and

not publish the Panopticon immediately in 1791, though he sent Eden a copy directly in February 1792 stating that it had never been distributed to booksellers, which is where the work mentioned here by Eden was obtained by Sir Charles Bunbury. See Correspondence iv (1788-97), ed. A. Taylor Milne (London, 1981) (CW), 361; and Semple, Bentham's Prison, 13 n.

justly punished.¹⁴² If this was achieved Eden believed the law would be looked upon with affection. This would contribute to the affection of the whole society for the law, and this in turn would lead to patriotic attachment to the country. Penitentiary imprisonment became, for Eden, the means by which the majority of offenders ought to be returned to a society for which they had temporarily lost respect.

¹⁴² Eden consequently favoured the retention of capital punishment for the most serious offences, and whilst it ought, for the sake of deterrence, to continue to be publicly inflicted it had to be considered 'as the most solemn and affecting scene, that can be exhibited'. See Principles, 21-7 and 300.

CHAPTER TWO

THE PENAL THEORIES OF WILLIAM EDEN AND JEREMY BENTHAM

A. Eden, Bentham and Contemporary Penal Debate

The previous chapter examined some elements in the development of support for penitential imprisonment in the decade before 1776. Much depended on the work of reformers motivated by religion - men such as Denne, Hanway, and, by far the most important, John Howard. Howard's detailed examination of prisons and prison systems provided the basis for a persuasive, scientific movement of reform.¹ However, it has been established that Howard's theories, whilst important, were primarily concerned with the organisational and hygienic improvements required to remove the worst deficiencies of the existing system.² He sought only the removal of abuses and the provision of a cleaner, better regulated carceral environment.³ On questions of theory Howard

¹ Howard, The State of the Prisons in England and Wales..., (Warrington, 1777).

² There is no criticism of English criminal law in Howard.

³ As Ignatieff has said, 'Howard was by his own admission a "plodder" and made little reference to Voltaire, Beccaria or other key theorist'. See Ignatieff, A Just Measure of Pain, 66. Though Bentham had great respect for Howard he said 'no leading principles' were to be found in his work. see 'Panopticon', Bowring, iv. 121.

tended to emphasise, as did Denne and Hanway, repentance as a method of reform. Whilst there can be no doubt that this was an important element in the rising popularity of the penitential prison, the question to be examined here is whether Denne, Hanway and Howard's work contributed to the development of Bentham's penal theory in particular.⁴

In seeking forerunners to Bentham's theory the work of Howard, whilst respected by Bentham, offers few foundations for the central themes within his own thinking.⁵ Parallels can be found relating to the use of architecture and design in the fabrication of a penal institution, but in terms of theory there is little to suggest that Howard, or men of his persuasion, formed any kind of precursor to Bentham. Even from a cursory examination of their approaches to punishment it is clearly the case that those driven by religious inspiration did not separate crime from sin. Rather, they did their utmost to reinforce the traditional connection between these two concepts. Motivated by a resurgent Christian fundamentalism the theories of these religious reformers stand in stark contrast to the approaches of

⁴ There is no doubt that Bentham did read the work of such reformers, though not as early as one might have expected. See, for example, his thanks to his father for sending him Hanway's Solitude in Imprisonment..., but not until July 1777, Correspondence, ii, letter 221, 58-61.

⁵ For a detailed description, from Bentham, of his admiration for Howard see Correspondence (CW), ii. 105-7, where he said Howard was, 'one of the most extraordinary men this age can show'.

Montesquieu, Beccaria, Eden and Bentham.⁶ It is a point of some importance to note the degree to which, what may be termed, 'secular' notions of penal reform were accompanied by these more reactionary ideas from religious, ascetically inclined reformers.⁷ The distinction between the two strains of reform ran throughout the penal ideas discussed at the time. For instance, the increasing value attached to the use of shame in punishment was thought, by all, to be a valuable element in penal practice. Yet, clearly, any use of shame in Bentham was wholly secular. It was fear of being shamed in the face of local communities, rather than in the face of God, which was seen to be the valuable restraint. Whereas, for Hanway and Howard, it was undoubtedly an individual's relationship with God that was paramount.

The analysis presented here, therefore, does not concentrate on the contributions of men such as Hanway and Howard since they are distinct from the theory developed

⁶ The religious ideals of Quakers and Wesleyans appear distinct from the Deistic provisions of natural religious sentiment and compassion found, for example, in William Eden's theory; and Bentham, of course, sought to do without even these. On the role of Evangelicalism as a conservative social and political force see, I.R. Christie, Stress and Stability in Late Eighteenth-Century England, (Oxford, 1984), 187-8.

⁷ Ignatieff, A Just Measure of Pain, 53; solitary confinement originated in Pope Clement XII's Vatican prison of 1703, where 'the Catholic experience of Monastic discipline' was applied as a means of punishment aimed at reformation. Ibid. Howard visited this prison and acknowledged its strong influence.

in the manuscripts of Bentham during 1777,⁸ although they were highly influential within the country at large.⁹ Nevertheless, penitential, reformatory imprisonment was a theme which both Eden and Bentham, whilst arguing from their own opposing philosophical standpoints, came to pursue along with all others. A common, recommended form of punishment does not, by any means, imply a common theory of punishment, yet it can be shown that central aspects of the penal theory of William Eden are reflected in the later, more systematic thinking of Jeremy Bentham.

William Eden was not a systematic philosopher; his ideas display great elegance in communication, but give few immediate indications of any soundly structured theory. Yet throughout his work the fluency of expression was unfailingly persuasive in communicating his central argument that lenient punishment was the best means for delivering justice, whilst simultaneously protecting the established structures of English -and especially English landed - society.¹⁰ It will be argued that Bentham well understood this overriding, central principle of Eden's

⁸ For comments, from Bentham, on the development of his 'Theory of Punishments' between January and November 1777, see Correspondence (CW), ii. pp. 11, 23, 57, 68 and 72.

⁹ For details of the advocacy of penitential imprisonment by Howard, Denne and Hanway, and on the ideological origins of the penitentiary, see Ignatieff, A Just Measure of Pain, 44-79.

¹⁰ Bentham himself often noted the quality of Eden's language, see 'Preface to A View...', Bowring, ii. 4.

approach, and that in recognising the distinction of Eden's argument in comparison with his predecessors and contemporaries, Bentham was aware of some similarities between his own interpretation and that of Eden.

This approach of claiming Eden as one of Bentham's intellectual colleagues will seem liable to objection. It has been noted how Bentham contrasted his own approach with that of Eden's, and it is plainly the case that Bentham found much to criticize in the philosophic principles (or lack of them) in Eden's Principles of Penal Law.¹¹ However, although there was plenty in the thinking of Eden to which Bentham objected, there was also, as his own words testify,¹² something of value.

The most recent and comprehensive work on the relationship between Eden and Bentham, carried out by Janet Semple, has emphasised Bentham's negative opinion of Eden.¹³ And certainly there is a general tone of condescension throughout the particular manuscript to which Semple refers. Bentham stated that Eden, for instance, 'swims along the stream', whilst, in contrast, he portrayed his own efforts as being a struggle to turn the stream; in other words, Bentham suggested that Eden was more of an ingratiator than an analyst. The anti-Eden

¹¹ Janet Semple, has made great use of an unpublished Bentham manuscript in which he briefly compares his own efforts with those of Eden. See, UC xxvii. 107.

¹² See citations from UC xxvii. 107 below.

¹³ See Semple's Bentham's Prison, 69. All following quotes in this paragraph are taken from this source.

approach continued when Bentham charged him with being 'one of the ornaments of a Court', and again, he juxtaposed his own position, claiming, to have 'long sequestered myself from the face of men, in the fond hope that I might one day do them service'.¹⁴ Clearly, in this valuable private note, Bentham showed a contempt, and perhaps some resentment, for Eden's undoubted success at court. Bentham regarded the popularity of Eden's work as resting primarily upon a clever use of sentimentalism.¹⁵ Eden had, said Bentham, 'the affections on his side'; indicating a belief that Eden was appealing to a vague sentimentalism that was becoming increasingly fashionable. For a third time within the space of this one short text Bentham once more identified his antithetical relationship to Eden by freely admitting that 'I am afraid of the affections, and my constant care is to keep them out of the way'.

Obviously Bentham had misgivings about Eden's theory, drawing, as it did on the established tradition of English criminal law administration, and on the same Lockian

¹⁴ Eden was indeed, by all accounts, making himself into something of a court figure. See BL Add. MSS 34412, fo. 189: 'I congratulate you on the amazing Progress you make in the Accomplishments of a Court Character', John Lee to William Eden, 11 October 1772.

¹⁵ Eden was extensively quoted by contemporaries such as Henry Dagge, Dr. S. Parr and Basil Montagu, see Radzinowicz, English Criminal Law, 301 n. The success of Principles of Penal Law in England and Ireland has been noted in Ch. 1 above. On the Continent, Eden was used as a model by Brissot, Bibliotheque Philosophique du Législateur, i, p. xv. Princess Dashkoff, close friend of the Empress Catherine the Great, sought a copy. See G.C. Bolton, 'Eden and the Convicts', 36.

assumptions reflected in the work of Blackstone.¹⁶ However, these dismissals of the acclaimed work of Eden are followed by further comments, unacknowledged by Semple, which suggest that Bentham did find something of value in Eden's work after all. After the derisory comments mentioned above it is particularly revealing to find Bentham also claiming that Eden's book contained, 'words that are in some respects new and proposals[?] that are even more so'.¹⁷

Semple makes the point that by assisting Eden in the matter of penal theory Bentham might cynically have been seeking to gain government employment, and this could have affected his approach to Eden's theory.¹⁸ The manuscript does unquestionably show a peculiarly unusual desire on the part of Bentham to find agreement with Eden. In general, Bentham experienced no great difficulty in disagreeing with contemporaries - and especially so in the case of Blackstone - but with Eden he appeared much more circumspect. Bentham said of Eden:

Whenever I agree with him I feel myself at ease:

¹⁶ These assumptions encompassed a belief in natural political rights and contract theory.

¹⁷ UC xxvii. 107.

¹⁸ Semple, Bentham's Prison, 69. Bentham was seeking an offer to accompany the American peace commission of 1778, to which Eden was appointed in March of that year. For an interesting letter from Lord Mansfield on the appointment see Eden, Journal and Correspondence, i. p. xiv. By winter 1777-8 Eden was a close confidant of Lord North and, without reference to the Cabinet, they 'decided on a complete renunciation of colonial taxation' before the Commission was despatched. See P.D.G. Thomas, Lord North, (London, 1976), 108-9.

whenever I differ with him, it is with pain.¹⁹

The main problem in ascribing this uncharacteristic desire to accommodate Eden as little more than an attempt at achieving office, is that the dating of the manuscript is so uncertain.²⁰ Semple's argument relies on the assumption that the note was completed at the same time Bentham began corresponding with Eden over the Hard-Labour Bill in 1778. But the indications are, from the context of the manuscript and others with which it is located, that the date of the manuscript is earlier.²¹ It is more likely that it was produced during the period 1776-7, when Bentham was far from any idea of gaining employment through Eden. Bentham was not in correspondence with Eden until 1778, and even then was not seeking to go to America 'in the official capacity of a Secretary, but as a friend,

¹⁹ UC xxvii. 107.

²⁰ Bentham rarely dated his early manuscripts and UC xxvii. 107 is no exception.

²¹ Other material boxed at UC xxvii relates to 'Preparatory Principles of Punishment'. From Bentham's correspondence Professor J.H. Burns has dated the production of material on the Theory of Punishment to 1776-7. See IPML (CW), p. xxxviii. On 14 February 1777 Bentham wrote to his brother Samuel that he was considerably advanced with his work on penal theory saying, 'of Punishments I have done upwards of 300 [pages]', Correspondence (CW), ii, letter 203, 23. See also his letter to the Reverend John Forster in St. Petersburg, April/May 1778, 'For about a year and a half [i.e. late 1776-Spring 1778] I have been employ'd principally in writing a Theory of Punishment which I hope to send to the press in the course of two or three months'. *Ibid.* 248.

for the sake of company and advice'.²²

It must also be emphasised that these comparisons were expressed in a private note, with no indication that they were ever further publicized. This short, but important, manuscript was clearly not for public consumption. Assuming, then, that Bentham really did find something worthwhile in Eden's work before 1778, the question is - what were these 'words and proposals' that Bentham valued enough to call new, and can he be said to have made any further use of them?

Apart from the goal of deterrence, which was increasingly accepted in England as a prime justification for the exercise of the penal sanction, and the restatement of Beccaria's discussion of the need for proportion in punishment, Eden and Bentham agreed on four further ideas essential to the definition of any secular penal theory.²³ These concepts were: a reduction in the general levels of physical severity in both the theory and forms of punishment; an emphasis on the psychology of the individual offender; the pursuit of consistency and

²² Bentham to Rev. John Forster, April/May 1778, 104. Also important is the fact that Bentham hoped to accompany not Eden but Governor George Johnstone, another of the Commissioners, since he believed, 'Governor Johnstone... was very fond of the Fragment'. See Correspondence (CW), ii, letter 248, 98-115.

²³ For the growing acceptance in England of deterrence as an end of punishment, see Radzinowicz, English Criminal Law, chapter 10. Beccaria's work was highly effective in promoting deterrence (though not reform) as an end of punishment in England. See discussion above in Ch. 1.

certainty in punishment, combined with a necessary discretion for judges; and finally, a desire to see the inconsistencies and antiquated legal fictions produced by piecemeal statute law removed. These ideas will now be examined, identifying the extent to which Bentham was prepared to develop his thinking in directions already suggested by Eden, and signifying any direct use that Bentham can be said to have made of Eden's work.

Obviously, with each of these concepts, Bentham looked to Beccaria before Eden, but with Eden's interpretation the work of Beccaria was brought specifically within the English legal environment. Eden attempted to use the novelty of Beccaria's arguments to provide a means of returning English law to the condition he believed had existed some three or four generations before he wrote in 1771.²⁴ Bentham also emphasised the role of penal law for English society, and although he came to regard his complete *Pannomion* as being applicable to any country by the 1780s, in the period 1775-9, he too could arguably be portrayed as offering a specifically

²⁴ Eden, Principles, 1. That is, before the Black Act of 1723 and the multiplication of capital statutes. On the importance of this Act see E.P. Thompson, Whigs and Hunters, (London, 1975), 21-4; and Radzinowicz, who says, 'the Act constituted in itself a complete and extremely severe criminal code which indiscriminately punished with death a great many different offences, without taking into account either the personality of the offender or the particular circumstances of each offence,' English Criminal Law, 77.

English analysis.²⁵ And though this may have been a temporary position, it was certainly to the English environment that Bentham first looked.

i) *Bentham's Recognition of Eden's Emphasis on Leniency*

In the manuscript discussed by Semple Bentham appeared to recognise that Eden was making some valid claims. As has been shown in the previous chapter, the relevance of Eden's work was widely seen by his contemporaries to lie in the concentration on the idea that leniency in punishment was the key to the promotion of public virtue.²⁶ In saying that Eden was new in some respects Bentham was acknowledging this novel emphasis incorporated into Eden's theory as a distinct, new recommendation for a move towards the introduction of lighter sentences. Eden's conclusions in favour of leniency were drawn from an understanding of individuals as rational, social and religious beings which stood in contrast to the utilitarianism espoused by Bentham. Nevertheless, general agreement with Eden's demand for a reduction in the severity of punishments implemented is reflected throughout Bentham's works.

For Bentham however, it was not a question of lenient punishments improving the morality of the citizen body, by

²⁵ The *Pannomion* was Bentham's proposed complete code of laws. For Bentham's involvement with a Digest for English law, see Lieberman, Province of Legislation, Ch. 12.

²⁶ Eden, Principles, 284.

virtue of an increase in the love of the laws, that led to his approval of a reduction in severity. He claimed that the amount of pain being inflicted under the English system in the early 1770s was wrongly applied because it far exceeded the pain caused by the commission of offences.²⁷ By emphasising the role of proportion in producing an effective deterrent, we find Bentham demanding an end for the severity of punishments. From Bentham's standpoint the lack of proportion between punishments and offences prevalent in the body of English law seemed inevitably bound to fail in deterring future offences, since there was no scale of punishments to crimes and no certainty of a punishment's application. Yet deterrence was not the sole purpose of the English system of law, arranged, as it increasingly was, to deliver 'undifferentiated and crude retribution'.²⁸ The burgeoning mass of capital statutes was widely regarded as a means of delivering justice, as an end in itself, irrespective of any ensuing deterrence value. Thus, maximum punishment, the ultimum supplicium, became fixed to a vast range of offences for the explicit purpose of delivering harsh but what legislators accepted as just punishment in a society perceived to be sinking beneath an

²⁷ Bentham's arguments for a reduction in severity rested on his belief that much existing punishment was groundless, inefficacious, unprofitable and needless. These categories are examined below in Ch. 5.

²⁸ Radzinowicz, English Criminal Law, 79. E.P. Thompson has said the 1723 Black Act 'signalled the onset of the flood-tide of eighteenth-century retributive justice', Whigs and Hunters, 23.

endless rise in crime.²⁹ Petty offences came to be regarded as considerable threats to social stability and were consequently assigned the most serious of punishments, death.³⁰

From both Eden's and Bentham's standpoints, however, punishments were not an end, only a means. Punishments ought to deter future offending. Without proportion and certainty of application any extra pain would fail to deter, since potential offenders would be unable to distinguish between degrees of crime and avoid those to which more severe punishments were attached. And without certainty of application the hope would always be harboured that, if caught and convicted, the sentence might not be carried out. Accordingly, the level of pains inflicted needed to be reduced so that proportioned punishment could be applied, and applied with certainty. Thus we find 'proportionality', a central tenet of Beccaria's work, being variously adopted by both Eden and Bentham as a basis for a general reduction in pains inflicted.

In some regards Bentham can be said to have gone further than Eden in calls for reductions in severities.

²⁹ Blackstone disagreed with this view, saying: 'It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty'. See Commentaries, iv. 17.

³⁰ Although so many offences were assigned the capital sanction that it was impractical to apply the penalty in practice to any but the most serious.

As far as the death penalty was concerned, for instance, Bentham envisaged a drastic reduction in its use, and it has been shown that he eventually took his anti-death penalty arguments to their ultimate conclusion and demanded the abolition of the punishment altogether.³¹

Although Bentham may have agreed with Eden that the overall severity of punishments was in need of reduction, this does not mean that he pursued leniency *per se*. For whilst Bentham well understood why Eden was different, and why he was popular, he by no means agreed that leniency in punishment should be pursued as an end in itself. Their contrasting, underlying philosophies produced significant distinctions which mitigated the extent to which Bentham drew from Eden's work.

Bentham sought a reduction in severities only through a better proportioning of pain of punishment to pain of offence. A noticeable result of this was an emphasis on the need to establish an accurate account of the pain produced by offences.³² Bentham was far from Eden, and perhaps even Beccaria, in gauging of the quantities of pain thought to be produced by both offences and punishments. Indeed, it was a crucial point for Bentham's

³¹ For the extent to which Bentham opposed the death penalty see Rosen, 'Utilitarianism and the Reform of the Criminal Law', (Cambridge, forthcoming); Radzinowicz, English Criminal Law, 390; Bedau, 'Bentham's Utilitarian Critique of the Death Penalty', 1033-65; and Crimmins, 'Strictures on Paley's Net: Capital Punishment and the Power to Pardon', 23-34.

³² With severe offences defined as those which caused a great calculable pain to society at large.

theory that though an offensive act itself might be simple, this in no way implied that the calculation of pain caused was also simple.³³ This carried great implications for the development of Bentham's theory, some of which are considered below in chapters four and five.

Distinctions between Bentham and Eden on the question of justifiable quantities of pain can be seen when their discussions of analogy in punishments are compared. Both Eden and Bentham agreed that analogy could be useful in making punishments more effective as deterrents, but the more precise demands of Bentham's theory led him to approve, in 1775-7, of much greater severity in analogous punishments than did Eden.³⁴

Relying on a belief in the existence of a commonly held natural sentiment, which Bentham, of course, considered to be nonsense, Eden thought that:

The justice and wisdom of every penal law depends on its analogy to the particular quality of the crime, to which it applies. The punishment then becomes an established consequence unconnected with the caprice of authority and flowing from the nature of the offence...³⁵

In paraphrasing the words of Montesquieu Eden perpetuated here an illusive notion that some kind of spirit of

³³ For a discussion of the complexities of the calculation of pain of punishment and offence see Halévy, Philosophic Radicalism, 67-70. See also Théorie des peines..., 10.

³⁴ See Ch. 6 below, 'The Selection of Modes of Punishment' for a detailed discussion of Bentham's use of analogous punishments.

³⁵ Eden, Principles, 73-4. Compare Montesquieu, The Spirit of the Laws, Bk. XII, Ch. 4, 189.

punishment could be established by referring to the utterly incalculable 'nature of the offence'; but also, this concept of the nature of punishment implied an even less precise sense of retaliation than it did for Montesquieu. For Eden, analogy seems not to have meant corporal analogy as it frequently did for Bentham in the early development of his penal theory. Eden's position as far as legal mutilation was concerned, for example, was that, 'such refinements of cruelty put the whole species, rather than the criminal mind to disgrace'.³⁶ And for punishments such as branding or disfigurement, Eden believed them to be, 'contrary both to humanity and sound policy'.³⁷ In practical terms there was already sufficient evidence, in Eden's view, to show that offenders became used to the continual insult of branding or prominent mutilation, and rapidly lost all sense of shame. In addition they were permanently identified as criminals and this made their future reform virtually impossible. His discussion of analogy therefore provided little support for corporal punishments. For the great majority of lesser offences, particularly those directed against property and which caused no physical harm to others, he considered fining to be the best form of punishment:

Pecuniary penalties form the last, and best class of those salutary restraints of law, which alone render national liberty, either valuable or permanent. It

³⁶ Eden, Principles, 53.

³⁷ Ibid. 52.

is a wise and merciful institution, which converts the little attachments of selfishness, into the strong holds of society.³⁸

Eden realised that fines were not always appropriate in that it was difficult to assess offences in monetary terms, and fining was an uneven punishment for rich and poor. Yet his overwhelming support for non-corporal punishments was a significant position to adopt in the England of 1771, when capital statutes were still on the increase.

Six years later Bentham, on the other hand, can still be found to centre his theory on the infliction of mainly corporal pain. Using analogy widely throughout his early penal manuscripts Bentham was led into suggesting that certain forms of mutilation could be usefully adopted.³⁹ At this stage Bentham was predominantly concerned with an understanding of the legal sanction as physical pain rather than a pain more particularly directed at the mind.⁴⁰ In contrast to Eden, whose references to analogy implied a much vaguer and not necessarily physically

³⁸ Ibid. 60.

³⁹ See 'Of Corporal Punishments', for an assessment of the full variety of disabling and mutilating punishments, Bowring, i. 413-7; and Radzinowicz, English Criminal Law, 391.

⁴⁰ However, the emphasis on punishments such as whipping and branding was not maintained for long in Bentham's thought. By 1790 he stressed, unreservedly, the value of imprisonment, whilst never entirely abandoning the use of more physical punishments. For a useful discussion see Ignatieff, A Just Measure of Pain, 75, though it must be noted that Ignatieff relies on Richard Smith's 1830 retranslation of Dumont's Théorie des peines..., which centred on Bentham's thought of the 1770s.

painful punishment, Bentham's arguments for analogy produced some extreme suggestions, several of which could hardly be designed to reduce the quantities of pain inflicted on offenders.⁴¹

Clearly then, although some claims can be made for agreement between Eden and Bentham on the question of less penal severity, it is obvious that Bentham's concentration on greater precision in the quantification of punishment, which he was in the process of developing with respect to deterrence, did not allow him to accept fully Eden's uncritical demand for less physically painful forms of punishment.⁴² However, Bentham did follow Eden in offering an unmistakeable, humanitarian concern for the welfare of those who suffered under the law. As Bentham said in an unpublished note:

In one thing I will not yield even to him: the love of humankind, my fellow creatures: however different soever may be our ways of manifesting it.⁴³

This desire to improve the English system for the benefit of his 'fellow creatures' underpinned Bentham's theory

⁴¹ Included amongst manuscript material relating to analogous punishments one can find descriptions of 'half-roasting', 'the iron horse' and 'the artificial precipice'. See UC cxliii. 18, 28, 32, and 33.

⁴² Bentham was prevented from uncritically supporting leniency because of his second end of punishment, that of repairing the pain of the offence. Such a concept was absent from Eden's thinking and demanded the infliction of sufficient pain as punishment to outweigh any profit gained by an offender. See Bentham, Théorie des peines..., 12, 'l'une de prévenir la répétition de délits semblables, l'autre de réparer autant que possible le mal du délit passé'.

⁴³ UC xxvii. 107.

just as it did Eden's. Bentham, being well aware of the significance of Eden's arguments against the unjustified severity of the law as it stood, perhaps believed that leniency would be automatically incorporated into his own system. What is clear, both from his theory of the distribution of pains and more immediately from his critique of the death penalty, is that reduction in severity was, as with Eden, an undoubted goal.

ii) The Emphasis on Individual Psychology

Of prime importance in the concern for less severity was the way in which punishments were now to be perceived by the criminals themselves. In other words, both Eden and Bentham began their approaches to questions of punishment with an analysis of the potential offender, rather than from the more conventional direction of looking at the nature of the crime or offence as an action somehow isolated from the circumstances in which it was performed, and for which a wrathful act might be designed as retaliation. In this sense Eden was again influential for Bentham by pursuing a theory which emphasised the psychology of the offender. For Eden this was expressed in terms of an individual appreciation of a law if it treated offenders with leniency and compassion; for Bentham it was based on a hedonistic concept of human psychology, of the rational and necessary choice in favour of pleasure or the avoidance of pain.

Bentham's individual was thus said to measure right

and wrong action only in terms of pain and pleasure, generally for himself, in view of the punishments employed by the state. Eden's individual measured right and wrong action by what he called, 'that natural sympathy better felt than expressed'.⁴⁴ With human action based on these instinctive foundations it appears that although Eden's individual thought firstly of himself, he was soon led by his natural sympathy to think quickly of others - not from selfish motives but from some kind of natural sympathy and consideration. Yet this natural and unselfish consideration was effective only with the immediate family and acquaintances of individuals, and Eden maintained that it was against human nature generally to recognise any wider public interest.⁴⁵ He attempted to extend the natural social concern he believed he found in the family or small community group towards society in general, and encouraged the incorporation of compassion and benevolence into a system of lenient statute enactments and common law. In Eden's theory, therefore, the law should assist with the process of men becoming aware, by reason operating naturally with instinct, of the need to relinquish a portion of their 'natural liberty', their selfishness, in order to establish a 'civil liberty' where

⁴⁴ Eden, Principles, 3.

⁴⁵ 'This change, in which the public interest is recognized to be the great end of penal jurisdiction, tho' founded in reason, is contradictory to the most active propensities of human nature, and therefore submitted to with reluctance'. Eden, Principles, 3.

penal law is extended to all by the common consent of all.⁴⁶

Eden's selfish individual held self-preservation rather than individual happiness to be the first principle to which he adhered.⁴⁷ Once self-preservation was made more certain by the institution of political society and the dispensations of the law, Eden's man was seen to reach a point where he felt secure enough to begin to see injuries to other individuals as being injuries to society as a whole. Natural sympathy then allowed him to abandon, partially, his concern for himself and attend to those for whom he felt natural compassion, in the interest of the public virtue of society as a whole.⁴⁸

Bentham's individualism was more encompassing, where men are regarded as being more constantly selfish, though recent studies have emphasised how he too allowed considerable role for benevolence within his utilitarian

⁴⁶ These terms, from the first few paragraphs of Eden's work, appear to be from Rousseau. However, Eden adopted these ideas from Beccaria whose account of the social contract was quite unlike the total surrender of rights of which Rousseau spoke. It seems closer to Locke's idea that the government is purely fiduciary and individuals forming the state make only a minimal surrender of liberty.

⁴⁷ Eden, Principles, 15.

⁴⁸ There appear to be considerable elements of Humean thought here, see Ch. 1 above. Miller has said that Hume '... sees men less as selfish than as partial in their benevolence, serving the interests of those connected to them at the expense of mankind in general'. See Hume's Political Thought, 118.

view of society.⁴⁹ Bentham's hedonistic individuals are by no means condemned to absolute selfishness,⁵⁰ yet he displays less confidence than Eden in man's ability naturally to develop a virtuous concern for others.⁵¹

Bentham differed more substantially from Blackstone, Eden, and to some extent from Beccaria also, in his rigorous application of a sensationalist understanding of individual psychology gained from a close reading of the work of the early French utilitarian Helvétius.⁵² Using a strict, and now commonly regarded as naive, conception of man's pursuit of pleasure, Bentham broke away from traditional English philosophies and based his own theory on the understanding that gradations of experienced pain

⁴⁹ For the compatibility of Bentham's self-regard with 'limited benevolence', see F. Rosen, Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code, (Oxford, 1983), 206-11. On Bentham's view of society as a set of interacting groups, rather than selfish individuals see L.J. Hume, 'The Political functions of Bentham's Theory of Fictions', in The Bentham Newsletter, 3 (1979), 18-27.

⁵⁰ For the virtue of beneficence in Bentham see Deontology, Together with A Table of the Springs of Action and Article on Utilitarianism, ed. A. Goldworth, (Oxford, 1983) (CW), 'prudence, Probity, and Beneficence', 190-207. For the motive of benevolence, see IPML (CW), 145 n, 154 n, 167, and 284.

⁵¹ Via Bentham's utilitarian concept of other-regarding action, assistance to others was seen as able to bring happiness or pleasure to selfish man and could explain compassionate behaviour to some extent. See IPML (CW), 292, for Bentham's understanding of the dictates of 'beneficence'.

⁵² For Helvétius's influence on Bentham see UC xxvii. 144, 148, and 173; and Bowring, x. 27. For discussion of the context and value of Helvétius's De l'esprit, (Paris, 1758), see J.H. Burns, 'Utilitarianism and Reform: Social Theory and Social Change, 1750-1800', Utilitas, 1 (1989), 211-25.

and pleasure were capable of being assessed with sufficient accuracy to form a precise system of proportioned pain of punishment against pleasure of offence. By including assessments of all the circumstances and sensibilities involved in any offending incident Bentham realized, and attempted to quantify, the variation in each individual's relationship with statute law. And, in a way which was only partly reflected in the subjective approach to punishment seen in Eden's work, Bentham extended the concentration on the individual psychological ego and its perception of the penal sanction.

Bentham can be seen as taking an established approach to new levels, and in doing so was following a movement common to penal theorists of the 1770s.⁵³ Certainly in this regard Bentham was very much in tune with the demand that individual motivation be recognised, and he shared, with Eden in particular, a general interest in the experience of those who were subjected to the force of the law.

iii) Consistency, Certainty, Celerity and the Role of the Judge

The idea of a clear indication of, and the meaning behind, the punishments that would be delivered if certain offences were committed was central to Bentham's objects

⁵³ See Lieberman's discussion and description of Beccaria's theory as 'psychological', Province of Legislation, 207.

of punishment.⁵⁴ Indeed, there are grounds for claiming that clarity was the ultimate goal of Bentham's whole *Pannomion*.⁵⁵ Blackstone was criticised so vehemently because Bentham was unclear about what he was saying, or rather, he was aware of the many inconsistencies and incongruities in Blackstone's work.⁵⁶ For the deterrent of punishment to be effective all members of the community must be clear about the law. Such an approach indicates once more how firmly Bentham's thinking was grounded in the context of Enlightenment thought.⁵⁷ The people he followed, Voltaire, Helvétius, and Beccaria, sought to substitute clarity and precision for an ancient, muddled tradition and outright confusion.⁵⁸ To 'enlighten' was

⁵⁴ For Bentham, 'uniformity, clarity, order and consistency were essential in both law and administration', L.J. Hume, Bentham and Bureaucracy, 239.

⁵⁵ The advanced nature of Bentham's call for codification is recounted by Halévy, where it is noted that opinion was vehemently against such reform, Philosophic Radicalism, 76.

⁵⁶ For a concise account of the obvious inconsistencies in Blackstone see I. Hampsher-Monk, A History of Modern Political Thought, (Oxford, 1992), 313. For an analysis of Bentham's view that '... Blackstone had misunderstood and misrepresented both the nature and the merits of the British Constitution', see J.H. Burns, 'Bentham and Blackstone: A Lifetime's Dialectic', Utilitas, 1 (1989), 39.

⁵⁷ Bentham was in accord with much French Enlightenment thought, particularly as expressed in the aims of the Encyclopédie, which, he claimed, also pursued the goal of happiness. See UC xxvii. 14(b).

⁵⁸ See Halévy, Philosophic Radicalism, 17-21. For an early recognition of the importance of precision in language for Bentham, and his invention of words in the pursuit of clarity of meaning, see C.M. Atkinson, Jeremy Bentham: His Life and Work, (London, 1905).

Bentham's earliest aim; it was for this love of clarity that he described Beccaria as being 'received by the intelligent as an Angel from heaven would be by the faithful'.⁵⁹

Both Eden and Bentham closely followed Beccaria's demand for more consistency and certainty in the application of punishment. Indeed, this was the area which struck the strongest chord with many English theorists who were dismayed at the confused state of English common and statute law.⁶⁰ The strong psychological basis of Bentham's theory meant that both consistency and certainty were essential if his rules of proportion were to be applied effectively.⁶¹

For Eden, consistency still depended more upon a consolidation of existing statutes and a correct application of law to similar cases. He certainly called for greater certainty in the execution of legal punishments and, as shown in the previous chapter, one of his main arguments in favour of more leniency was that this allowed the certain execution of all sentences without the need for commutation.⁶² However, much as he supported the concept of a graduated scheme of offences

⁵⁹ Bentham, Fragment On Government, 14 n.

⁶⁰ Certainty of punishment was, for example, one of the main reasons for Blackstone's interest in Beccaria's work. See Blackstone, Commentaries, iv. 17.

⁶¹ This being certainty in both the punishment attributed to offences and in the execution of sentences.

⁶² See Eden, Principles, 13; and discussion above at Ch. 1.

and corresponding punishments, he claimed, as did Blackstone, that it was not possible to produce a fixed scale of penalties as an aid to consistency because even apparently similar offences differed to such considerable degrees.

Bentham began his work on reform in the criminal law by planning a digest of existing statute laws, which would incorporate all valid customary law, and, in valuing the work of the legal antiquarian Barrington, Bentham continued to support the consolidatory call that aimed to 'take notice of such acts of parliament from which no good effects could be expected'.⁶³ Bentham took from Barrington the message that reform of the statutes was needed immediately to remove anomalies and redundancies, and to eradicate the most outdated remnants of statute law. In this he was close to Eden. But in the degree to which he called for consolidation he again went further since Eden did not seek to replace common law with a new digest of statute law; Eden cannot be said to have required such a comprehensive reordering of existing legislation as did Bentham.

Definition was what Bentham sought, for it was essential for individuals, open to the expectation of pain in return for unlawful action, to assess satisfactorily their choice of possible actions. Bentham tried to establish a clarity in the 'meaning' of law by his use of

⁶³ Daines Barrington, Observations on the More Ancient Statutes..., iii. See also below Ch. 2.

paraphrasis,⁶⁴ and correspondingly, he sought clarity of 'misdeeds' by attempting a comprehensive method of bipartition which could define a thoroughly extensive range of offences.⁶⁵ It was in the name of clarity that Bentham itemized the objects of legal punishment.⁶⁶ These, all aiming at the balancing of happiness against mischief, sought primarily to prevent any offence from being committed at all. This was the logical end for a system designed to adjust the desires of individuals to what ought to be done for the happiness of all.⁶⁷ If offences were to be perpetrated, however, the second object of punishment was to prevent the worst offences from being committed. The third object further aimed to cause the offender to 'do no more mischief than is

⁶⁴ On paraphrasis Bentham said, it is 'the only method in which any abstract terms can, at the long run, be expounded to any instructive purpose', A Fragment on Government, ed. J.H. Burns and H.L.A. Hart, with an Introduction by R. Harrison (Cambridge, 1988), 108. Harrison describes paraphrasis as a method which 'relates sentences about rights to sentences about obligations, and sentences about obligations to sentences about laws or commands'. See Harrison, Bentham, 81. Thus, from the threat of the political sanction real obligations are established. It has also been noted how 'the abiding interest in clarification... stretches from the earliest manuscripts', in which Bentham was 'concerned "to frame a Dictionary of moral terms... in which clear ideas shall stand annexed to each expression" through to such later work as that published in the Logic'. See *ibid.* 13; and compare UC xxvii. 4.

⁶⁵ Interestingly, he did not think that such definition was as urgently necessary for punishments. See UC cxliii. 14.

⁶⁶ IPML (CW), 165.

⁶⁷ See Harrison, 'Introduction', A Fragment on Government, p. xvii.

necessary to his purpose'. Finally, his fourth object was that, whatever the mischief might be, it was necessary to prevent it at 'as cheap a rate as possible'; meaning that as little pain as possible was to be applied in order to achieve the first three objectives.⁶⁸

Clarity was emphasised throughout since the system required that potential criminals have a detailed knowledge of the threats from the law so that judgements concerning likely punishments could be made. To achieve this clarity the law must be publicized, applied with consistency, and its punishments known. Bentham's whole argument against common or judge-made law was that 'uncertainty is the very essence of every particle of law so denominated'.⁶⁹

The questions of clarity and certainty were no less important than the notion of celerity in punishment. From the very earliest manuscripts it is clear that weeks, months and years spent languishing in a prison awaiting trial, or awaiting the execution of a penalty after sentencing, was regarded by Bentham as entirely detrimental to the workings of an effective penal system.⁷⁰ The principle reason was that such behaviour would inflict an unknown, yet certainly greater, amount of

⁶⁸ IPML (CW), 165.

⁶⁹ Ibid. 308.

⁷⁰ Demands for celerity in punishment are frequently found in Eden and Beccaria. See, for example, Beccaria, On Crimes and Punishments, Ch. 19, on promptness of punishment. The origins for celerity in punishment are found much earlier.

pain on the offender; pain not acknowledged or accounted for in the sentencing assessment. Speed in implementing a punishment was believed to be both merciful and beneficial to a delinquent, for he says,

To expect a pain of any kind is itself a pain: viz: that kind of pain which we have stiled a pain of apprehension. The longer the expectation is, the greater is the total of that pain.⁷¹

Thus for Bentham, as for Beccaria and Eden, the legal sanction ought to be swiftly applied where guilt is established, otherwise any punishment will be significantly less effective in its express function of influencing future behaviour.⁷² If such objectives are pursued with clarity then it a strong argument can be made to view the political sanction as a consistent and efficient motivator.⁷³

As for the role of judges, Eden continued to believe, in open opposition to Beccaria, that it was the judge who had to take the decision regarding the correct amount of punishment.⁷⁴ And, ultimately, Bentham also expressed a

⁷¹ UC cxl. 7.

⁷² On speed of execution Eden said that the interval between sentencing and execution should not, 'be so great as to destroy that promptitude of punishment, which is requisite to make the sufferings of the offender the apparent consequence of his offence', Principles, 297.

⁷³ Much depends, however, on the way in which the assessment of mischief is made; Bentham's highly original analysis of the spread of pain is looked at in detail later in Ch. 4 below.

⁷⁴ For Eden judicial discretion was essential to the 'reasonable selection of the objects of its [the law's] coercion, in the moderate and judicious application of its

similar desire for judges to retain a certain amount of interpretative power. Eden's understanding was, once more, based on humanitarian rather than utilitarian grounds. When discussing excessively severe punishments he claimed that 'the humanity of the Judges will be interested in the evasion of it'.⁷⁵ His theory forced him to put great faith in the instinctive compassion of the Judge since questions of natural morality and natural religion could not, he believed, be answered by a calculative approach to penal assessment. Eden's justification for the continuation of judicial discretion was therefore fairly traditional. Though Bentham also disagreed with Beccaria and, ultimately, placed his felicific calculation in the hands of the judges (a group of men he despised as much as lawyers and whose influence he had hoped to remove) his reasons for doing so cannot be attributed solely to Eden. However, concerning the amount of discretion available to judges, Bentham did come up with the same solution as Eden. Both men said that if judges are to be allowed to alter punishments, depending upon the circumstances of each individual offence, then this should be a discretionary power only to reduce, not to increase, punishments.⁷⁶

penalties'. See Principles, 65.

⁷⁵ The 'it' here refers to 'the imposition of excessive law'. See Eden, Principles, 17.

⁷⁶ Bentham was clear about the latitude to be allowed to judges: 'it is therefore proper to allow a certain latitude to the Judge, not of increasing, but of diminishing a punishment. The Judge must declare the

Yet Bentham attacked the position of the judge further by suggesting that, 'as little ought to be left to the Judge as may be';⁷⁷ for he generally believed that only the legislator should make law. With this requirement of a community-wide assessment of the appropriateness of proposed sanctions the responsibility to ensure that laws were framed in pursuit of the greatest happiness was placed firmly on the shoulders of the legislator, rather than the judge:

It has been shown that the happiness of the individuals, of whom a community is composed, that is their pleasures and their security, is the end and 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.⁷⁸

Bentham also demanded that the proportioning of punishments should be as certain as possible. This, of course, must favour a degree of discretion for the judge, since it is only by detailed examination of individual cases that correct proportioning can be achieved. Bentham did concede that a measure of discretion should be allowed for sentencing, but the point was that judicial interpretation, if allowed to go too far, could not provide the clarity of understanding, and certainty of

reasons whenever he uses this discretionary power'. See 'Rationale of Punishment', Bowring, i. 411.

⁷⁷ UC cxl. 61.

⁷⁸ IPML (CW), 34. It may be useful to emphasize here that Bentham identified the legislator's concern as being specific to a particular community - the political sanction ought to be appropriate to the society for which it was designed.

expectation, that was required of a competent system of legislation.

It can therefore be seen that, in terms of theory, certain elements found in the thinking of Eden in his work of 1771 do recur in the thought of Bentham produced around 1777. Their reasons for arriving at similar conclusions are always different, and it can be suggested that Bentham supported those conclusions of Eden's only in so far as they coincided with his own approach to punishment. Yet Bentham himself said that Eden's work contained 'words that are in some respects new'.⁷⁹ This appreciation of a certain novelty in Eden's theory suggests that perhaps Bentham did accord Eden more respect as an analyst than has so far been recognised, and is helpful in explaining some of the progress made in the development of Bentham's own theory of punishment.

iv) Bentham's Attack on Common Law and Piecemeal Statute Law

Halévy has said that, 'Beccaria laid down a principle and outlined a system, but neither in the rigorous definition of the principle, nor the systematic development of its consequences, did he come near Bentham'.⁸⁰ By the stringent application of his philosophy Bentham redefined the purpose of the legal sanction, aiming to undermine the very foundations of

⁷⁹ UC xxvii. 107, (49).

⁸⁰ Halévy, Philosophic Radicalism, 58.

English law. With his earliest writings he criticized the whole English common law tradition.⁸¹ To achieve the establishment of his new 'science of legislation' Bentham's logic was carried to its ultimate conclusion and he demanded the entire replacement of the old amalgam of traditional and statute law with a single, clear, precise code of offences and corresponding punishments.⁸² The concern which Bentham repeatedly stressed throughout his Fragment on Government, was that Blackstone held an 'antipathy to reformation'.⁸³ Although Blackstone sought improvements in the state of English law, he had no intention of implementing any widescale change. And more to Bentham's distaste, Blackstone constantly asserted the superiority of common law over statute.⁸⁴ Eden agreed with Blackstone, and with the popular assumption of the day, that common law held more value than statute law; but the extent to which Eden criticised the resulting

⁸¹ Bentham's A Fragment on Government, (London, 1776), was produced immediately before he completed the main body of his work on the theory of punishment in 1777.

⁸² Eden, on the other hand, had no such all-encompassing aim, nor any new science to construct - it would have been impossible for him to attempt to do so with the belief he held in the value of common law. Eden was a born conciliator, Bentham took this to be his weakness, deriding him as being 'smooth as oil', and claiming he, 'writes secure of pleasing'. See UC xxvii. 107.

⁸³ A Fragment on Government, 4.

⁸⁴ Indeed, one of Blackstone's principal claims was that recent statute legislation was unwisely implemented and was plainly inadequate in comparison to the ancient wisdom of customary law. Commentaries, i, 'Introduction', sect. iii.

confusion, and demanded a rigorous consolidation, may well have been attractive to Bentham.⁸⁵

Indeed, Eden has been described as playing an important role in identifying the error of retaining laws introduced originally as emergency measures.⁸⁶ In short, Eden claimed that there was a tendency for severe, usually repressive, laws to become a permanent feature of the statute books.⁸⁷ The effect of such emergency legislation was to increase unintentionally the severity of the law; and once such laws were regarded as normal, any new measures required to deal with extraordinary circumstances would need to be that much more severe, and so the standard of severity spiralled upwards.

Following Eden's lead Bentham was particularly critical of *ad hoc* legislation as he watched it develop.⁸⁸ His interest, when initially considering the construction

⁸⁵ Certainly, a similar approach made by Barrington was very well received by Bentham. On Bentham and Barrington see, Radzinowicz, English Criminal Law, 364 n; and Lieberman, Province of Legislation, 186 n.

⁸⁶ Radzinowicz, English Criminal Law, 18, 305, and 310.

⁸⁷ Eden, Principles, 11-13.

⁸⁸ Bentham provided a withering lampoon which illustrated his contempt for the process of English parliamentary legislation in the eighteenth century: '...the Country Gentleman who has had his Turnips stolen, goes to work and gets a bloody law against stealing Turnips: it exceeds the utmost stretch of his comprehension to conceive that the next year the same catastrophe may happen to his Potatoes. For the two general rules... in modern British legislation are; never to move a finger till your passions are inflamed, nor ever to look further than your nose'. UC cxl. 92. Cited in Lieberman, Province of Legislation, 210.

of his Digests - first of common law to be passed into statute by parliament, then of statute law itself - can be traced back to the inclination of men such as Eden who pursued what was essentially a Baconian inspired drive towards consolidation.⁸⁹ However, although emphasis can be placed on the manner in which Bentham initially called for a consolidatory approach to reform, it is clear that this was little more than an interim stage, and that by the early 1780s Bentham had moved beyond a critique of the common law towards a vision of a whole panoply of coded legislation which would satisfy the complete range of legislative requirements.⁹⁰ To begin his construction of this 'Pannomion' Bentham began with his definition of the purpose and methods of punishment, certain of the vital role it played, not only in the directing of action but in the entire justification of the concept of a law itself. Just as Eden, following the example of Beccaria, had come to regard an accurate understanding of the principles of

⁸⁹ For the disparate collection of theorists, including Blackstone, Eden, Bentham and Romilly, who can be identified with 'the traditional Baconian programme for statute consolidation', see Lieberman, Province of Legislation, 181, and 200. On Bentham's Digest, see Lieberman, *ibid.*, 241 ff. Also see R. Munday, 'Bentham, Bacon and the Movement for the Reform of English Law Reporting', Utilitas, 4 (1992), 299-314, to find the view that, 'For Bentham, the major evil was the law's want of notoriety', and Munday stresses the interest shown in good reporting and organisation. Compare UC lxx(a). 117. Bentham had made considerable progress on both his Digest and A Comment on the Commentaries by May 1775. For Bentham's praise of Francis Bacon see, UC xxvii. 12.

⁹⁰ The *Pannomion* was to include a Penal, Civil, Constitutional and Procedural Code. For the evolution of the *Pannomion* see, Rosen and Burns's editorial introduction in, Constitutional Code (CW), pp. xxxv-xxxix.

punishment as the starting point for any modern conception of 'law' and 'state', so too did Bentham. Recognising the validity of this approach Bentham also began his analysis by establishing his own 'Principles of Penal Law' in the manner attempted by Eden, and the early texts on punishment formed the foundation for his Pannomion.⁹¹

Of all the parts of his later system the 'political' sanction was Bentham's primary concern, because of his intense dissatisfaction with the condition and functioning of the English law as he found it. He sought to provide a more rational, 'scientific' base for legal punishment which held the potential to be the most destructive of freedom for the individual.⁹² His approach emphasised, from the beginning, that the pain of legal punishment was particularly susceptible to rational improvement and throughout his career it was to this sanction that he devoted most attention.⁹³

⁹¹ When Bowring collected Bentham's writings on punishment together in the Works of 1838-43 he gave them the combined title: 'Principles of Penal Law'. See Bowring, i. 365-580.

⁹² Bentham regarded the particular nature of this 'science' to be nearer medicine than mathematics. See P.J. Kelly, Utilitarianism and Distributive Justice, (Oxford, 1990), 35.

⁹³ Compared, that is, with the pain provided by the three other sanctions discussed in chapter 3 below. This interest in the controllability of motivating pains led him later to a closer scrutiny of the moral sanction which, whilst more intangible, was similarly believed to fall short of its potential as a man-made producer of social happiness. The religious sanction was beyond the control of rational men, because of divine intervention or irrational belief. The physical sanction was natural and

His early critique of punishment included a division of the concept into component parts which has not appeared in his published works:⁹⁴

The subject of the present work is Punishment. It is divided into three parts. The first I call the descriptive part: the 2^d, the selective part: the third the Commentative part.

The first enquires what is profitable to be done in the way of punishment: the 2^d what ought to be done: the 3^d, what has been done, comparing it with what ought to be done.⁹⁵

The combination defined here of exposition and criticism is consistent with the method adopted in his other works of the mid-1770s, most notably his Fragment on Government. Indeed, in this attack on common law Bentham is clear about punishment being a crucial and 'fundamental idea', as one would expect, accepting that the Fragment was produced at exactly the time he wrote his 'Theory of Punishment'.⁹⁶

Bentham's approach to punishment, as with the state

could not be improved.

⁹⁴ An early manuscript fragment, uncertainly dated, though his reference to the 'subject of the present work being punishment' suggests 1777 as the likely year.

⁹⁵ UC cxlii. 1. This fragment is of some importance in that it gives a statement of Bentham's fundamental approach to the theory of punishment which, as yet, has not been found in any of his printed works and recensions. An early date is suggested by the similarity of writing, paper and layout with other early material from mid-1770s. All emphasis is Bentham's.

⁹⁶ It has been established by J.H. Burns that the majority of Bentham's work on the 'Theory of Punishment' was completed during 1777. See, IPML (CW), p. xxxviii. Bentham himself said, 'For about a year and a half [i.e. from late 1776] I have been employ'd principally in writing a Theory of Punishment', Correspondence (CW), ii, letter 248, April/May 1778, 100.

of English law in general, was to examine what was happening in practice. In the law in general this was established under the definition 'common law', and Bentham was, of course, aggressive in his attack upon this pre-eminent institution and upon those who supported it - most obviously Blackstone.⁹⁷ It is now apparent that the 'commentative', also termed the 'historical', part of his analysis of punishment is similarly found to be an attack on the common theories, the accepted practices, of punishment as he found them.⁹⁸ As he said in his 'preparatory principles', against the belief of Montesquieu, 'a point of History is not a law... A passage of History is but a set of signs serving to express the belief of the Historian'.⁹⁹ In this blunt statement Bentham rejected the entire tradition of looking to past case-law for examples from which to construct laws in the future.

From the brief but incisive fragment given above several points can be noted. Firstly, there is the striking use of the word 'profitable'. Already, it seems, Bentham had a method in mind which defined what punishment ought to achieve in terms of an economic model.

⁹⁷ Bentham believed the forms and methods of common law to be responsible for 'the evils of the English legal system - its injustice, its anachronistic and tottering institutions and forms, and its gross inefficiency'. See G.J. Postema, Bentham and the Common Law Tradition, 309.

⁹⁸ See UC cxlii. 1, 'the third the Commentative /historical/ part'.

⁹⁹ UC lxix. 99.

Punishment sought profitability, and this became its prime justification.¹⁰⁰ It can also be noted that Bentham had decided how the ends of punishment 'ought' to be pursued, and he established a distinct contrast between this and what had, in fact, already been carried out in the way of punishment. As it stood, Bentham could not regard the law as a satisfactory sanction. The old traditions of punishment had to be swept away, but first a new positive system had to be constructed, since, 'an unpleasing vacuity is left unless we build as we demolish'.¹⁰¹

B. Eden's Hard-Labour Bill and Bentham's Theory

By early 1778, Bentham had been working on his theory of punishment for over eighteen months; it was at this stage that Eden once again introduced legislation incorporating the conclusions of his own, and other's, recent work on penal theory.¹⁰² The plan was to introduce thirty-eight penitentiary prisons throughout England and

¹⁰⁰ Profit being measured in terms of pleasure over pain.

¹⁰¹ UC cxix. 105.

¹⁰² Eden's second Hard-Labour Bill was prepared during March 1778, and was published along with a memorandum of Observations. These Observations were circulated, anonymously, for consultation, though all knew Eden to be their author. Howard played a large part in the consultation process - his work The State of Prisons in England and Wales... had been published in 1777, and had increased the activity for penal reform, but unlike Eden he offered little discussion of the fundamental principles of criminal law.

Wales and to integrate the existing prison hulks into this entirely new system of imprisonment with hard labour.

i) *The Influence of Eden's Plan for National Imprisonment*

Eden had plainly been persuaded that contemporary theories of institutional reform justified the wide-scale introduction of imprisonment. His own, novel idea, as stated earlier in the 1776 House of Corrections bill, was that imprisonment with hard labour would deter offenders from committing further crime, and would also be 'the means of reforming many offenders, and of rendering them useful members of the community'.¹⁰³ It has been suggested above that this represented the first application of a theory of reformatory punishment and was particularly influential on later penal theory.¹⁰⁴

Bentham not only approved of Eden's practical suggestions for the improvement of penal practice but positively promoted them. In a long letter to the Reverend John Forster, Bentham explained how he came to write A View of the Hard-Labour Bill:

About 6 weeks ago a draught of a Bill fell into my hands, for changing the punishment of Transportation into Hard-labour, to be performed in Houses which it

¹⁰³ The text of the bill is in the Catalogue of Papers printed by order of the House of Commons, Parliamentary Papers, ix, 286.

¹⁰⁴ See above, Ch. 1. Bentham noted, with some surprise, that he had missed Eden's first attempt to introduce wide-scale imprisonment in 1776: 'somehow or other, the progress that had been already made in it near two years ago in the House of Commons, had escaped me'. See 'Preface to A View of the Hard-Labour Bill', Bowring, iv. 3.

proposes to establish for that purpose throughout England... The proposal of a measure which like this came within the plan of my book on punishments was an occasion I thought not to be neglected, of trying whether my speculations were likely to be of use... Having no time to lose, I put together a few thoughts on the subject which in the compass of little more than three weeks I made up in to a Pamphlet intitled A View of the Hard-Labour Bill. It has been out about a fortnight.¹⁰⁵

Bentham was plainly impatient to add his voice to a debate about which he had already developed much to say. His own 'Theory of Punishment' was largely complete and the opportunity of perhaps seeing some of his ideas incorporated into an actual bill was too good an opportunity to miss, his renowned reticence for publication being, for once, absent.

Bentham clearly found much to support in Eden's draft saying, 'it gave me real pleasure to have to do with a work which I could applaud with so good a conscience'.¹⁰⁶ It is interesting to note the distinction that Bentham drew between Eden's first work on penal theory of 1771, the Principles of Penal Law, and the ideas presented in the 'Preface' and Observations of this renewed attempt at a scheme of national imprisonment:

I would willingly... give you something that was worth reading. I will therefore strive hard to get you a copy of Mr. Eden's Bill which is not sold. I mean for the sake of the Preface which you will find spoken of in my Preface. I think you told me once that you had heard the Empress was pleased with his Principles of Penal Law, and had order'd them to be translated. If so, she would be much more pleased I should think, with this Preface of his (which for the

¹⁰⁵ Correspondence (CW), ii, April/May 1778, Letter 248, 100, Bentham to Reverend John Forster.

¹⁰⁶ Ibid. 104.

little there is of it is of a much superior stamp).¹⁰⁷

Obviously Eden's Hard-Labour Bill made quite an impact on Bentham. The development in Eden's thinking which Bentham admired has already been examined in chapter one, for the principal ideas found in Eden's legislation of 1776 were largely restated here, but with much additional influence from Jonas Hanway and especially John Howard.¹⁰⁸ The scheme of penitential imprisonment outlined in the bill of 1778 gained considerable support as it was circulated privately for consultation, but although the bill was passed as the Penitentiary Act in 1779, and has been rightly identified as a milestone in the development of penal theory, it was by no means universally applauded and Eden had to work hard to get the bill through parliament.¹⁰⁹ It is worth repeating that the main

¹⁰⁷ Ibid. 114. This paragraph also adds weight to the suggestion that Catherine the Great had read and approved of Eden's Principles of Penal Law. See Ch. 1 above.

¹⁰⁸ The Hard-Labour, or Penitentiary, Bill was drawn up by Eden with assistance from Blackstone, Howard, Sir Richard Sutton, Sir Charles Bunbury and Sir Gilbert Elliot. See Bolton, 'William Eden and the Convicts', 38-40.

¹⁰⁹ See ibid. 39-40. Radzinowicz describes the Penitentiary Act, 19 Geo. 3, c. 74, as 'one of the most important laws in the history of the prison system', English Criminal law, 444 n. Eden's plans for the extension of imprisonment were attacked both in 1776 and 1778 by those concerned that widespread imprisonment would serve to encourage greater criminality. For example see Sir John Fielding's letter to Eden of 1776: 'I begin to fear that collecting the Rogues of different Counties into one Ship may instead of begetting Reformation occasion Friendships and Connexions which would be cemented by their fellow-sufferings and make them unite when discharged', BL Add. MSS 34413, fo. 20. For Beattie's discussion of a general uncertainty over imprisonment as

responsibility for the drafting of the bill went to William Eden, with great assistance certainly coming from John Howard, two men ardently committed to reform of the penal system.¹¹⁰ The approach of a more conservative figure can be seen in the form of William Blackstone, who also assisted but appears to have had reservations about imprisonment, regarding it only as an interesting experiment.¹¹¹ But Eden's theory of corporal leniency when attached to Howard's practical arrangements for prison reform produced one of the most important developments in the history of the English penal theory. It has been well described how the penitentiary was designed to bring together lenient punishment with reformatory hard labour, by,

... a regime that would bring them to a sense of shame and remorse so that they might be reclaimed and remade in the image of the men whose institutions these were, and go back into society as productive and honest citizens.¹¹²

There are two reasons for Bentham's considerable approval of Eden's draught of 1778, which he described as

a valuable punishment see, Crime and the Courts, 567-8.

¹¹⁰ Sean McConville mistakenly identifies Blackstone as the main drafter of the Penitentiary Act in A History of English Prison Administration, 1750-1877, 108.

¹¹¹ See Radzinowicz, 347 n, and 380. Although Blackstone did say of penitential imprisonment, 'if the plan be properly executed, there is reason to hope that such a reformation may be effected... and such a gradual scale of punishment be affixed to all gradations of guilt, as may in time supersede the necessity of punishment, except for very atrocious crimes.' Commentaries, iv. 372.

¹¹² Beattie, Crime and the Courts, 575.

'masterly and instructive'.¹¹³ Firstly, as mentioned, Bentham saw an opportunity to publicise his own penal theory which was suited in several respects to the methods suggested by the bill; but perhaps of greater interest to Bentham was the fact that Eden's bill amounted to a substantial attack on traditional arrangements. The self-congratulatory belief that all was well with the English legal and penal system had long been supported by writers who overemphasised the balanced and liberal nature of the English constitution and English society.¹¹⁴ There can be little doubt that Bentham regarded Eden's bill as the beginnings of a long overdue attempt to undermine some of the conventional, decaying penal practices of England, and in the process prepare the way for a fully censorial approach to English politics and its institutions. As he said in his own Preface to A View of the Hard-Labour Bill:

Had custom left him [Eden] at liberty to follow the dictates of his own intelligence, little or nothing, I suppose, would have been left to any one else to add to it on the score of perspicuity: if... it be reasonable to judge what he could have done, from what he has done... He thought, I suppose... that one plan of reformation was enough to proceed upon at once. On the present occasion, his business was to reform a part of the system of punishment adopted by our legislation; not to go about reforming the legislative style.¹¹⁵

However, no matter how much Bentham regarded Eden's

¹¹³ Bowring, iv. 3.

¹¹⁴ This approach was particularly reliant on the favourable analysis of the English constitution found in the continental theories of both Montesquieu and Beccaria.

¹¹⁵ 'Preface to A View To the Hard-Labour Bill', Bowring, iv. 4.

Observations and bill as a welcome and overdue attack on the English system, in terms of penal practice, Bentham certainly found obvious advantages with, 'solitary confinement... combined with labour'.¹¹⁶ If, then, he regarded this as an improvement on the punishment of transportation his interest in imprisonment with labour must now be explained.

ii) Imprisonment at Hard Labour

In his commentary on Eden's draught of the Hard-Labour Bill Bentham explicitly referred to the benefits of imprisonment with labour, and though it must be recognised that in 1778 Bentham was still a clear supporter of corporal punishment, he does appear to have thought that imprisonment could fulfil many of the requirements of his newly developed theory of punishment. The specific elements deemed necessary for an effective punishment will be examined in a later chapter,¹¹⁷ but several points can be mentioned here in reference to the manner in which Bentham was able to support, and gain fresh impetus from, Eden's bill.

The first advantages Bentham saw with the suggested form of imprisonment over transportation was that imprisonment could be used to regulate more closely the application of pain. Pain provided by imprisonment was also possible to be remitted if necessary. Both factors

¹¹⁶ Ibid. 3.

¹¹⁷ See Ch. 6 below.

were important but quantification was of prime concern for Bentham's theory that the infliction of pain could be calculated. Bentham introduced the idea that the labour-houses offered a superior 'divisibility' of punishment compared with transportation. He argued that the quantity of punishment was capable of being proportioned 'with greater nicety, to the different degrees of malignity in different offences'.¹¹⁸ The concept of 'malignity' directly recalled Eden's discussion of malignity controlling the severity of punishment and indicates the level to which Bentham was participating in a communal debate. Bentham explained that whereas imprisonment was divisible in point of variability, equability and commensurability transportation could only be divisible in point of variability.¹¹⁹

Bentham agreed with Eden's considerations that transportation was 'insufficient for the purposes of example and reformation' and, in using his own theory to identify specific reasons for this insufficiency, he said of transportation, 'it had a multitude of bad properties; and it had no good ones, but what derived from servitude'.¹²⁰ In what he described as 'a slight immethodical sketch', Bentham went on to list the major

¹¹⁸ Bowring, iv. 31.

¹¹⁹ Bentham emphasised that transportation was in general only prescribed for terms of seven or fourteen years. He suggested that imprisonment could be allocated for any period, and indicated that terms of even less than a year may also be used for lesser crimes. *Ibid.* 31-2.

¹²⁰ *Ibid.* 6.

deficiencies of transportation; these were that as a punishment it was essentially unequal, unexemplary and unfrugal.¹²¹

Bentham's analysis, using the principles of his own theory, therefore confirmed the superiority of imprisonment at hard-labour over transportation as a form of punishment. And with many suggestions from John Howard, whom Bentham particularly admired, also being incorporated into the draught there is little wonder that Bentham approved of the bill. It should be noted that the imprisonment envisaged was solitary confinement. Janet Semple has shown how Bentham was again part of contemporary debate by his firm support, in 1778, for this particular form of punishment.¹²² It is surely not the case, however, that Bentham approved of solitary confinement for its effect of opening the offender's conscience to reflect on the sinful ways that had brought him to punishment, as was the case with Hanway and Howard. The reformatory reflection deemed valuable in Bentham's view of solitary was to facilitate an improvement in the calculation of the individual, once separated from association with other criminals. The experience of pain of deprivation was an encouragement to change their behaviour in order to avoid such experiences in the future. Prevention of 'particular' criminal behaviour depended, for Bentham, on corrections in calculations of

¹²¹ Ibid. 6-7.

¹²² Semple, Bentham's Prison, 40.

interest, not on the encouragement of penitence or remorse. Nevertheless, the concept of single confinement of inmates as proposed by Eden, on Howard's recommendation, was immediately suitable to Bentham's theory and clearly influenced its development during the late 1770s and early 1780s.¹²³

A dramatic way in which Bentham's theory was influenced by Eden's bill is shown by the manner in which he adopted the specific idea of a junction between the interest and duty of those implementing penal policy. It was suggested that the pay of the supervisors be linked to the satisfactory care of inmates in the new penitentiaries to protect against abuse. This theory was to have a profound effect on the future development of Bentham's penal theory. In effect, by extending this theory Bentham visualised a situation whereby imprisonment, and the opportunity it offered for control and reform of individual habits, could be seen as almost the only punishment necessary for more serious offences.¹²⁴ The control would not only be on those confined but also on their confiners. With this concept, connecting interest with duty, Bentham perceived how a penal theory could be enacted by assuring the duty of the implementors of the theory. Bentham's attraction to Eden's suggestion is

¹²³ However, Bentham abandoned his support for solitary confinement when its disastrous effects quickly became known. See Semple, Bentham's Prison, 78 ff, and 130.

¹²⁴ See 'Panopticon', Bowring, iv. 39 ff.

reflected in his statement that:

It is by strokes like these that genius and penetration distinguish themselves from shallowness and empiricism. The means that are employed to connect the obvious interest of him whose conduct is in question, with his duty, are what every law has to depend on for its execution.¹²⁵

Eden originally expressed this principle simply as a means of ensuring that the governor perform his duty.¹²⁶ Bentham however, was so taken with the virtue of this concept that he immediately extended it, and drew it into his own theory, saying, that if this principle was good for the governors it could also be usefully applied to the prisoners. We therefore find Bentham introducing a theory of reward as a complement to that of punishment, for he established that rewards are likely to be more effective in connecting interest with duty than are punishments. Considering the reformatory aspect of forced labour Bentham says:

To extract, therefore, all the labour that can be got from him, it is necessary to apply reward in aid of punishment; and not only to punish him for falling short of the apparent measure of his ability, but to reward him for exceeding it. Thus it is, that the course which recommends itself to *sentiment*, as the most humane, approves itself to *reason* as the most useful.¹²⁷

Surely, we see here Bentham reconciling claims for principles of humanity and compassion, found in Eden's thought, with his own system. The concept of rewarding convicted offenders seems remarkable for a theorist to

¹²⁵ Bowring, iv. 12.

¹²⁶ Ibid. 12, sect. xxii.

¹²⁷ Ibid. 12.

express who held that the purpose of punishment was to outweigh with pain the pleasurable profit of an offence. Yet this is precisely what Bentham suggested when he said 'it might be... useful... if the convicts themselves were to be allowed some profit, in proportion to the produce of their own labour'.¹²⁸ Bentham justified this suggestion on the grounds that such a provision would have the benefit of increasing the welfare of the public at large by making the prisoners' labour more productive, by increasing the happiness of the prisoners themselves, and also, presumably, by reinforcing the morals of the convicts with an improved habit of directed industry.¹²⁹ The use of this concept of a created junction between duty and interest, found in the work of Eden, therefore gave Bentham fresh inspiration for the further development of his whole theory of jurisprudence.¹³⁰

iii) Conclusion: The Influence of Eden on Bentham

It seems clear, then, that Eden gave Bentham considerable assistance in the development of his own model of imprisonment as an appropriate form of punishment. Yet, although the second Hard-Labour bill played a significant role in the development of the idea

¹²⁸ Ibid. 12-13.

¹²⁹ Ibid. 12.

¹³⁰ Bentham benefitted from Eden's use of the idea of an artificial identification of interests, but this does not imply that the concept originated with Eden. Earlier presentations of the principle are given in the thought of Hobbes, Hume and Helvétius.

of imprisonment as an appropriate punishment, reservations remain concerning the degree to which Eden can be said to have influenced the penal theory of Bentham.¹³¹

It can certainly be argued that Eden's concentration on moderation in punishment, as a protection for the security and political liberty of the citizen within the state, could not fail to have been appreciated by Bentham, as it drew so strongly on the thought of Montesquieu and Beccaria - both of whom Bentham acknowledged as predecessors in his own work. And, the points of similarity in their theories examined earlier in this chapter are also important.¹³² But although various common lines of legislative reform can be established does it follow that such similarities are anything other than simple coincidences?

Eden's demand for leniency as a principle was obviously not compatible with Bentham's system, as established in 1777, where a pursuit of the greatest happiness was the general guide. Nevertheless, by emphasising leniency to such a degree Eden must be seen to indicate a new direction for penal theory which demanded

¹³¹ Without Eden's contribution to outlining a theory of national imprisonment Bentham may not, perhaps, have developed his central reliance on 'imprisonment with hard labour' as the core of his Panopticon prison scheme.

¹³² It was shown they agreed on reduction in severity, emphasis on individual psychology, the socially divisive nature of existing law, the need for consistency, certainty and the role of judges.

more than simple consolidation.¹³³ With Eden's analysis of punishment eventually coming to form the centre of official proposals for revision of the penal code, he led the way in determining a newly specified social and legal sphere which Bentham was to enlarge on significantly. The law could not continue to impose unrestrained and increasing severities in the name of social security. In Eden's work care of the citizen body, not the government, re-emerged as the purpose of legislation.

In addition, Eden differed from writers such as Hanway, Howard and Blackstone who frequently conceived of the criminal law as the defender of morality and religion.¹³⁴ Though a religious element was undoubtedly included in Eden's thinking it was only as provider of a natural, human instinct for compassion, not as a definer of moral norms that could delineate sinful behaviour. It was a clarification of the validity of the legal force of society that Eden sought rather than a reinvigoration of religious conformity. With this perspective in mind it is understandable that Bentham did not confront Eden's work as he did Blackstone's. For both Eden and Bentham gross severity did not equate with competent deterrence. The levels of severity which they believed useful differed, but this is not important. What is crucial is that

¹³³ Lieberman suggests that Eden was no more than another reformer who demanded Baconian consolidation. See Province of Legislation, 199-205.

¹³⁴ This also often took the form of a protection of the state establishment.

Bentham appreciated the value of Eden's concentration on leniency, and was aware of the humanist interest this represented. Bentham went further than Eden in some cases,¹³⁵ and clearly took bolder steps in his attack on the edifice of English common law. With his forceful assertions of the accuracy of his own method Bentham, typically, allowed for few compromises. Yet it is important to remember that he also moved with prevailing opinion, relying upon the thinking of others before making his own contribution.¹³⁶ This was particularly clear during 1778, when he entered public debate and drew practical conclusions from his theory - and when his temporary reliance on William Eden became most apparent.¹³⁷

¹³⁵ For instance, Bentham's desire to see reductions in severity led him to demand far greater restrictions on the use of capital punishment than is found in Eden's Principles. See UC cxli. 90.

¹³⁶ This Bentham explains himself when recalling the influence of Beccaria and Helvétius. He also drew on the thought of many other thinkers including: Montesquieu, Barrington, Hume, Hartley, Priestley, D'Alembert, Harris, DeLolme, Condillac and Adam Smith. See UC xxvii. 144, 148, 173.

For Bentham's intellectual debts on the notion of the greatest happiness of the greatest number see the references to Cumberland, Hutcheson, Maupertuis, Hume and others in, R. Shackleton, 'The Greatest happiness of the greatest number: the history of Bentham's phrase', Studies On Voltaire and the Eighteenth Century, 90 (1972), 1461-82; and Radzinowicz, English Criminal Law, 378 n.

¹³⁷ On the issue of solitary confinement, for instance, as mentioned above, Bentham went along with the general intellectual currents for reform produced by men such as Denne, Howard and Eden in favour of endorsing the benefits of solitary confinement. As opinion changed, Bentham also changed, deciding that solitary confinement was not productive of such great benefit after all.

PART II

THE PRINCIPAL ELEMENTS

OF BENTHAM'S THEORY OF PUNISHMENT

CHAPTER THREE

BENTHAM'S CONCEPTION OF PUNITIVE PAIN

In his attempt to elicit a more scientific approach to punishment Bentham made a substantial reassessment of both the nature of the pain of punishment and the sources from which it could be said to originate. Only with an awareness of his perception of these topics, and their relevance to social motivation, can one fully understand the value and extent of influence Bentham assigned to the political sanction within his system of codification.¹

A. Pain as Punishment

Bentham differed considerably from his contemporaries, not only with his expression of legal

¹ Bentham made his first attempt at constructing a Penal Code in the period 1777-80. See UC lxiii, lxxii, xcvi; IPML (CW), p. xxxviii; and Of Laws In General, ed. H.L.A. Hart (London, 1970) (CW), 305. The code was never apparently published. For his second attempt at drafting a Penal Code between 1826-31, see UC lxiv, lxv, lxvii, lxviii. Only a 'Table of Contents' of this code was published, as an Appendix to the Constitutional Code; for the use of all nations and all governments professing Liberal pinions, Vol. i (London, 1830). The division of offences into five classes in IPML (Ch. 14) compares with the published 'Table of Contents' of 1830. The establishment of the nature and seriousness of offences in the penal codes via an emphasis on distributions of pain amongst single or multiple, known or unknown, victims clearly reflects an essential element within his theory of punishment.

punishment as the embodiment of an unquestionable evil,² but also with a broader use of the term 'punishment' itself. Indeed, at first sight it seems that Bentham was capable of extending the term 'punishment' to every conceivable kind of pain. On closer inspection, however, it is clear that Bentham did make a distinction between pains which could correctly be termed punishments and those which could not.

Giving the example of an instance in which a man's goods were destroyed by fire he illustrated how a pain of 'calamity' could be distinguished from a pain of 'punishment'. In the same text he similarly provided a clear statement of his view that the pain of punishment must come from one of four sources, or sanctions. Thus, he explained:

If this [the fire] happened to him by what is called an accident, it was a *calamity*: if by reason of his own imprudence (for instance, from his neglecting to put his candle out) it may be styled a punishment of the *physical sanction*: if it happened to him by the sentence of the political magistrate, a punishment belonging to the *political sanction*; that is, what is commonly called a *punishment*: if for want of any assistance which his *neighbour* withheld from him out of some dislike to his *moral character*, a punishment

² See the famous quote on punishment as an evil at, IPML (CW), 158; and UC cxliii. 37-8, lxviii. 39; for Richard Smith's version see, Rationale, 1. Bentham, followed Hobbes in describing punishment as an evil, see Leviathan, 202: 'A punishment, is an evil inflicted by public authority, on him that hath done, or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience'. This view of punishment stood in contrast to the general view, particularly of practising magistrates, that since punishment satisfied the love of symmetry and the desire for vengeance it could be regarded as a good, see Halévy, Philosophic Radicalism, 55.

of the moral sanction: if by an immediate act of God's displeasure, manifested on account of some sin committed by him, or through any distraction of mind, occasioned by the dread of such displeasure, a punishment of the religious sanction.³

The first point that can be noted is Bentham's obvious awareness that he was stretching the definition of punishment beyond what was 'commonly called a punishment'.⁴ Conventionally, only a pain of the political, or legal, sanction was recognised to be a punishment;⁵ so how did Bentham justify regarding a substantially wider range of sources as also providing the pain of punishment?

Punishment was, for Bentham, a particular category of pain, produced not just as the result of some individual action, but of an action that could be labelled an 'offence'.⁶ In Bentham's words, 'the idea of punishment presupposes the idea of offence: punishment, as such, not being inflicted but in consideration of offence'.⁷ Any description of pain as a 'punishment', or threat of 'punishment', thus relied on its being a response from

³ IPML (CW), 36.

⁴ Ibid. See above quote, line 8.

⁵ This seems true for Bentham's eighteenth-century contemporaries, though see Hobbes, Leviathan, 204, for a conception of excessive pain applied as punishment when, in fact, it ought only to be described as harm because of its excess.

⁶ The actual pain felt was the same as any other pain: pain was pain for Bentham regardless of its source. See, IPML (CW), 36, where he suggested pains 'differ not... in kind'.

⁷ Ibid. 4.

some authority operating to inflict pain when a 'rule' was broken by an offending action.⁸ Such a rule might be known or unknown, but always it had to be established by one of the four sanctions. From Bentham's hedonistic theory - i.e. the avoidance of pain or the pursuit of pleasure - all that was required of individuals was to understand the rules that had been established. This understanding could be gained only by recognizing those actions which have resulted in punishment, from whichever sanction, and by being aware that such actions could be avoided in future. There was no moral distinction between punishment supplied from the physical, religious, moral or political sanctions; if pain came from one of these sources then it was 'punishment'.⁹ The essential key in identifying pain as a punishment was obtained from experience, at first or second hand, of the consequences of certain actions.¹⁰

⁸ Thus, physical pain can be regarded as punishment applied by the authority of nature, religious punishment from the authority of a deity, moral punishment via the authority of a community, and legal punishment on the authority of the law.

⁹ It is interesting to note that, for Bentham, excessive punishment was still punishment. Whilst it may be incorrectly applied, in that it was disproportionate, if such pain was in response to a legal offence then it ought still to be described as punishment. For Hobbes such excessive pain was not punishment, but harm. Cf. Leviathan, 202-4.

¹⁰ It is by experience, and that alone, that the tendency of human conduct, in all its modifications, to give birth to pain and pleasure, is brought to view: it is by reference to experience, and to that standard alone, that the tendency of any such modifications to produce more pleasure than pain, and consequently to be *right* - or more pain than pleasure, and consequently to be *wrong* - is

From Bentham's illustration of the fire given above, for instance, a practical rule could be drawn that if one was not careful with candles then punishment of the physical sanction might be applied and one's house burnt down. In Bentham's understanding, individuals sought to avoid the pain of punishment by taking account of past actions which had resulted in pain, and by planning to avoid similar actions in the future.¹¹ Conventional thinkers who recognised punishment as solely a legal institution, would have been hard pressed to justify such a conception of punishment, for how might an individual be said 'to deserve' to lose his home to fire if he was struck by an accident any more than if he was struck by a calamity?¹² For Bentham, accidental neglect could receive pain which was regarded as punishment (though from nature not from man) since it could be said to be a 'rule' that carelessness with candles sometimes caused the destruction of property; a rule of nature, an offending action and a punishing pain, can thus be discerned. Bentham's theory, can therefore be said to acknowledge the existence of, and apply equally to, natural, man-made and supernatural

made known and demonstrated. 'Rationale of Judicial Evidence', Bowring, vi. 238.

¹¹ Bentham thought this to be only partly true for the existing political sanction, for laws were unclear and their existence often unknown to the offender before an offence was committed.

¹² A 'Calamity' is not a punishment.

systems of punishment.¹³

It became apparent that any pain applied outside a system of rules was not, therefore, a 'punishment' and had to be described as something else, something that could not be protected against by experience of past action - this Bentham referred to, with regard to the physical sanction, as a 'calamity'. Hence a distinction was established between 'pain' as a result of an action, and 'pain of punishment' as the result of an action that could be described as an offence.

By defining the sources of motivation in such a manner Bentham appears to have been looking for systems which could be incorporated into the pursuit of the greatest happiness principle. He sought a better understanding, and, from this, a greater potential for control, of the entire range of pain-threatening, motivating forces which were at play in every society. He noted that the sanctions were sources of pleasure as well as pain, and it was this encompassing dual provision by which men were said to be bound to certain modes of conduct; but it was the threat of pain that was deemed always to be dominant in directing human action.¹⁴

¹³ Bentham's attachment to systems was considerable: 'I write from System: it is the fashion to hate systems', UC xxvii. 107.

¹⁴ 'A sanction then is a source of obligatory powers or motives: that is, of pains and pleasures; which, according as they are connected with such or such modes of conduct, operate, and are indeed the only things which can operate, as motives'. See IPML (CW), 34-5 n. On pleasure as the absence of pain see, *ibid.* 34, '... pleasure, and what comes to the same thing, immunity from pain'. On the

B. The Four Sources of Punishment

The development of Bentham's understanding of the motivating sanctions has been widely documented. From his early A Fragment on Government and A Comment on the Commentaries three sanctions, the political,¹⁵ moral and religious, are found discussed. Later, in IPML, a fourth sanction (the physical) was identified;¹⁶ and finally, in the unfinished Deontology of 1814, the role of 'sympathy' was given a new classification as a fifth independent sanction:¹⁷

Sympathetic sanction: the force of sympathy, acting in the character of a tutelary sanction, tending to the prevention of meditated mischief. In no state of society... can that social affection be wholly without place or wholly without the power of exercising... its influence on human conduct.¹⁸

As Bentham's ideas matured, his perception of the various

few useful applications for reward within legislation see, *ibid.* 285 n.

¹⁵ The political sanction incorporates the legal sanction; the moral sanction is synonymous with the popular sanction. See Deontology (CW), 151-152 n.

¹⁶ IPML (CW), 34.

¹⁷ See Deontology, Together with A Table of the Springs of Action and Article on Utilitarianism, ed. A. Goldworth, (Oxford, 1983) (CW), pp. xxi, 183, 152, 197, and 201-4. Bentham made this further distinction when he came to regard the social or sympathetic feelings aroused by the consideration of pleasure or pain experienced, or about to be experienced, by another person as being fundamentally distinct from pleasures and pains of a self-regarding kind. He concluded that the source of such feelings ought to be classified separately.

For a discussion of the concept of sympathy in the eighteenth century see, F.L. Van Holthoorn, 'Adam Smith and David Hume: with Sympathy', Utilitas, 5 (1993), 35-48.

¹⁸ Deontology (CW), 201.

sources of motivation became more comprehensive, whilst his fundamental position regarding the origins of motivation appears to have changed very little. For although the addition of a fifth sanction presented an increasingly complicated range of sources from which punishment could be said to come,¹⁹ the essence of Bentham's punishment thinking was persistently based on the dominance of self-regarding motives.²⁰ The early position taken in IPML must therefore be examined. What has yet to be explored is the relationship between the motivating pains he listed, and the pain of 'punishment' they were said to incorporate, in relation to his theory of punishment. By reference to the manuscripts it can be shown that Bentham gave particular attention to two of the sanctions, the physical and the moral, as holding considerable potential for support of the prescribed aims of the political.²¹

¹⁹ In a further refinement Bentham also suggested, circa 1821, the addition of two more sanctions, the antipathetic, and the retributive. See *ibid.* p. xxi, n. 4.

²⁰ The strength of the sanction of sympathy was open to wide variation: 'In some states of society it is indeed in the whole extremely weak, and in every state the strength of it is susceptible of great variation as between individual and individual'. {deontology 201}.

Throughout his life Bentham continued to hold that the force of sympathy was not as strong as self-regard, since, '... if, in the general tenour of human conduct, self-regard were not prevalent over sympathy, - even over sympathy for all others put together, - no such species as the human could have existence.' See Constitutional Code, vol. i, Ch. VI, sect. 31, art. 12, (CW), p. 119.

²¹ Attention has been drawn to the importance of the moral sanction since the publication of Constitutional Code (CW), i, ed. F. Rosen and J.H. Burns. The role of public opinion is examined in Rosen, Representative

i) *The Physical Sanction*

Scattered through his writings are numerous references to the power of the physical sanction. It was regarded as the root of all sanctions:

Of these four sanctions the physical is altogether, we may observe, the ground-work of the political and the moral: so is it also of the religious, in as far as the latter bears relation to the present life. It is included in each of those other three. This may operate in any case, (that is, any of the pains or pleasures belonging to it may operate) independently of *them*: none of *them* can operate but by means of this.²²

The physical sanction was none other than 'the powers of nature' that underpinned all other worldly sanctions, including the sanction of sympathy which was still included, in IPML, as part of the physical sanction. Indeed, in the light of his assertion, that all pain was an evil, it can be said that when discussing the pain of the physical sanction Bentham was talking of the 'evils' of nature. He concluded that this far-reaching sanction formed a vital support to the source of pain in which he was initially most interested in re-ordering, that of the political sanction.

The physical sanction could operate without reference to the other sanctions; but it was most 'useful' in Bentham's view when integrated within the political sanction. We are therefore brought to a point whereby a motive produced by nature, by the physical sanction (i.e.

Democracy, Ch. 2, and briefly by Harrison, Bentham, 179-81.

²² IPML (CW), 37. Bentham's parenthesis.

the fear of some sensual pain), urged individuals not only to seek their own pleasure, or avoid pain, but also, to obey restrictions imposed by the political sanction. Failure to obey such legal restrictions would expose them to the threat of physical pain from the political sanction. In other words, the political sanction referred to the physical sanction in order to make its threat meaningful to society's members. So Bentham's understanding of the law was thereby firmly secured to a hedonistic base, suggesting that a pre-requisite psychological desire of individuals to avoid the certain pain of the physical sanction was needed for the political sanction to be effective. Individuals were said to refer to the physical sanction when considering the motives of the political - they avoided physical pain by avoiding legal punishment.

ii) The Religious Sanction

The religious sanction was dealt with briefly. Being the producer of motives formed by the hope of divine reward or the fear of divine punishment the religious sanction was seen as a threat the execution of which was restricted to some future life, beyond the known natural world.²³ Bentham placed little reliance on this sanction, for although realizing that in certain individuals it was clearly an effective source of motivation he found it difficult to give an acceptable account of the 'dictates

²³ Ibid. 36 n.

of religion'.²⁴ With his desire to establish an anchor of experience in every branch of science, and especially in the 'science of divinity', Bentham's scientific framework produced a highly sceptical account of the value of punishment from this source. Consequently, he dismissed the motivation of piety as 'either reducible to self-interest or founded on illusion'.²⁵ The effects of such illusions were unpredictable, and consequently Bentham believed, as did Helvétius, that the sanction of religion was too volatile to be used as a tool in the prevention of crime.²⁶ Bentham concluded that religious motives were infinitely variable, and this served only to underline the importance he attached to 'consistency' for the efficacy of the various sanctions in general.²⁷

²⁴ Ibid. 119. Though the religious sanction could occasionally prove to be the most powerful motivator of all, producing dangerous fanaticism: 'Fanaticism never sleeps: it is never glutted: it is never stopped by philanthropy; for it makes a merit of trampling on philanthropy: it is never stopped by conscience; for it has pressed conscience into its service. Avarice, lust, and vengeance, have piety, benevolence, honour; fanaticism has nothing to oppose it'. See IPML (CW), 156 n.

²⁵ See J.E. Crimmins, Secular Utilitarianism, (Oxford, 1990), 273.

²⁶ For an illustration of how Helvétius was not prepared to follow Voltaire who 'felt that, if his valet and his wife believed in heaven and hell, he would be "less often robbed, and less often cuckolded"', see D.W. Smith, 'Helvétius and the Problems of Utilitarianism', Utilitas, 5 (1993), 275-89.

²⁷ Compare with Burke's approach where religion was defined as a necessary prejudice and provider of moral opinion. See Halévy, Philosophic Radicalism, 159.

iii) The Moral Sanction and its Potential

When considering the consistency in the application of punishment from any of the sanctions, Bentham constantly assessed the pain from what he termed the 'moral', or popular, sanction to be the most accurately applied. The term 'moral' was used in reference only to the general public opinion of those acquainted with an offender and his behaviour.²⁸ It operated, as he said,

... at the hands of such chance persons in the community, as the party in question may happen in the course of his life to have concerns with.²⁹

Expressed in such terms this represents a pervasive motivating force, yet it was made quite plain that the use of the term 'moral' did not indicate any belief in the existence of an absolute, ethically 'right' form of behaviour as represented by the force of popular

²⁸ For a discussion of the rise in importance of public opinion from early in the eighteenth century see, J.A.W. Gunn, 'Opinion in Eighteenth-Century Thought: What did the Concept Purport to Explain?', *Utilitas*, 5 (1993), 17-33, and Beyond Liberty and Property: The Process of Self-Recognition in Eighteenth-Century Political Thought, (Kingston, 1983).

²⁹ IPML (CW), 35 n. The moral sanction was alternatively termed 'popular', but Bentham disliked the term *public opinion*, or in French *opinion publique*. The latter was, he said, 'unhappy and inexpressive; since if *opinion* is material, it is only in virtue of the influence it exercises over action through the medium of the affections and the will'. *Ibid.* It is difficult to see Bentham's early objection to 'public opinion' when he seemed willing to accept 'popular opinion', though the implication is that he required a reference to action. His later use of the title 'Public Opinion Tribunal' perhaps indicates a significant change in standing for the value of the moral sanction.

opinion.³⁰ Acknowledging that a collective opinion approved of certain actions and disapproved of others did not imply an inevitable equation between the desires of public opinion and the principle of utility, which defined solely what ought to be done for the greatest happiness of those in society. The argument that any moral code could be founded on this moral sanction was quickly refuted in the Rationale. It was accepted that the fundamental concept of the moral sanction might be represented by a 'whole legion of fictitious entities', among which, 'reputation, honour, character, good name, dishonour, shame, infamy,' were mentioned; but this did not, it was stressed, form any justification for any abstract morality or any law of nature.³¹ The most that could be said was that the created 'fictitious set of rules' had sometimes led moralists to believe, mistakenly, that this was the case. Popular opinion and hence popular morality could not be ignored, but similarly, neither could it be taken as a moral guide, except in circumstances where it coincided with the happiness of the greatest number.

Punishments from the moral sanction were represented in the Rationale as being of a class that, '...admit of no distinctions', and where the individual suffered by,
... losing a part of that share which he would

³⁰ Nevertheless, it will be shown below that Bentham saw the moral sanction as frequently coinciding with the greatest happiness principle.

³¹ Rationale, 213-4.

otherwise possess of the esteem or love of such members of the community as the several incidents of his life may lead him to have to do with.³²

The pain was said to be produced in two forms: firstly, several 'contingent evils' were seen to befall the offender as a consequence of the general ill-will imposed, but secondly, and of more importance, the offender was said to experience,

... immediate pain or anxiety, the painful sense of shame, which is grounded on the confused apprehension of the unliquidated assemblage of evils.³³

This second form of pain was termed the 'characteristic evil' of the moral sanction and could not be produced by the political sanction except in as far as it was able to 'gain an influence over the moral'.³⁴ Thus, although the moral sanction was a powerful one there was no 'settled or concerted rule' to which it could be related and, in Bentham's view, it had to take second place and be utilized, if possible, by the political sanction.³⁵

Yet as indeterminate as the moral sanction was said to be, there was no doubt about its effectiveness in matching its punishment to the offence. In a comparison of the pain from the political and moral sanctions Bentham said:

Punishment as applied by the legal tribunals - punishment applied under the name of punishment -

³² Ibid. 205.

³³ Ibid. 206. This assemblage of evils can take any form of pain, from resentment to death itself.

³⁴ Ibid. 207.

³⁵ IPML (CW), 35.

attaches to such evil acts alone the mischief of which has place as well in a shape sufficiently determinate, as in a quantity sufficiently great, to warrant the application of evil in the shape and in the quantity in which it is so denominated. Punishment as applied by the Public Opinion [Tribunal], applied as it is in effect without the name, attaches itself to mischief in all shapes in which the hand of man can, without special and sufficient justification, be instrumental to the production of it.³⁶

In other words, the moral sanction was more consistent in its infliction of pain in that it attached to, and punished, every offence it discovered, whereas punishment of the political sanction was restricted only to determinate offences brought before the magistrate, and was further said to be continually in danger of running to excess.³⁷ In an unpublished passage Bentham was even more explicit, saying:

This mode of punishment is susceptible of a vast number of degrees: and it is capable of being adjusted or rather it in great measure adjusts itself with unexampled accuracy to the demand for punishment as constituted by the quantity and quality of the offence.³⁸

It seems, then, that the moral sanction was regarded as extremely accurate. However, it was only valuable in Bentham's terms, 'in so far as its force is employed in augmentation of the happiness of the people', for any punishment that was applied against behaviour that accorded with the greatest happiness was necessarily

³⁶ First Principles Preparatory to Constitutional Code, ed. T.P. Schofield (Oxford, 1989) (CW), 291.

³⁷ Ibid. 291.

³⁸ UC lxviii. 287.

unjust.³⁹ In his mature writings of the Constitutional Code Bentham regarded public opinion as 'more often than not' coinciding with the greatest happiness principle, but even on such occasions he was keen for the political sanction also to be used.⁴⁰ In such circumstances the moral sanction was said to strengthen the political since by punishing offences which it discovered via its own action it might also uncover civil or criminal offences. In other words, actions not acceptable to popular opinion would, on becoming known to popular opinion, attract the pain of disapproval from the moral sanction - and with this came publicity. Once publicity was applied the offensive action lay exposed to the view of officers and magistrates, who then operated the political sanction, and additional legal punishment might well follow. The moral, or popular, sanction hence improved the efficiency of the political sanction by revealing offences.⁴¹

As Bentham's thinking on reform developed, the moral sanction adopted a raised profile, eventually finding quasi-judicial expression as the 'Public Opinion Tribunal' in an attempt to provide a better application of the moral sanction.⁴² This institution was again regarded as:

³⁹ First Principles (CW), 291.

⁴⁰ See Rosen, Representative Democracy, 24-8.

⁴¹ For the use of the moral sanction in exposing offences to the political see, First Principles (CW), 291-2.

⁴² Ultimately, the Public Opinion Tribunal ought to support the sanction of the law by encouraging a 'sort of Moral Code', Constitutional Code (CW), 134 n. This 'Moral

... a fictitious entity... the imaginary tribunal or judiciary by which the punishments and rewards of which the popular or moral sanction is composed are applied.⁴³

Yet although fictitious, this tribunal was considered to be comprised of all individuals who made up the state along with interested parties from other communities.⁴⁴ With such a composition it was deemed to be extremely influential, urging individuals to do what was best for their reputation, and eventually, in the full expression of Bentham's democratic thought, forming a primary check on the sinister or pernicious misuse of political power.⁴⁵

Bentham's understanding of man as a social creature, and his belief in the existence of the moral sanction prior to the existence of political society, encouraged his progressively more precise accommodation of this primary, socially motivating force.⁴⁶ Indeed, it was

Code' aimed to promote the sincerity of officials.

⁴³ First Principles (CW), 283.

⁴⁴ Constitutional Code (CW), 35.

⁴⁵ Although it has been said that 'in the Code Bentham does not explain how the sub-committees of the Public Opinion Tribunal represent or speak for the public interest' (Rosen, Representative Democracy, 28) see Securities against Misrule and Other Constitutional Writings for Tripoli and Greece, ed. T.P Schofield (Oxford, 1990), 25-9, where Bentham explained, 'it is by publicity that the Public Opinion Tribunal does whatsoever it does'.

⁴⁶ See Rationale, 214, for the existence of an uncontrolled moral sanction 'before the formation of political society'. It is not yet known whether this adequately represents Bentham's view, but see Deontology, 201, where he suggested that there were 'different degrees of the influence with which the several sanctions operate in different stages in the career of civilization'. The implication was that sanctions existed throughout the

Bentham's belief that as communities became increasingly more 'civilized' the strength of the moral sanction grew as men became ever more sensitive to the threatened loss of the multiplying sources of pleasure that civilized society had to offer.⁴⁷

The improved complexity and condition of social structures in developed communities were seen to aid the force of the moral sanction in distinct ways. Through the ease of communication, and especially through the power of the press, individuals were seen to fall more completely under the influence of the moral sanction.⁴⁸ The potential for pain from this source in 'civilized' communities did not appear to have been in question:

Dependent as men in a state of society are upon one another, the punishment derived from the source in question... may, and, indeed, frequently does rise to a tremendous height. It admits of no evasion: it comes upon a man from all quarters: he can see no end to its duration, nor limits to its effects.⁴⁹

development of civilisation. That is, in pre-political society whilst there could have been no political sanction, the moral sanction was already present. For the development of the moral sanction from the sympathetic, and the sympathetic from the physical, see *ibid*, 204.

⁴⁷ 'The power exercised by the moral sanction varies according to the degree of civilization', Rationale, 221. The tone of this text, revised by both Dumont and Smith, is echoed in the manuscripts where Bentham emphasises the importance of civilization for the functioning of the Public Opinion Tribunal. See UC lxvii. 287 (2 November 1823).

⁴⁸ Rationale, 221.

⁴⁹ *Ibid.* 210. The moral sanction was only said to be of no effect in those of 'callous and brutish nature, if any such there be, in whom all sense of disgrace, and all the foresight of the consequences, is utterly extinguished'. Rationale, 207. See also note 58 below.

The strength of motivation, derived from the moral sanction, was deemed to be of profound importance to the legislator who ought to attempt to harness this substantial social force.⁵⁰ The starting point for the adoption by the political sanction of the moral sanction was based on the understanding that,

... the whole sum of the evils depending upon the moral sanction... is liable in many instances to be brought upon a man by the doom of the political magistrate.⁵¹

Once this principle was established Bentham spent time exploring ways in which the moral sanction could be better adjusted to support the aims of the political.⁵² His main conclusion was that an 'extraordinary nicety' of adjustment could be made by the process of 'recordation of appropriate publicity'.⁵³ He recognised that already this was taking place to some extent, particularly through the

⁵⁰ Ibid. 211, where it is claimed that even the most extreme punishments created by the political sanction could accidentally be equalled by the moral. The moral sanction was termed 'an engine of great power' in the Rationale, and both editors, Dumont and Smith, spent considerable time explaining the need to press the moral sanction into the service of the political. See Rationale, 214-5, and Théorie, Bk. III, chap. 2. It can also be noted that great pleasure was available from the moral sanction: 'These may likewise be called the pleasures of good repute, the pleasures of honour, or the pleasures of the moral sanction'. IPML (CW), 44.

⁵¹ Rationale, 211.

⁵² UC lxviii. 287-289 (1823).

⁵³ UC lxviii. 287, fo. 68. Recordation is defined in the O.E.D. as the action or process of recording or committing to writing. On the importance of reporting for Bentham see, R. Munday, 'Bentham, Bacon and the Movement for the Reform of English Law Reporting', Utilitas, 4 (1992), 299-314.

reporting of legal cases in newspapers, journals and periodicals, but by 1823 he was suggesting something on a much larger scale.

To increase the influence of the moral sanction he recommended the establishment of a simple institution which, if implemented, he predicted would be so effective as to be ridiculed by those ruling with sinister or pernicious interest and seeking to preserve their hidden influence.⁵⁴ Bentham conceived of this institution as a kind of register, 'bearing some such title as that of the Book of Disrepute'.⁵⁵ Explaining that the book could contain any number of chapters, dividing categories and types of offence, Bentham listed the following examples:

1. The Murderer's Book
2. The Manslayer's Book
3. The Perjurer's Book
4. The Swindler's Book
5. The Lying Defamer's Book
6. The Fraudulent Insolvent's Book
- [7.] The Peculator's Book⁵⁶

He stated that any amount of books could be included, and specifying any sort of offence; but he made it quite clear that there were some types of offence for which it would

⁵⁴ '... an institution by much too simple and thence if tried too effectual not to be scoffed at by those whose interest it is that the misdeeds of the ruling and influential few should remain possible for ever unpunished and unrepented'. See, UC lxviii. 287-8.

⁵⁵ This book is not mentioned in any of Bentham's published works or recensions, although it appears to have been a centrepiece of his new ideas for utilizing the power of the moral sanction in the 1820s.

⁵⁶ See UC lxviii. 288. All chapter titles have been capitalized following Bentham's occasional example. The numeral '7' is omitted in the manuscript.

be pointless to list those found guilty. On this point there is some difference between the views expressed by Bentham in the manuscripts and those appearing in later recensions. Bentham plainly regarded the moral sanction as constituting an effective threat only against those of the middle and higher classes of society, by whom he assumed the offences he listed would be committed. In an interesting and important limitation on the spread of the moral sanction he suggested that it would be useless to include classes such as 'the pickpocket's book', or 'the burglarer's book', since men who were guilty of such offences formed a class of malefactors who were,

... commonly below the reach of that species of punishment in regard to which, the Public Opinion Tribunal unites the functions of Executioner and Judge.⁵⁷

These exemptions from the punishment of the moral sanction are not to be found in the work of either Dumont or Smith. Bentham's view in the manuscripts indicated a more complex and sophisticated understanding of the action of the moral sanction, and of the Public Opinion Tribunal in particular, than can be found either in current interpretations or in the work of Bentham's earlier editors.⁵⁸

However, for those guilty offenders that were said to be affected by the moral sanction, the following three

⁵⁷ UC lxviii. 289.

⁵⁸ Compare with note 49 above, where it was doubted that there were any men who are immune to the sense of disgrace applied by punishment of the moral sanction.

courses of action were prescribed. Firstly, when a sentence had been pronounced, a additional clause in the judgement ought to stipulate that the offenders name, age, birthplace, present and past residences, and perhaps also a full designation of parentage, should be entered into the corresponding chapter in the 'Book of Disrepute'. Secondly, the offender's name, with the date, the time, and the place of the convicting judge and court should be published in the Gazette, along with the offence as described in the 'Book of Disrepute'. And finally, the name, offence and date of sentencing should be republished in 'various public receptacles'. Bentham suggested these might include the Court Calendar as well as 'A sort of an Almanack annually published by itself', which, '... might be hung up in churches, Town halls, Courts of Justice etc.'⁵⁹ And finally, in a further emphasis on the status of men whom Bentham regarded as being particularly vulnerable to the moral sanction he wrote:

... an appropriate selection from it [the Almanack] might find an apposite station in the Royal Exchange, the Bank and other such places of resort for the higher classes of commercial men.⁶⁰

It appears Bentham had refined his view of the moral sanction to a considerable degree by 1823, and though he did not give it the comprehensive force one might expect after reading the various interpretations of his editors

⁵⁹ All quotes in this paragraph at, UC lxviii. 289.

⁶⁰ Ibid.

in the Théorie and the Rationale,⁶¹ there is little doubt that he believed the punishment it could provide might be made considerably more effective. With the novel concepts of a 'Book of Disrepute' and an annually published 'Almanack of Offenders', Bentham was seeking to bring a barrage of publicity down upon those convicted. As indeterminate as the pains of the moral sanction were, an offender of the appropriate standing would be exposed to an increased punishment under such a system, and the moral sanction would have become a considerable part of 'the vast system of machinery to which we have given the name of the political sanction'.⁶²

iv) *The Political Sanction*⁶³

Although Bentham came to regard the moral sanction as particularly efficient and underused, in his early work he largely took it for granted that a well-constructed and correctly applied political sanction would be most effective in the pursuit of the greatest happiness of those in society. This could not be said of the other sanctions which were seen to operate free from the control of human rational, predetermined judgement. For the

⁶¹ For the Théorie, see Bk. III, Ch. 2, 'Des peines de la sanction morale'. For the Rationale, see Bk. III, Ch. 2, 'Of Punishments belonging to the Moral Sanction'.

⁶² Rationale, 215.

⁶³ Incorporated into the Penal Code, 12 July 1826. See UC lxviii. 36-78, chapter I, entitled 'Ends'. The political sanction includes the legal sanction. See Deontology, 200.

physical and religious sanctions could not be controlled by men but only recognised and accepted; and even the moral sanction, which was produced by men, could not be shown to develop in any rational way.⁶⁴ The application of pain from the moral sanction, whilst being potentially powerful against those offences it discovered, was both unpredictable and uncertain. The moral sanction was an undesigned source of punishment, its great strength was that it was a natural, social sanction.

For Bentham the political sanction of the law was artificial,⁶⁵ and the punishment from this source was distinguished as a specific balance to mischievous action and its natural consequences. Legal punishment was, he said,

... annexed by political authority to an offensive act, in one instance; in the view of putting a stop to the production of events similar to the obnoxious part of its natural consequences, in other instances.⁶⁶

This was a more technical expression of what Beccaria had already stated:

The purpose of punishment, then, is nothing other than to dissuade the criminal from doing fresh harm to his compatriots and to keep other people from doing the same.⁶⁷

Clearly, Bentham was seeking to form a link between the artificial force of the political sanction and the natural

⁶⁴ The action of the moral sanction could never be determined with certainty.

⁶⁵ See IPML (CW), 157.

⁶⁶ Ibid. 157.

⁶⁷ Beccaria, On Crimes and Punishments, 23.

motivation that generated mischievous activity.

With the political sanction, however, Bentham believed it ought to be possible for its operation to be arranged such that it always accorded with the all-directing principle of the greatest happiness. The purpose of statute law was to increase general social happiness. But the prospect of the pain of legal punishment was never overtly said by Bentham to take precedence over the other sanctions. Any of them, and especially the moral sanction as a conception of the force of popular opinion, was capable of having a particularly powerful effect on certain individuals in certain circumstances.⁶⁸

Legal punishment, conceived of by Bentham as part of the political sanction, was a many faceted construction:

Punishment... is an evil inflicted by lawful authority upon an offender on account of some offence, for the sake of preventing him from continuing or preventing him and others from engaging in future in the like offence. This it may do in any of three ways: by reforming, deterring or disabling.⁶⁹

Although the ends of legal punishment - deterrence, disablement and reformation - remained principally as already defined by others, Bentham's approach was exceptional in that he expressly stated that the evil of punishment 'ought only to be admitted in as far as it

⁶⁸ Depending upon the particular susceptibilities of the individual concerned; this underlines Bentham's understanding of the interplay between the four sanctions and each individual's motivation.

⁶⁹ UC cxliii. 31, Marginal: 'Punishment in general defined'.

promises to exclude some greater evil'.⁷⁰

The political sanction assumed a particularly significant role for Bentham because of its origins in the legislative processes of the state.⁷¹ Unlike punishment from the other sanctions, pain applied by legal means had implications regarding the definition of the nature of the state which sought to impose such punishments. Thus punishment could be defined as 'nothing but Pain inflicted by, or by command of, a superior for... an act done'.⁷² Indeed, Bentham was more explicit in relating punishment to the state, saying, 'Power is created by punishment - the essence of Power over intelligent objects consists in the punishment impending over those who oppose its exercise'.⁷³

All punishments sought to direct people away from some actions, and towards others, yet legal punishment was applied by a state apparatus. Such penalties were regarded as being quite distinct from the punishment attributed to the moral sanction which was applied by members of society amongst themselves, and did not require

⁷⁰ IPML (CW), 158. In a footnote Bentham claimed here he had little to say on the ends of punishment 'which has not been said before'. This can only be taken to refer to the ultimate ends as mentioned, and not to the means of achieving these ends. Definitions of the purpose of punishment can also be found at, Rationale, 2; Théorie, 3-6; and UC lxviii. 36 (24 April 1826).

⁷¹ See his 'Station of Punishment in the Map of Jurisprudence', at UC cxl. 60.

⁷² UC lxix. 74.

⁷³ UC cxix. 91.

assistance from the state.⁷⁴ Bentham went so far as to say that 'the immediate principal end of punishment is to control action'.⁷⁵ This phrase holds connotations of a sinister, dominant, sovereign state engaging in excessive control of a subject population.⁷⁶ Yet from Bentham's writings against the abuse of power, and from his early investigations into the nature of the law, it can be recognised that his concept of control, even at the beginning of his work, emphasised the role of 'influence' as well as 'coercion'.⁷⁷ Legal punishment was not said to operate solely by coercion. The practice of legal restraint might be described as a coercive act, but the ends of deterrence and example were effective principally because of the influence they exerted, and such influence was thought to be more substantial and more important than any originating coercive threat. Thus the use of a restraining physical control was suggested by Bentham as a means of disabling any person who inflicted, or threatened to inflict, more pain than pleasure on the

⁷⁴ Although in attempting to develop the force of the moral sanction via a 'Book of Disrepute', as described above, Bentham appears to have been eroding this distinction, by creating an official apparatus for the enforcement of the moral sanction.

⁷⁵ IPML (CW), 158 n.

⁷⁶ See Kelly, Utilitarianism, 3-5, for an account of those critics who regard Bentham as being primarily concerned with security and the endorsement of coercion.

⁷⁷ The law was said to have the instruments of 'coercion' and 'remuneration' at its disposal, and by using these instruments could only promote happiness by 'influencing actions'. Of Laws in General, 289.

community. Generally, any further control was said to operate on individual behaviour by way of influence, following the single instance of coercive restraint, with the ends of such action being reformation and example.⁷⁸ Such political pain, as provided by any system of law had, for Bentham, to aim to ensure security for members of the community by preventing offences for the greater happiness of all, and to this end limited restraint was justifiable; but, by the same token, excessive coercion was not.

Bentham's understanding of what entailed a satisfactory and justified legal punishment was complex.⁷⁹ With his appreciation of the variety of pains, or evils, available for infliction on social individuals, he did not see legal punishment as being a narrowly directed form of pain. Pains were capable of being applied to the mind or the body of an offender, of being spread to the offender's friends and relations, and of being inflicted upon anyone witnessing such punishment. Indeed, with most forms of punishment the pain inflicted was generally assumed to affect both mind and body simultaneously.⁸⁰ Michel

⁷⁸ IPML, 158 n.

⁷⁹ Indeed, his idea of eleven 'properties', that ought to be encompassed by legal punishment, is notably sophisticated and precise. IPML (CW), 175-86. For a discussion see, for example, Halévy, Philosophic Radicalism, 64-7. For the relationship of these 'properties of a lot of punishment' to his theory of punishment see Ch. 6 below.

⁸⁰ The basic division in the pain of punishment was described as: 'In one case, the idea that that[sic] of an act of the positive kind terminating physically in the body of the person punished: in another it is an act still of the positive kind but never by its ordinary physical

Foucault has suggested that in the eighteenth century punishment was commonly viewed as only a physically inflicted pain.⁸¹ Bentham certainly had no problem in dissociating punishment from specifically physical pain. Not only did Bentham illustrate this perception in an interesting manuscript amongst his later penal code writings, which shows how legal punishment in 1823 had moved far from the point where physical pain was all that was considered,⁸² but as early as 1780 he had already explored the nature of non-physical punishment - listing several inflicted pains not of the body. In fact, of the twelve kinds of pains catalogued in IPML, only one - pain of the senses - related directly to the body.⁸³ And, in

effects extending to his body: in a third case, it is not so much as any positive act at all: it is nothing more than a mere negative act which has neither a termination nor a commencement anywhere.' Of Laws in General (CW), 38. Contemporary methods of punishment commonly inflicted all three divisions of pain simultaneously.

⁸¹ See Foucault, Discipline and Punish, 16. Foucault is clearly right in saying that legal punishment was generally confined to the infliction of physical pain, although in the English system, with which Foucault was perhaps not so familiar, exceptions can easily be found, e.g. fining. See Beattie, Crime and the Courts, Ch. 9. Foucault also makes the common error of associating Bentham's thought solely with mid-19th century authoritarianism where his name is attached to developments of which he would not have approved, e.g. the Millbank Penitentiary with its oppressive uniformity. On the relationship between Bentham's thought and its use in the nineteenth-century see S. Conway, 'Bentham and the Nineteenth-Century Revolution in Government', Victorian Liberalism: Nineteenth-Century Political Thought and Practice, ed. R. Bellamy, (London, 1990), 71-90.

⁸² UC lxviii. 287.

⁸³ Though it can be said that a somewhat contradictory impression is found in the manuscripts. A discussion of violent analogous punishments (recounted by Semple,

an early manuscript Bentham talked of the effects of imprisonment, in an unreformed prison, in as striking a way as he was later to extol the less physically tortuous pains of the panopticon.⁸⁴ He was certainly aware, in 1777, that punishment could be applied, from a variety of sources, to 'the heart, the thoughts, the will, the inclinations' as well as the body.⁸⁵ Yet, at the same time, Bentham made special provisions to avoid the extremes of mental punishment. In his final conceptualization of the panopticon, for instance, he followed Howard, and established a line on the strictly limited use of solitary confinement, which 'dangerously inflated an unpredictable infliction of pain'.⁸⁶

It can be seen, therefore, that within Bentham's thinking, there existed a broad understanding of the manner in which pain from the political sanction could be inflicted on offenders. He was prevented from moving too far in the direction of simple coercion⁸⁷ by a fundamental

Bentham's Prison, 26) is given alongside the clear awareness of need for reductions in levels of severity. See UC cxliii. 16, 18, 28 and 33.

⁸⁴ See, UC cxliii. 16, where it is suggested that darkness and a diet of bread and water would contribute to a reforming, miserable reflection on crimes committed, i.e. he sought punishment for both mind and body.

⁸⁵ As Foucault says it was later to be applied, Discipline and Punish, 16.

⁸⁶ McConville, English Prison Administration, 114, and 121. This concern with solitary confinement was ignored by later prison designers.

⁸⁷ Bentham's lack of interest in coercion has been emphasised in the analysis of his civil law writings. See Kelly, Utilitarianism and Distributive Justice, 23 and

analysis of the psychological condition and practical situation of individual offenders, and this element was present in his earliest work of the 1770s.⁸⁸

118.

⁸⁸ For the emphasis placed on individual circumstances and sensibility and on Bentham's concern for safeguarding the interests of convicted offenders, for example, see J. Semple, Bentham's Prison, 26.

CHAPTER FOUR

DISTRIBUTIONS OF PAIN

Bentham spent a considerable amount of time examining the manner in which pain from an offence could be said to be felt and perceived by members of the society within which such an act was committed. Similarly, he considered the way in which pains arising from an act of punishment might be said to operate. In both respects Bentham's analysis has been found to be highly original, and to provide a substantially new method for considering the consequences of actions in relation to the actual and imagined effects of legal punishment.¹ This chapter will examine how Bentham defined an offence, how he understood pain to be disseminated by a mischievous act, and how he determined the distribution of pain from an applied punishment.

A. The Definition of an Offending Act

Before Bentham turned to the consequences of an offence he first considered how illegal acts had been previously identified. In accord with his critique of other legal practices, he noted a distinct contrast

¹ The consequences, that is, of punishments both threatened and inflicted.

between what could be observed and what he would wish to see. In an early manuscript, which formed part of the groundwork for his critical jurisprudence, he stated,

What is an Offence is any thing that he who has power plans to make one: What ought to be an offence, upon the principle of utility, the only one we acknowledge, is something that makes mischief.²

This position was clearly reflected in later published work where he refined his definition of what should constitute an offence, and arrived at the position that 'such acts alone *ought* to be made offences, as the good of the community requires should be made so'.³ He saw the 'good' of the community embodied in the maintained happiness, or lack of unhappiness, of individuals, both assignable and unassignable;⁴ and he held that by acting detrimentally towards an individual, one was also acting detrimentally towards the state.⁵ Indeed, with emphasis on his paramount concern for individual welfare, Bentham made it clear that he could regard an act as harmful to the state only in as much as it was, or could be, found to be

² UC xxvii. 18.

³ See IPML (CW), 187-8; and also 165 n.

⁴ It has been suggested that Bentham was indebted to the Instructions... of Catherine II of Russia for the principle of this division between assignable and unassignable individuals. See Halévy, Philosophic Radicalism, 61. The Empress Catherine is mentioned in several places in Bentham's manuscripts. See for example, UC xxxii, and xxvii. 44.

⁵ IPML (CW), 188.

harmful to an individual.⁶ With the deterrence of such acts providing the prominent justification of punishment a political state was defined as an assemblage of individuals, forming an 'imaginary compound body';⁷ this carried with it fundamental implications both for his understanding of an offence and for his entire theory of punishment.

An act ought only to be categorised as an offence if it causes mischief, and mischief for Bentham was explicitly defined:

Mischief is either Pain or the chance of it, or loss of pleasure, or the chance of it. It is either Pain certain or in contingency: or the loss of pleasure certain or in contingency.⁸

In such terms pain was related, and attributed, solely to the experience of some living, existing creature. Such a definition of 'offence' bore little relation to any metaphysical or supernatural entity - whether this be an idealised concept of justice or a claim for divine sanction. Any connection between the idea of 'sin' and the notion of 'offence' was entirely absent from Bentham's definition of an offence. Indeed, grounds are provided for claiming that Bentham's theory attempted the most complete division of these two ideas amongst eighteenth-

⁶ 'An act cannot be detrimental to a state, but by being detrimental to some one or more of the individuals that compose it. But these individuals may either be assignable or unassignable'. *Ibid.*

⁷ *Ibid.*

⁸ UC xxvii. 18.

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⁷ *Ibid.*

⁸ UC xxvii. 18.

century thinkers.⁹

Of more substantial interest, Bentham's theory sought to separate the assessment of offending acts from the historic foundations which upheld traditional conventions of morality and law. Whether offences were defined by legal precedent or by dint of a common morality, as for example reflected in principles of common law, all were said to be redundant. On this point Bentham's conflict with the theory of Eden is particularly clear. Bentham wrote, 'men will find it much pleasanter to embrace his [Eden's] opinion, especially if it be already their own, than to be at the trouble of attending my reasons'.¹⁰ Indeed, notions of public vengeance were common to many justifications of punishment in mid-eighteenth century Europe.¹¹ Bentham suggested that their place should be taken by a single empirical test as represented by the experience of pain suffered by some assignable or unassignable individual or individuals.¹² Such a test

⁹ See the discussion of Montesquieu, The Spirit of the Laws, Bk. XII, Ch. 4; and compare with Beccaria, who went much further than Montesquieu when he said, 'some think that the gravity of sin should play a part in the measurement of crimes... The seriousness of sin depends upon the unfathomable malice of the human heart and finite beings cannot know this without revelation', On Crimes and Punishments, 16-17.

¹⁰ UC xxvii. 107.

¹¹ For a description of how, by 1760, most of Europe based the right to punish on 'la vindicte publique', public vengeance, see Garland, Punishment and Modern Society, 139-41.

¹² 'Is an offence committed? it is the tendency which it has to destroy, in such or such persons, some of these pleasures, or to produce some of these pains, that

provided a single standard sufficient to determine whether an act was 'wrong', and whether it ought consequently to be classified as an 'offence' and made preventable by law.

The concentration on and presentation of criminal behaviour as depending upon harm experienced by an individual, and forming an assault upon the wider community, can be found in Beccaria's Crimes and Punishments, but Beccaria's use was substantially different from Bentham's. Of crucial importance was Bentham's insistence that the extent of the harm inflicted was dependent upon the motive, circumstances and intention under the influence of which an act was carried out. In sharp contrast to this Beccaria seemed to be at a loss when considering the variety of circumstances that his argument suggested may need to be accounted for. In a seminal passage he stated:

... the only true measurement of crimes is the harm done to the nation, and hence those who believe that the intention of the perpetrator is the true measurement of crimes are in error. Intention depends on the actual impression objects make on the mind and on the mind's prior dispositions; these vary in each and every man with the extremely rapid succession of ideas, emotions, and circumstances. Thus, it would be necessary to frame not only a separate law code for each citizen, but a new law for each crime.¹³

The desire for a fixed code can be overwhelmingly felt here, as a method for circumventing the innumerable

constitutes the mischief of it, and the ground for punishing it', IPML (CW), 49.

¹³ Beccaria, On Crimes and Punishments, 16.

difficulties connected with the establishment of the variety of circumstances in each case.¹⁴ And it can be noted, as Halévy suggests, that Bentham's 'attempt at a scientific and systematic theory of penal law' was far superior to Beccaria's 'few detached observations', since it took account of the variety of circumstances that seemed to daunt Beccaria.¹⁵ For Bentham, whilst accepting Beccaria's insistence that 'harm' was a valid measure of an offence, he unhesitatingly asserted that the variety of circumstances must also be accounted for and were fundamentally relevant to the calculation of harm done in each instance, for they gave important indications of the disposition of the offender.¹⁶ Only then can the actual harm inflicted on the community, or the amount of pain required to deter future acts of a similar kind, be calculated. It was impossible for Bentham to accept that an assessment of 'harm done to the nation' in any way contradicted, undermined or cancelled the argument for establishing the 'intention of the perpetrator'. In fact, the opposite was the case as the intention of the offender

¹⁴ There was great similarity here with Beccaria's view that as far as the division of offences was concerned 'their changing nature in the different circumstances of various times and places would make this an immensely and tediously detailed task'. See *Ibid.* 17. Yet Beccaria did think such a categorisation 'proper' for his analysis - clearly Bentham showed more stamina and, a fuller treatment, in attempting one.

¹⁵ Halévy, Philosophic Radicalism, 57-9.

¹⁶ 'This concept of flexible punishment stood in striking contrast to the doctrines of Montesquieu and Beccaria'. See Radzinowicz, English Criminal Law, 376.

was regarded as a valuable indicator in calculating the amount of harm done to society. A flaw was exposed within Beccaria's pursuit of a more humane system of punishments, since, despite his appeals to sentiment and compassion, he left the door open to careless punishments (i.e. those which inflict too much or too little pain) in failing to allow for the assessment of individual circumstances and intention. With a system of rigid codification, by which Beccaria claimed to seek a better proportioning, he provided no method for a calculation of individual harms in his assessment of the total 'harm done to the nation'.¹⁷ Fixed categories of offence were therefore offered as the basis of Beccaria's justice, in much the same way as they had formed the framework for the conventional penal theory which he attacked. With little or no account taken of individual motives, circumstances and intentions, it seemed unlikely that a close assessment of actual 'harm done to the nation' could be reached via Beccaria's method of assessment.

In contrast, Bentham's theory proceeded from a definition of offence which placed sole emphasis on the infliction of pain on individuals.¹⁸ From this precise foundation progress could be made to a consideration of

¹⁷ Beccaria, Crimes and Punishments, 16.

¹⁸ On Bentham's subjective approach to offences and punishments see Radzinowicz, English Criminal Law, 370-73. Bentham said of offences, 'the same offence at different times and places will stand, and to different persons will appear to stand, in a different light in point of criminality'. Of Laws in General, 217.

how inflictions of pain might be gauged, and an attempt made to distinguish the nature of the dispersal of the variety of forms, or 'shapes', of pain throughout society.

Thus, with Bentham's theory an attempt can be seen to define what Beccaria felt able only to describe as 'the confused series of human actions'.¹⁹ Bentham proceeded, by a system of logical bipartition or 'bifurcation' to unravel the consequences of an act; and via his 'exhaustive', 'dichotomic procedure' he sought to trace some order in the manner of its imposition on society.²⁰ His ultimate intention was to place an objective quantification on the strength of the pain received and delivered, and though it remains doubtful whether he can be said to have succeeded, his analysis was exceptionally effective in offering one impression, or overview, of the intricate consequences of actions.

¹⁹ Beccaria, On Crimes and Punishments, 14.

²⁰ Thus the results of an offensive act were divided firstly into primary and secondary categories and then subdivided. See Ch. 4 below. Bifurcation, or division into two, was said to be more appropriate than categorisation by genus, because the human mind was thought to be only ever capable of comparing two ideas simultaneously. For a discussion of Bentham's method of classification see Halévy, Philosophic Radicalism, 60.

Mary Mack describes how Bentham was given his first insight into 'bifurcation' at Queen's College Oxford: 'this training was the sole course of instruction that Bentham was grateful for... he discovered the Porphyrian tree, the ancient system of analysis which divided subjects into two and only two classes'. See M. Mack, Jeremy Bentham: An Odyssey of Ideas, (London, 1962), 45.

B. The Consequences of a Mischievous Act

Before examining the consequences of an act Bentham spent some time in IPML looking at the elements upon which the tendency of any act to produce pain depended. Along with the act itself, and the circumstances in which it was effected, he examined the state of the agent's mind as expressed by intentionality, consciousness, motive and disposition.²¹ The conditions of the offending agent's mind were related to an assessment of the 'mischievousness' of the act in question, or the total quantity of pain caused by an act.²² Accordingly, the quantity of any punishment inflicted had also to correspond with an encompassing assessment of the mental conditions underlying such mischievousness.

The importance of individual psychology was therefore raised early in Bentham's assessment of punishment, and emphasised the extent to which the nature of intention, consciousness, motive and disposition were seen to affect the seriousness of a crime.²³ As far as intentionality and consciousness were concerned, Bentham constructed a

²¹ See IPML, chapters: 8. 'Of Intentionality', 9. 'Of Consciousness'. 10. 'Of Motives', and 11. 'Of Human Dispositions in General'. See also Radzinowicz, English Criminal Law, 374-5.

²² How this affects the proportioning of punishment will be examined in detail in Ch. 5 below.

²³ Certainly this discussion was relevant to the approach that other penal theorists were taking in relation to the increasing concentration on the psychology of the offender and the broadening debate on the nature of crime in general. See, for example, Eden, Principles, 6.

clear six-case gradation of offensive actions, from those deemed to be completely unintentional to others judged completely intentional.²⁴ In the first case there was said to be no secondary mischief produced at all, for an unintentional evil clearly offered little reason to expect any recurrence in future.²⁵ Conversely, secondary mischief was said to be at its highest when the consequences of an act were completely intentional, for then there was every reason to expect a future recurrence.

Yet, whilst Bentham attempted to develop the use of such psychological assessments in the calculation of mischief, he also followed Beccaria to some degree, who suggested that intention could not be used as a measure of the seriousness of an offence. Beccaria believed that an

²⁴ Case 1. Involuntariness	no secondary mischief
Case 2. Unintentionality with heedlessness	some "
Case 3. Missupposal of a complete justification without rashness	no " "
Case 4. Missupposal of a partial justification without rashness	some " "
Case 5. Missupposal with rashness	more " "
Case 6. Consequences completely intentional and free from missupposal	highest " "

Table constructed from IPML (CW), 153-4.

²⁵ I.e. if it was unintentional it was an accident - accidents do receive punishment from the physical sanction but individuals can avoid the same punishment themselves by avoiding similar accidents. Of most importance for what was termed the 'secondary consequences' of an offence, see below.

intentionally evil act (i.e. one that knowingly inflicted pain) may accidentally, or unexpectedly, produce a greater surfeit of pleasure and hence a good, and thus could not be used universally to judge the seriousness of offences.²⁶ Bentham explicitly stated that an individual may intend an 'act', but could not ever intend the 'circumstances', since these were beyond an individual's control. Indeed, he went on to say that the 'goodness or badness of the consequences depend upon the circumstances',²⁷ hence an individual's intentions alone could never determine 'goodness' or 'badness'. In any case, the value of intention was not easily gauged.

It is frequent to hear men speak of... the goodness and badness of a man's intention: a circumstance on which great stress is generally laid. It is indeed of no small importance, when properly understood: but the import of it is to the last degree ambiguous and obscure.²⁸

What is at least clear, is that Bentham believed intention ought only to be taken into account as evidence of future pain producing action, never as a means of calculating past mischievousness, as was often the case with retributivist theory.²⁹

²⁶ Beccaria said on this point, 'sometimes men with the best intention inflict the worst evil on society, and, at other times, they do the greatest good for it with the most wicked will', Crimes and Punishments, 16.

²⁷ IPML (CW), 88-9.

²⁸ Ibid. 88.

²⁹ Clarified in his discussion at IPML (CW), 75, where it was stated that: 'In every transaction... which is examined with a view to punishment, there are four articles to be considered: 1. the act itself, which is done. 2. the circumstances in which it is done. 3. The

Here Bentham differed from Beccaria. For Beccaria entirely discounted the common claim that punishment was deserved when malicious intention was displayed, since he categorically stated that 'those who believe that the intention of the perpetrator is the true measure of crimes are in error'.³⁰ In claiming that intention had little, if any, role to play, Beccaria seemed to preclude any appreciation of the potential future harm that might be disclosed by assessments of intention. Bentham's approach can therefore be seen as an attempt to introduce a wider assessment of the potential harm produced from actions, and from intentionally evil actions in particular.

Bentham's concept of the 'evil' of punishment was therefore presented not simply as compensation for any immediate profit gained by an offender, or as a kind of 'counter-crime', as has been suggested by Halévy,³¹ but as a far more comprehensively proportioned response to a total mischief deemed to have been, or likely to be, spread by the offence.³² Such a view stretched far beyond a consideration of action at the time of the offence. In

intentionality that may have accompanied it. 4. The consciousness, unconsciousness, or false consciousness, that may have accompanied it.'

³⁰ Beccaria, Crimes and Punishments, 16.

³¹ Halévy, Philosophic Radicalism, 55.

³² The mischievous, or harmful, effects may be either certain or probable. All such consequences were 'conceived... to constitute one aggregate body'. See IPML (CW), 143. This entire aggregate body of mischief provokes the punishment.

attempting to assess the seriousness of a breach of the legal rules Bentham therefore formulated a concept implying the 'addition' of painful consequences of acts in order to reach a view of their full or 'aggregate' effect on society.³³ In this way Bentham introduced the following complex understanding of consequentialism, the extent of which formed a considerable development in the discussion of punishment.³⁴

i) *Three Views of Mischief*³⁵

Bentham examined mischief, at its simplest, from three different points of view. It could be discussed with regard to its own Nature, its Cause, or its Object.

The 'Nature' of mischief might be either 'simple' or 'complex'; both simple and complex mischief could be further classed as 'certain' or 'contingent'.³⁶ Simple

³³ Ibid.

³⁴ No comprehensive assessment of this element of his theory is known. Halévy touches on it briefly in Philosophic Radicalism, 60, though he fails to mention even the most crucial and obvious distinction between primary and secondary mischief. Radzinowicz is similarly brief, and whilst he notes the importance of the ideas of alarm and danger, he makes no clear connection between these and primary or secondary mischief. See English Criminal Law, 374. The detail of Bentham's discussion of the distribution of pain, whether by offence or punishment, seems to have remained largely undisturbed. See also manuscript fragments indicating possible errors in the method of contemporary calculation, UC xxvii. 24.

³⁵ See Diagram 1 for an illustration of the bipartition of the three views of mischief. As described at IPML (CW), 147-152.

³⁶ Here we find Bentham applying the Lockean conception of the 'resolvability' of complex perceptions into simple ones. See *ibid.* 42 n. In this of IPML the

mischiefs, from which all complex ones could be resolved, were further classed as 'positive' or 'negative'. Positive mischiefs were those regarded as productive of mischief by all penal theories, since it was these which consisted in the clear infliction of physical, actual pain. Bentham stated here that negative acts did not distribute actual pain, but something better termed a loss of pleasure. However, it was clear that such losses of pleasure did constitute an addition to the overall sum of mischief spread; they were, for instance, closely related to the pain of privation.³⁷ This was accommodated in Bentham's theory by the significant redefinition of losses of pleasure as some loss of 'benefit' or 'advantage', with the actual benefit being material.³⁸ The material nature of such pains had to be established for Bentham's theory to include all manner of sufferings, and particularly those excluded from conventional accounts, otherwise the attempt at quantification, or calculation, of the total sum of mischief inflicted would be undermined.

The second view of mischief was named its 'Cause'. Here Bentham examined how a mischief was produced. It was derived either from one, independent, 'single' action, or

simple pleasures and pains are enumerated.

³⁷ See ibid. 'Pleasures and Pains, Their Kinds', 46.

³⁸ The benefit is material because: (1) it affords actual pleasure, and, (2) it averts pain or danger, and so provides security. 'In so far, then, as the benefit which a mischief tends to avert, is productive of security, the tendency of such mischief is to produce insecurity'. Ibid. 148.

from an act possible only with the 'concurrence' of other actions.³⁹ Concurrent actions could be carried out by the same or other persons who produced the mischief creating act, and in either case these concurrent actions might be the same as the act in question or of 'other kinds'. Thus with the Cause of the mischief Bentham was highly selective in identifying whether an act was a simple event or the derivative of a complex chain of events. And in asking whether concurrent acts were of the same type or not, his theory broadened its search into any connected chain of actions in pursuit of all mischievous acts relative to the single act in question.

Thirdly, he suggested that mischief could be assessed from the perspective of determining who could be said to be the 'Object' of the mischief. Here we find the definition of an 'assignable' individual or group, or an 'unassignable' multitude of individuals. When assignable, the known individual might be the individual carrying out the mischievous act or some other person or persons. The unassignable object of mischief might be the 'whole' community or some 'subordinate' part of it. This acknowledgment of the existence of unassignable pain was of particular importance in that it could embody, 'in point of magnitude', a mischief much greater than the actual, immediate pain applied to any assignable

³⁹ Bentham uses the phrase 'not without... concurrence', apparently to imply that an act of this second category is in some way dependent upon other actions as well as being 'concurrent' with them. Ibid.

individual.⁴⁰ Bentham's classification continued with a distinction between mischief which alighted upon the originator of it himself, when it was said to be 'self-regarding',⁴¹ and that which affected any other party, when it was said to be 'extra-regarding'. And finally, he defined three further divisions to the category of extra-regarding mischief as 'private', 'semi-public' or 'public', which related to the number of other individuals it was possible to say were affected by the mischief in question.⁴²

At this point Bentham paused in his categorisation, leaving continued progress into inferior divisions until the later, substantial, chapter on the 'Division of Offences'.⁴³ It remains to be stressed, that the three views of mischief formed a unique assessment of the nature, cause and direction of pain distributed throughout society, and provided the foundations for Bentham's discussion of the better known aspects of primary and secondary mischief of a positive pain.

⁴⁰ For the comparison of primary assignable mischief with secondary, unassignable alarm, see *ibid.* 149.

⁴¹ Halévy calls this 'reflexive', Philosophic Radicalism, 61.

⁴² These divisions were used as the basis for his penal codes. See 'Penal Code - Table of Offences', Constitutional Code (CW), Table 2. On Bentham's reasons for omitting the category of self-regarding offences, see *ibid.* 'Notes to Part II'.

⁴³ See Ch. 16 of IPML (CW), 187-280. A description of his classification of offences can be found in Halévy, Philosophic Radicalism, 60-4.

ii) The Shapes of Mischief⁴⁴

Bentham began his analysis, for simplicity's sake, with acts defined as productive of positive, immediate pain, rather than those seen as contingent or resulting in the loss of some benefit.⁴⁵ In pursuit of an understanding of the spread of such positive acts Bentham defined various forms, or 'shapes', in which the mischief of an act was revealed.⁴⁶ This was the same for a pain from any source, of any nature and acting upon any object.

Bentham believed the mischief of any act could be divided into two parts. The first he called 'primary' mischief, which related to the pain sustained by an assignable individual or individuals. The second part he labelled 'secondary' mischief, for, whilst clearly originating from the former, this secondary mischief extended throughout the whole, wider society, affecting innumerable unknown, unassignable, individuals.

Most eighteenth-century discussions on punishment, from Montesquieu to Kant, adopted a definition of mischief as a painful or detrimental act against known persons. However, this often formed the end as well as the beginning of the analysis of the 'effects' of an offence. So with retributive justice, it was possible for

⁴⁴ Incorporated into a Penal Code on 12 July 1826, at UC lxviii. 36-78. See Ch. II, titled, 'Good and Evil from human agency - their progress in the community'. For a representation of the 'Shapes of Mischief' see Diagram 2.

⁴⁵ IPML (CW), 147.

⁴⁶ Ibid. 143.

retaliation to be applied on behalf of the victim in proportion to the pain suffered by that specific person. Pain was not seen to radiate beyond the immediate sufferer from the offence; or, if it was recognised, it was not taken into account in consideration of the seriousness of the offence.

With Bentham, however, even with this most easily identifiable part of the mischief of an offence, he carefully distinguished between two distinct branches: the 'original' - being the immediate suffering of the person on his own account; and the 'derivative' - being the share of suffering which might fall on some other assignable person or persons. It can be noted that here Bentham was including suffering conventionally excluded from assessments of punishment, since he incorporated within this category those individuals who suffered by way of direct connection with the victim, or simply from a sympathetic feeling towards the victim.⁴⁷ But although he 'bifurcates' his definition of primary mischief, he maintained a clear argument that this branch of mischief was concerned only with the establishment of the pain suffered by identifiable individuals.

The full value of Bentham's attempt to understand the combined social effects of pain-producing acts became more apparent when he moved on to a consideration of 'secondary' mischief, or the harm spread more generally across the whole community.

⁴⁷ Ibid. 144.

As with primary mischief the category of secondary mischief was divided into two distinct parts. The actual pain of the secondary mischief was described as 'alarm', while a second, category of pain was expressed as being one of 'danger'.⁴⁸ Both, clearly, were less easily attributed to any particular offensive incident than in the case of the primary mischief.

The pain of alarm was based on his understanding of the apprehension of suffering of one individual, by others who were informed of the suffering, and who were disposed to conceive of themselves as also incurring the chance of suffering in a similar manner. Bentham accepted that mischief in this sense, though clearly existing, was difficult to assess, though he was in no doubt that actual pain was felt by those alarmed. The alarm that some unconnected individual might feel on hearing of the report of an offence, for instance, would depend upon a considerable variety of unknown circumstances relative to the likelihood of the unconnected individual actually falling victim to a similar offence.⁴⁹ What could say for sure was that,

... the alarm, though inferior in magnitude to the primary [mischief], is, in point of extent, and

⁴⁸ A real threat, but not equatable with alarm felt, for real danger is unknown.

⁴⁹ Bentham discussed such circumstances in relation to an example of a robbery. He listed factors regulating the secondary alarm such as, the degree of pain they understand to have been suffered, the frequency one may have to travel in the same area where the offence took place, the quantity of money one may have occasion to carry, etc. See IPML (CW), 145.

therefore, upon the whole, in point of magnitude, much superior.⁵⁰

Although impossible to quantify precisely, it was crucially important, for Bentham, that such a spread of general mischief be taken into account as a key consequence of an offence, and hence a significant element in the assignment of a punishment.

Bentham carefully examined the link between the alarm and the danger felt when individuals became aware of an offence having been committed. For not only did individuals fear that they might become victims of similar crime, but 'they really do incur such a chance'. The reality of this danger formed a distinct part of the secondary mischief perpetrated by offences, although the actual level of the danger was unknown.⁵¹

In illustration of the above assessments of mischief, it can be seen that an offence of theft from a person may be interpreted in the following way. It is described as inflicting a simple, positive pain of certain nature; the cause of the pain is the single act of taking for self-regarding profit, and the object is found to be a private,

⁵⁰ Ibid. 149.

⁵¹ There was a subtle difference between the alarm felt after an offence and after a punishment. Following an offence many individuals might fear a similar act done to themselves. After a punishment many individuals might feel sympathetic pain for the victim, but only potential offenders would fear a similar pain being inflicted upon themselves.

assignable individual who suffers the loss.⁵² From the 'Shapes of Mischief'⁵³ it is seen that the known victim suffers a primary pain, by losing the value of the property stolen and by being given the fear that a similar offence may recur in future. In this instance no other assignable persons are affected and the primary pain is therefore said to stop with the original sufferer. When the secondary pains are examined the alarm can be shown to affect adversely all those who hear of the individual's loss, and all are in actual danger of suffering from similar losses in the future until the offender is restrained from further acts of a similar kind. The act will also cause other individuals to contemplate committing similar offences, and the fear produced from this additional threat increases the suffering from the original offence.⁵⁴

iii) The Secondary Mischief of 'Danger' - A Motive for Future Offending?

In examining what this chance of experiencing similar danger actually amounted to Bentham had to admit that 'a past offence afforded no direct motive to a future'. This was held because, for Bentham, a motive had to include the prospect of some pleasure or other advantage to be enjoyed

⁵² See Diagram 1.

⁵³ See Diagram 2.

⁵⁴ Seven categories of the 'Three Views of Mischief' and five categories of the 'Shapes of Mischief' are therefore operative in such an instance.

in the future. But an offence once passed is done with, the profit is taken and it cannot furnish more pleasure in the future. 'It is not one robbery that will furnish pleasure to him who may be about to commit another robbery'.⁵⁵ So Bentham concluded that the motive which actually did operate upon a man had to be the idea of the pleasure he expected to derive from the specific offence he was contemplating, not from any offence in the past.⁵⁶ But although a past offence did not offer any direct motive for a future offence it did have mischievous consequences.

Two mischievous consequences of an offence, relative to the chance of future 'danger', were given. Firstly, an offence tended towards the production of similar crimes by suggesting its feasibility to persons exposed to the temptation. The idea, or understanding, of committing such an offence would be communicated, and the chance of real, future danger was further increased if the suggestion of the offence was accompanied by a belief in its 'facility'.⁵⁷

Secondly, and perhaps more seriously for Bentham's argument, one offence tended to produce another because it worked to weaken the force of the tutelary motives which

⁵⁵ IPML (CW), 145.

⁵⁶ His 'pleasure exists independently of any other robbery'. Ibid.

⁵⁷ Its facility was increased by any lack of certain punishment.

tended to restrain such actions.⁵⁸ This weakening of the force of the restraining motives was particularly important because it was related to the question of temptation. The role of temptation, and whether potential offenders succumbed or resisted it, was a major issue in the eighteenth century. It was central to the debate examining the influences acting upon the wills of potential criminals, and was frequently used to explain how a single offence could practically lead to the production of several further offences.⁵⁹ Bentham engaged with the debate surrounding temptation and returned to his four motivating sanctions to clarify how the will of potential offenders might be influenced.⁶⁰ Giving the example of an offence of robbery, he listed the following effective motives:

1. The motive of benevolence, which acts as a branch of the physical sanction.
2. The motive of self-preservation, as against the punishment that may stand provided by the political sanction.
3. The fear of shame: a motive belonging to the moral sanction.
4. The fear of divine displeasure: a motive belonging to the religious sanction.⁶¹

Bentham insisted on little or no influence on forces from

⁵⁸ An initial exemplary offence is not therefore a seducing motive in itself, but a force counteracting the strength of the tutelary motives. See 'Human Dispositions in General', IPML (CW), 134-7.

⁵⁹ See, for example, Blackstone Commentaries iv. 16; and Eden, Principles, 11-3.

⁶⁰ The tutelary sanctions, that is, presented in IPML, rather than in Deontology.

⁶¹ IPML (CW), 145-6.

the physical and religious sanction, but saw considerable effect upon the political and moral. A past robbery may weaken the force of the political sanction in the degree of uncertainty of punishment to which it was attached. This uncertainty was proportionably increased by every instance in which a man was known to commit the offence, without undergoing punishment. A robbery may weaken the force of the moral sanction in as much as this force will be less with any decline in the number of people supporting the indignation of the community against those who participated in robbery.

Bentham concluded that in whichever way a past offence 'tends to pave the way' for the commission of future offences, either with the initial suggestion of the offence, or by adding to the strength of the temptation, it was said to operate by the force of 'example'. It had often been asserted, prior to Bentham's analysis, that the commission of particular offences led, in some way, to further offences of a similar fashion due to the exemplary nature of the original offence.⁶² Yet Bentham was attempting to identify here the actual strength of this exemplary force whilst emphasising, from the view of

⁶² Of particular prominence in this regard was Henry Fielding, who perpetuated and popularised the view in his important study into the causes of crime in London. See An Inquiry into the Causes of the late Increase of Robbers, (London, 1751). Examples provided of the impunity of receivers of stolen goods, the laxity in the apprehension of persons suspected of crimes, a reluctance to initiate proceedings against suspects, and an unjustified frequency of pardons were all said to have contributed to a rise in the incidence of similar offences.

utility, that there was no direct, only an influential, motivational connection.

This broad understanding of 'pain' as a varied product of offences enabled him to draw clarifying distinctions regarding the manner in which offences affected the society in which they were perpetrated. The benefit of approaching the question from such an angle was to open up numerous categories of pain-producing mischiefs, and therefore to give better direction to any conception of a corrective application of penal suffering.

Bentham saw such categories as relatively strict into which harms (mischiefs) could be assigned. He clearly stated that the 'two branches of the secondary mischief of an act, the alarm and the danger, must not be confounded'.⁶³ He acknowledged that both branches were intimately connected, yet insistently maintained that they should also be regarded as separate products. The reason for such a separation in secondary pains rested upon the crucial recognition of the independent operation of both the mischief of alarm and the mischief of danger. This distinction between alarm and danger was supported by examples which revealed the existence of one without the necessary presence of the other type of pain. So Bentham said,

⁶³ IPML (CW), 147. See below for the suggestion that Bentham believed conventional theorists did confound, or rather were simply unaware, of these two aspects of 'secondary' mischief.

The neighbourhood may be alarmed with the report of a robbery, when, in fact, no robbery, either has been committed or is in a way to be committed...⁶⁴

Hence the pain of alarm could exist independently of the pain of danger; and conversely,

... a neighbourhood may be on the point of being disturbed by robberies, without knowing any thing of the matter.⁶⁵

Thus, Bentham expressed a clear division between the secondary mischiefs produced by certain acts. Some acts produce alarm without danger, whilst others produce danger without alarm. The recognition of this feature in the spread of pain provided a valuable basis on which Bentham could demand reductions in the quantities of punishment and seek alternative methods for the prevention of crime.

The complexity of Bentham's analysis was underlined with the development of this assessment of the operation of the categories of mischief. Although he saw the secondary pains of alarm and danger as being able to operate independently, this was not the case for primary and secondary mischiefs. Whilst he certainly made a distinction between primary and secondary consequences, he could establish no absolute independence in their operation, for secondary mischief had always to be derived from primary mischief. Nevertheless, it was a key point, for Bentham, that there might be a considerable distinction between the actual primary and secondary consequences of an act. Situations could be imagined, for

⁶⁴ IPML (CW), 147.

⁶⁵ Ibid.

example, where the primary consequences of an act were mischievous while its secondary consequences were beneficial:

In some cases, where the primary consequences of the act are attended with a mischief, the secondary consequences may be beneficial, and that to such a degree, as even greatly to outweigh the mischief of the primary.⁶⁶

The obvious example of an act that fell into such a category was, as Bentham pointed out, an act of punishment when properly applied (i.e. when the pain it inflicts outweighs the profit of the offence). Thus the primary pain of punishment was pain inflicted on a guilty offender, yet the secondary consequence sought from such pain was a beneficial profit gained by the deterrence of similar offences in future. The point made was that secondary mischief was not the inevitable consequence of primary mischief, though it might generally be so. For the vast majority of offences, however, primary pain inflicted on the victim of a criminal action could lead only to the secondary pains of fear and danger spreading throughout the community.

Such subtle appreciation of the manner in which the pain of fear could be variously provoked by an offence was a significant advance on the perception of consequences of offences as envisaged by earlier discussions on punishment. Indeed, it could be said that in comparison to Bentham's analysis, thinkers such as Montesquieu, Beccaria or Eden did not actually discuss the substantial

⁶⁶ Ibid.

consequences of an offence at all.

The comprehensive nature of Bentham's conception of secondary harm led him to a convincing conclusion of the need to provide punishments which could necessarily, and simultaneously, both reform and deter.⁶⁷ For the ideas of 'alarm' and 'danger' applied only to future behaviour; either of the 'agent' who carried out the offence provoking the secondary mischief, or of those persons who may come to engage in acts of the same kind as a consequence of the example of the offence.⁶⁸ It was, therefore, vital for Bentham that if an inflicted punishment was to prevent individuals from committing future offences, it had first to prevent the alarm and danger from the same agent, by restraining or reforming him in some way; and next, it must prevent the alarm and danger of other potential agents by deterrence.

Clearly, Bentham was taking accepted, but undefined, concepts of reform and deterrence and attempting to determine how they might work in practice. The analysis he provided in IPML broke new ground via its process of bifurcation and categorization of meaning and influence. The inescapable implication of Bentham's method was that the proportioning of punishment to offence, via category based assessments of pain, spread by both offence and

⁶⁷ See *Ibid.* 147 n.

⁶⁸ All punishments refer to actions. Bentham applied the new term 'agible', to describe '... agents... in which the act or motion which is the *object* of the law in question may have its commencement'. See Of Laws in General, 34.

punishment, was the only logical solution to the problem of crime deterrence.⁶⁹ No other means of assigning penalties could be acceptable once the damage caused by offences was viewed in such terms. All branches of Bentham's bifurcation were dependent upon the spread of mischief in order for them to become active in the assessment of suitable punishment. In this sense an understanding that an offence was operating in a certain manner on those witnessing, or learning of such an offence, might perhaps have been more important than the question of precisely quantifying how much mischief was being produced. It could be said, therefore, that Bentham's analysis was more concerned with recognizing the action of pain, unhappiness, or fear, and defining their operation in specific directions, than it was in calculating the precise quantities of pain being created.⁷⁰ With Bentham's concern for the condition of unknown, 'unassignable' individuals, who were affected at a second, third or even greater remove from the instigating mischief, there remained, it seems, little

⁶⁹ The proportioning of punishments to offences had been widely discussed in the years immediately before the printing of IPML. See, Beccaria, On Crimes and Punishments, Ch. 6; Blackstone, Commentaries, iv. 1-19; Eden, Principles, 1-8. Also see the popular London journals, for example, the London Magazine, 39 (August 1770), 405 ff; the Scots Magazine, 33 (June 1771), 305 ff; and the Critical Review, 32 (November 1771), 321-9.

⁷⁰ Although Bentham appreciated the difficulty in calculating the 'sums' of pain at work, the numerous directions in which he was able to define mischief as capable of working does seem to go some way towards what Beccaria called a 'mathematically rigorous investigation'. See Beccaria, Crimes and Punishments, 17.

possibility of precise calculation.⁷¹ Thus, paradoxically, we find developed a theory which sought to calculate likely consequences in detail yet need not insist on assigning precise quantities in order to be effective. Indeed, by discussing unassignable pain so prominently Bentham removed the possibility of establishing exact quantities. Did he then sacrifice precise quantification for a better appreciation of pain's complex distribution? It seems unlikely, yet part of his theory's greatest validity lies in its expression of the intricate and widespread nature of the distribution of pain originating from apparently 'simple' offensive actions, aware, that all can never be known for sure.

C. The Diffusion of the Pain of Punishment

For Bentham, the pain of punishment was no different from any other pain; accordingly, the same method of analysis was applied to establish its existence and movement.⁷² Each lot of punishment could be divided into

⁷¹ Baumgardt has stressed, following Dumont, that whilst an 'arithmetic' approach is frequently called upon, its precision is problematic, and no less so for his theory of punishment than for his moral calculus in general, Ethics of Today, 361, and 459.

⁷² The pain of punishment was only distinctive as an artificial consequence of action. Such pain was an imposed evil - some parts were useful, others were not. The idea of punishment as a useful evil formed a consistent theme in Bentham's theory of punishment, from his earliest writings of 1776 through to his mature work in the draught Penal Code of 1826. Compare UC cxliii. 31 (c. 1776) and UC

primary and secondary pains; and the secondary pains subdivided into the pain of 'alarm' and the pain of 'danger'.⁷³ The primary pain of punishment was defined as the 'real' value of the punishment as inflicted on an assignable individual or individuals. The alarm was said to be the actual pain felt by those who viewed, or were informed of, the infliction of the punishment; and the danger was the threat of punishment to potential offenders - both of these aspects of the secondary mischief formed what was called the 'apparent' value of the punishment.⁷⁴

Primary penal mischiefs were said to be effective first in disabling and then in reforming any offender by the immediate application of pain. The secondary mischief, which was said firstly to operate via the pain of alarm, afflicted all those who were familiarised with the punishment - potential offenders and otherwise.⁷⁵ This pain of alarm was created by the thought of another suffering harm and was said to be a loss in the balance of the profit of happiness against the loss of pain. The pain produced in this category incorporated both a self-regarding concern that a similar primary pain might be

lxviii. 39, (15 May, 1826).

⁷³ See Diagram 2.

⁷⁴ For the discussion of real and apparent punishment see IPML (CW), 146. Radzinowicz notes the originality of Bentham on the divisions in the pain of punishment, saying, 'In this sphere again, Bentham was a precursor' English Criminal Law, 374.

⁷⁵ The alarm of punishment was therefore, in this single sense, an unjustified pain on all in society who were not potential offenders.

experienced directly in future if the same offence were committed, and also an extra-regarding benevolent concern for the individual who suffered from the existing primary pain.⁷⁶ The pain of punishment was seen, therefore, to carry far beyond the individual punished; in one sense all in society could be said to experience some pain of punishment when the political sanction was applied, this was calculated as a general loss in the social balance of pain against pleasure.⁷⁷

However, the secondary mischief of punishment also embodied the pain of danger. Such danger sought to deter potential offenders by example.⁷⁸ In providing an example of the pain to be applied to judged offenders, other potential offenders who contemplated similar illegal acts were threatened with the danger of similar pain. Yet this third category of pain from punishment was essentially different from the mischief of danger arising from an

⁷⁶ Benevolence could be felt towards victims of legal punishment as well as towards victims of mischievous, offensive action. The pains of benevolence were said to be 'the pains resulting from the view of any pains supposed to be endured by other beings. These may also be called the pains of good-will, of sympathy, or the pains of the benevolent or social affections'. See IPML (CW), 48.

⁷⁷ Any proposed action of a government, in this instance, any punishment, ought only to be executed when 'the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it'. Ibid. 13. If the quantity of the general pain of alarm was great then the validity of the punishment came into question.

⁷⁸ This was the prime purpose of punishment, to provide an example. See ibid. 158 n: 'Example is the most important end of all, in proportion as the *number* of the persons under temptation to offend is to one.'

offence. This was said to be the case since avoidance of the pain was in the control of the individual threatened, i.e. by simply not committing the offence an individual could avoid the danger of punishment. In comparison, those threatened with further danger following an offence, or number of offences, had no control over where or when the next similar offence would occur. Thus the nature of the mischief provided by punishment could be regarded in somewhat different terms.⁷⁹ The mischief of punishment was therefore applied with the intention of achieving an eventual benefit in the form of a reduction in offending.

It has been remarked by Halévy that it may have been Bentham's ultimate aim to,

... achieve the production of an evil of the second kind without producing an evil of the first kind - to inspire in possible criminals a feeling of alarm without it ever being necessary to resort to the infliction of the punishment itself.⁸⁰

What Halévy suggests is that if potential criminals are frightened enough by the 'apparent' pain of a punishment then it is irrelevant whether or not any 'real' pain is actually applied in the same act. Halévy has, it seems, greatly emphasised the apparent (secondary) pain of punishment over the real (primary) pain.⁸¹ Whilst he certainly appears to be correct in stressing that the

⁷⁹ See note 51 above for the distinction between alarm of offence and alarm of punishment.

⁸⁰ Halévy, Philosophic Radicalism, 67.

⁸¹ See, again, Diagram 2. The mischief from a punishment was believed to be active in precisely the same manner as mischief from an offence.

respective quantities of real and apparent pain need not be closely related, he is surely going too far to suggest that Bentham envisaged a situation where punishments might do without all primary, real pain.

What is missing from such an interpretation is the understanding that, firstly, once an offence has been committed then real pain has been inflicted on society, and real pain of punishment must consequently be applied in sufficient quantities to outweigh the profit of the offence. And secondly, the apparent pain might provide the example, and this need not be based on real pain as long as the apparent pain was convincing enough, but proportioned real pain was always needed to restrain, and perhaps reform the behaviour of guilty offenders. For no real punishment to be applied there had to be no real mischief in the first instance. Of greater concern is the additional omission from Halévy of the point that without an application of mischief of the primary category there could never be a mischief of the secondary, for, as discussed above, such categories might be distinct, but remain intrinsically linked.⁸² It was certainly the case

⁸² See above, where it is shown that secondary mischiefs must always derive from a primary - they can never stand alone (otherwise they would be primary mischiefs themselves). Thus, in the case of political punishment, if feelings of alarm (secondary pains) were inspired without any inflictions of punishment taking place at all, then such alarm would become the primary mischief. From Bentham's theory all primary mischief produces secondary mischief; in this instance such mischief would be the fear, concern and unhappiness spread when the discovery was made that criminals who were assumed to be punished had, in fact, received no actual, real pain at all.

that within the secondary category 'alarm' can exist without 'danger', but this by no means implied that without primary mischief there could be any secondary mischief. Thus, whilst Bentham was keen to make the apparent pain of punishment seem as great as possible, it was inconceivable for him to suppose that a secondary mischief could be created without the action of primary mischief.⁸³ The aim of Bentham's system was not, therefore, to achieve the production of secondary mischief without production of the primary, but rather to reduce the real pain of the primary mischief to as small a quantity as possible.

i) Bentham's Attack on the Misunderstood Consequences of Punishment

Bentham's analysis was wholly at odds with conventional understandings of the value and action of pain supplied by legal punishments. One of the greatest inadequacies he found with existing institutions and conventions was their inability to perceive the manner in which penal pain was distributed. In an important unpublished manuscript, taken from his early critique of criminal jurisprudence, Bentham not only highlighted the

⁸³ He did not expect his symbolism and elements of theatre - which aimed at heightening the impression of severity - to be able to extinguish the need for all primary punishment, only to make its application less substantial. For a discussion of some of Bentham's suggestions in the use of symbolism and analogy in raising the apparent pains of punishment, see Semple, Bentham's Prison, 31.

deficiencies of existing theoreticians but gave substantial insights into his hitherto unrecognised valuation of the 'mobility' of pain from punishment:⁸⁴

Unhappily such is the condition of human nature, that punishment can scarcely in any individual instance, much less in any class of instances be confined to the single person of the delinquent. Punishment is a draught which to use a scripture metaphor, can scarce ever be said to confine itself within the vessel that is chosen to receive it. So subtle is it's nature, it will ever be falling through and spreading itself over those that are contiguous. Punishment that shall be all stationary, is not to be found. All Punishment is of a prolific nature: it will propagate itself; and from that quantity what remains, as it was designed, in its stationary or proper form there will always come a considerable quantity that is Tralatitious. This one would naturally look upon as a misfortune - one would not wish to see it encreased. To a great Lawyer [Yorke] it seems otherwise. He observes that in society there is inevitably and always must be a considerable quantity of this sort to which I have given the name of tralatitious. As there is so much of it there already, says he, why need we scruple to make more. He might as well have said, as there are so many men blind already, what is the harm of putting out the eyes of more. If this be argument a man need never be at the trouble of apologizing for any measures of Government. It is impossible to do wrong. Indeed if this were not enough there is another argument, furnished and for ought it should serve, invented by another great Lawyer [Blackstone] that would abundantly do the business. According to the former [Yorke], Punishments cannot be inflicted on too many persons for the guilt of one. According to the latter, Punishments, let them be what they will can never be too severe. God forbid I should impute to either of those illustrious persons that cruel or unfeeling disposition which such sentiments considered in themselves, might seem to indicate. I only mention these examples as a proof that the best dispositions will not scarcely hold against that mechanical acquiescence in authority, that rage of vindicating every thing at any rate, that is unhappily so common among Lawyers.

⁸⁴ UC cxl. 11, fo. 149, titled 'CRIT. JUR. CRIM.' Marginals: 'Punishment Tralatitious. York'. Due to the wide-ranging and relevant nature of the unpublished material contained in this manuscript it is quoted here at length.

...

What is it that can stop the conjunct force of passions like those of Terror and Revenge, when stimulated by pride, and armed with the plenitude of Power? They plunge through thick and thin; and Lawyers, hoodwinked by professional prejudice, and secretly spurred on by interest, will plunge through thick and thin to justify them. Thus we see Toureil justifying torture, York the unnecessary punishing of the innocent, and Blackstone severity without bounds.⁸⁵

This is a highly interesting piece of analysis which gives substantial new emphasis to the whole construction of Bentham's IPML. With support from such manuscripts it is now becoming clear that a considerable part of Bentham's initial critique was in terms of the misunderstood nature of the spread of pain. He plainly devoted considerable energy specifically to a re-assessment of the action of pain in general, and to the pain of punishment in particular.

The general impression from his early manuscripts, as the above passage displays so well, is that the effect of inflictions of punishment was severely, perhaps even dangerously, misunderstood.⁸⁶ Punishment could never be

⁸⁵ For a description of Jacques de Toureil see, Bowring, x. 142; and for Toureil's defence of torture see, ibid. i. 231. By 'York' Bentham was probably referring to Philip Yorke, Earl of Hardwicke (1690-1764), judge and Lord Chancellor in 1737.

Bentham's comments regarding tralatitious punishment and his mention of York and Blackstone come as part of an extensive critique of criminal jurisprudence. See (CRIT.JUR.CRIM.), boxed mostly at UC cxix. Other parts of the work are to be found in UC cxvii - especially an account of working convicts in the Hulks, from 1778, at fos. 1-2.

⁸⁶ 'Dangerous' in the sense that if little interest was taken in the ultimate destination of legal pain then public confidence and respect for the law tended to be undermined.

confined to the delinquent himself, for such pain was 'subtle in it's nature', and inevitably 'prolific'.⁸⁷ Bentham was so concerned with this conception that he adopted a new term, 'tralatitious', to emphasise the elements of transference with which the pain of punishment ought to be crucially characterised.⁸⁸

In later volumes of his penal writings edited by Dumont and Smith one can also find much discussion of a newly introduced concept of 'mis-seated' punishment. This term was essentially used to mean 'punishment in the wrong place', but it similarly implied transference or overflow, and was closely related to Bentham's 'tralatitious' punishment.⁸⁹ Little substantial discussion of this 'mis-seated' punishment has so far been found in the

⁸⁷ UC cxl. 11, fo. 149.

⁸⁸ O.E.D. gives the uses of 'tralation' as, 'c. 1645 characterised by transference; c. 1653 passed from hand to hand, common; c. 1795 handed down from generation to generation.'

See UC cxli. 141, 'Tralatitious, In alienam personam, random'. Compare with punishment 'In alienam personam' - punishment that lights upon someone other than the offender; and punishment 'in propriam personam' - punishment which lights on the same person who offends. See Rationale, 3. Bentham frequently discussed punishment 'in alienam personam' in the archive. See UC cxli. 131-147.

⁸⁹ See Théorie, Bk. IV, 'Des peines déplacées', 344-78; Rationale, Bk. IV, 'Of Misseated Punishment', 277-323; UC cxl. 274, (February, 1811), where mis-seated punishment is linked with tralatitious punishment. The wrapper is titled in Bentham's hand, 'Peines - Misseeated', though this box mostly contains papers used in Dumont's, Théorie des peines. The term 'extravasated', introduced by Smith (Rationale, 282) is also used in the same sense as tralatitious, i.e. overflowing from the correct vessel within which the punishment is meant to be contained. See UC cxl. 297.

manuscripts, although its absence from IPML suggests that it was an idea developed after 1780.⁹⁰ The importance of the concept was that in Bentham's terms such punishment, both tralatitious and mis-seated, was punishment applied to 'a wrong person';⁹¹ hence it formed a distinct foundation for the pursuit of leniency. The argument was, that a 'lot' of pain affected many more people than simply the person to whom it was directly applied; thus, those contemporary, established quantities of punishment might have been too large for their purpose, since their derivative pains were ignored.⁹²

In his attacks upon conventional thinking Bentham's main concern was that the total lack of attention paid to the spread of punishment once applied caused both gross excesses of severity, and the potential punishment of the innocent. Bentham consequently attacked Yorke for simply not caring, and Tourel and Blackstone for justifying excessive and unnecessary inflictions of pain. By following Bentham's new division of the shapes of mischief it can be seen how such errors could arise and the value of his argument is revealed.

From the view of primary mischief, clearly Bentham could argue that too much pain applied to the actual

⁹⁰ The little that has been found at UC cx1. 274, 284, 297, is dated 1811.

⁹¹ Rationale, 277.

⁹² See Diagram 2 for the location of 'derivative' primary pains in Bentham's scheme of the shapes of mischief.

'original' offender caused grossly disproportionate amounts of pain to be spread to 'derivative', assignable persons.⁹³ These derivative persons, it must be emphasised, had committed no offence but were innocent receivers of pain through connections of interest or sympathy with the offender. Increasingly violent sentences, carried out for the sake of better deterrence, amounted to nothing more than a wholly wasted evil, and were capable only of increasing unhappiness. Such over-applications of pain made punishments unpopular, and consequently they could become increasingly inapplicable, as victims, juries and judges began to avoid full legal recourse in the face of what would eventually be regarded as unjust legal operations.

It also appears that Bentham accused earlier writers of confusing elements of what he classed as the secondary mischiefs of punishment. Here it must be remembered that, when discussing punishments rather than offences, secondary 'alarm' was actual pain, whilst secondary 'danger' was only a threat to potential offenders. In Bentham's theory it was quite clear, on a deterrent basis, which part of the secondary mischief of punishment ought to be amplified. Punishment dealing with the mischief of danger was the most effective and this ought to be expanded. The pain of alarm, however, affected all who became aware of the punishment, whether or not they were potential offenders. Thus Bentham's argument was that the

⁹³ See Diagram 2.

danger of punishment should be increased without an increase in the pain of alarm. Once seen in this light it became easy for Bentham to show that better detection, rather than more applications of pain, provided the solution, since this increased the 'danger' to potential offenders, whilst holding the pain of 'alarm' static, and perhaps even reducing it. Hence Bentham placed great emphasis on 'indirect measures' of legislation - such as better policing, and the compiling of criminal statistics - in manuscripts of the 1780s.⁹⁴

If the main primary mischief was raised, i.e. if more severe punishments were simply implemented, then all pain was increased, not just the pain and effective threat of the mischief of 'danger'. Consequently the punishment, though increased, may well fail to deter more.⁹⁵ Not only would there be more alarm (unproductive pain, since it caused no deterrence) but there would be an increased risk of the non-application of the legal sanction as the community gradually becomes aware of the excesses of punishment and is reluctant to see it applied.

Bentham's methodical analysis of the constituent parts of mischief provided him with a considerable groundwork for the application of the legal sanction.

⁹⁴ UC lxxxvii. 27; and see the section titled 'Indirect Methods of Preventing Crimes' in 'Principles of Penal Law', Bowring, i. 365-580. See also Radzinowicz, English Criminal Law, 30.

⁹⁵ This is what he believed he saw with the excesses of capital sanction. See 'On Death Punishment', Bowring, i. 525-532; and the discussion of Bentham's analysis of the death penalty in Ch. 6 below.

Firstly, new guidelines were established for 'correct' punishment; and secondly, a new basis was constructed for the more humane prevention of crime. From the subtle divisions and distributions of pain Bentham developed a unique understanding of how a legislator ought to limit the application of legal punishment, and he established the idea that, in certain cases, punishment might be unsuitable even if an offence had been committed.⁹⁶

D. A Surfeit of Pleasure and The Control of Future Action

With such emphasis being placed on the dividing of the consequences of pain the whole premise of Bentham's assessment of punishment can be found to rest on a twin foundation. Firstly, the principle was developed of producing only a surfeit of pleasure as the consequence of punishment; secondly, the end most likely to fulfil this first condition was expressed as the control of future action.⁹⁷

For Bentham, punishment ought to, 'augment

⁹⁶ See IPML (CW), 158-164.

⁹⁷ Commentators usually concentrate on the second of these foundations. See, for example, Long, Bentham on Liberty, 102, where it is noted that 'the basic principle... [is] enunciated in his work.. that punishments "ought only to be admitted in as far as it promises to exclude some greater evil", and that, 'the immediate principal end of punishment... is to "control action"'. What is often missed is the idea that punishments ought only to be supplied in the expectation of an eventual increase in social happiness.

'happiness', or, 'exclude... every thing that tends to subtract from that happiness: in other words, to exclude mischief'.⁹⁸ This held profound implications with regard to cases that could be deemed 'unmeet for punishment', in that any punishment might necessarily be avoided, when, though guilt be proven, future action could not be controlled.⁹⁹ Such control was essential to the provision of the central 'profit' of the punishment.¹⁰⁰ Where the cumulative effects of punishment were likely to constitute an eventual, positive addition to the sum of evil in society, there could be no justification for its application.¹⁰¹ This, Bentham believed, would be the case

⁹⁸ IPML (CW), 158.

⁹⁹ This is not to say, however, that the non-punishment of offences was unknown to contemporary thinkers. Indeed, it has been shown that William Paley saw a particularly positive role for non-punishment, though this depended on a maintained threat of severe punishment followed by selective judicial discretion to commute or pardon, rather than any assessment of distributed pains as with Bentham. See Crimmins, 'Strictures on Paley's Net: Capital Punishment and the Power to Pardon', 23-34.

¹⁰⁰ Although punishment could not be avoided if the first principle of punishment - that of being clearly beneficial - was established.

¹⁰¹ The infliction of pain on an offender without regard to the consequences was, in itself, insupportable. Bentham's concern for individual offenders was reflected in the Rationale: 'It ought not to be forgotten, although it has been too frequently forgotten, that the delinquent is a member of the community, as well as any other individual - as well as the party injured himself; and that there is just as much reason for consulting his interest as that of any other. His welfare is proportionably the welfare of the community - his suffering the suffering of the community. It may be right that the interest of the delinquent should in part be sacrificed to that of the rest of the community; but it never can be right that it should be totally disregarded'. See Rationale, 28-9.

in four specific instances, where punishment might variously be described as groundless, ineffectual, unprofitable or needless.¹⁰² The originality of such thinking lay in the fact that Bentham was not simply providing new categories of action which ought no longer to be termed offences, as was the case with Montesquieu, but rather, he offered four entirely new measurements for the valuation of any and all offences with the ultimate goal being greater social happiness.

¹⁰² IPML (CW), Ch. 13, 'Cases Unmeet for punishment', 158-164.

CHAPTER FIVE

UTILITARIAN FOUNDATIONS FOR A REDUCTION IN PAIN FROM THE LEGAL SANCTION

Bentham's development of the idea of proportion between crimes and punishments formed a major contribution to eighteenth-century penal discussion. He imposed order on concepts previously introduced by Montesquieu and Beccaria - and also, it is suggested below, by Hobbes - and provided thirteen 'rules or canons' for penal proportion.¹ It will be argued that he did so with the intention of ensuring, as Rawls has said, that 'the absolute level of penalties will be as low as possible'.² The result of Bentham's analysis was an intricate model calculating pains against pleasures, and aiming to provide graduations from mild to more severe punishment for the purpose of deterrence.

Particular emphasis will be placed on a previously undiscussed element of his theory - the nature and importance of individual 'disposition' as an indicator of future mischief or threat of mischief from an existing offender. The establishment of his assessment of this future threat will be discussed in terms of, firstly, the 'general' behaviour of the offender, and, secondly, the

¹ IPML (CW), 166-71.

² J. Rawls, 'Two Concepts of Rules', The Philosophical Review, 64 (1955), 13 n.

'particular' behaviour displayed on the occasion of the offence. These developments will be shown to produce a system seeking reductions in contemporary levels of legal punishment.

The most influential interpretations of Bentham's theory of proportion, developed by Halévy and Radzinowicz, suggest that in practice Bentham would have supported the continued infliction of severe punishments.³ However, manuscript evidence shows this to be an interpretation which fails to acknowledge Bentham's fundamental concern that a reduction in the levels of pain applied was required to achieve any improved effectiveness in the deterrent force of punishment.⁴

In relation to contemporary debate, regarding proportion and the graduation of punishments, Bentham's exploration of the concept of 'depraved disposition', as displayed in unlawful acts, is found to have been given prominent treatment.⁵ And particularly concerning the question of the 'temptation' to commit an offence, it will be shown that Bentham was important for the contribution of a sophisticated and encompassing system which

³ See Halévy, Philosophic Radicalism, 69-72; and Radzinowicz, English Criminal Law, 381-5, and 391-3, 'Emphasis on Severity'.

⁴ For Bentham's interest in leniency see UC xxvii. 48; for a discussion on precise calculation as an aid to deterrence see UC xxvii. 24a; and on the need for judicial interpretation see UC cxl. 61.

⁵ For the use of 'disposition' in determining the effectiveness of additions of small quantities of pain, see UC xxvii. 24a and 50.

intrinsically links the assessment of punishment to offence.

A. Precursors to a Theory of Proportion in England

In the construction of his theory Bentham freely admitted debts to both Montesquieu and Beccaria, whilst still judging his own work to be original in the provision of a coherent structure for the assessment of quantities of pain as punishment. Aware of the novelty of his model he stated,

... my fear is, that in the ensuing model, I may be thought to have carried my endeavours at proportionality too far. Hitherto scarce any attention has been paid to it. Montesquieu seems to have been almost the first who has had the least idea of any such thing. In such a matter therefore, excess seemed more eligible than defect. The difficulty is to invent; that done, if any thing seems superfluous, it is easy to retrench.⁶

Of course, examples of the advocacy of proportion in punishment can be found prior to the eighteenth century.

⁶ IPML (CW), 172 n. For Bentham's mention of Montesquieu and Beccaria as precursors to his own proportion theory a paragraph from Bowring, i. 399, is generally offered. See Radzinowicz, English Criminal Law, 384-5; Hart, 'Interpretive Essay', IPML, 1996, p. cv; and Rosen, 'Utilitarianism and the Reform of the Criminal Law'. Since Bowring took his text from Smith's recension of Dumont's Théorie des peines..., and it has not yet been established whether these are Bentham's words, it seems better to rely on Bentham's own reference from IPML. Bentham clearly thought that Montesquieu's analysis formed the beginning of some new approach, and, whilst he was well aware that he might be over classifying, Bentham remained convinced of the need to proceed in a more methodical manner.

Even amongst classical thinkers, with Cicero for instance, the notion of punishment being measured according to the extent of the offence is considered.⁷ But of special interest to Bentham's discussion is the work of Thomas Hobbes.

In Leviathan there can be found principles of punishment not dissimilar to those provided by Bentham's later system. Hobbes suggested, for example, that 'hurt inflicted, if less than the benefit of transgressing, is not punishment'. The clear sense being that the weight of punishment must overcome any 'benefit' provided to the offender by the offending act.⁸ Here was a concept closely corresponding with Bentham's core expression of the need to proportion the pain of punishment so that it would 'outweigh the profit' of the offence. Also suggested in Hobbes was the idea that any pain of punishment which did not reach this required 'weight' could not then be called a punishment. In such a case, he said, the punishment rendered became only a 'hurt inflicted'. Similarly, for Bentham, it would be described as pain 'wasted', since it was incorrectly proportioned to the profit of the offence.⁹

⁷ 'Noxiae poena par esto' (let the punishment be equal with the offence), Cicero, De Legibus, BK. III, Ch. 20.

⁸ For this and following references to Hobbes see Leviathan, Ch. 28, 'Of Punishments and Rewards'. Hobbes maintained here that the purpose of punishment was to deter future offences.

⁹ Hobbes stressed the need to inflict only the punishment determined by law, any 'greater hurt' was deemed to be 'not punishment, but an act of hostility', Leviathan, 204. Thus, not only did he imply a type of proportion, but he also provided a clear consequentialist

Therefore, although we have Bentham's statement indicating his belief that Montesquieu was the originator of the emphasis on proportion, it is certain that 'proportion' in punishment, in some sense, had a longer and more prominent English lineage than is perhaps indicated by Bentham's own references.¹⁰ The nascent mechanistic view found in Hobbes suggested a use of penal proportion which can easily be followed into Bentham's work.¹¹ And whilst Bentham never mentioned Hobbes in his punishment writings,¹² by depicting legal action as a force of potential pain working against the opposite impelling forces of potential pleasure, the same conclusion was reached by both thinkers - that a certain quantity of punishment could be defined as both necessary and correct. The parallels with Bentham's theory were strong in that the idea of proportion was crucial to both justifications

justification for the infliction of punishment, by saying that 'no pain [ought to be] inflicted without respect to the future good', Leviathan, 203. An intention to make the delinquent and others obey the law in future was therefore a crucial condition for Hobbes's definition of punishment.

¹⁰ Beccaria also noted the preeminence of Montesquieu in this field, 'The immortal President de Montesquieu touched hastily on this matter. Indivisible truth has compelled me to follow the shining footsteps of this great man'. See On Crimes and Punishments, 4.

¹¹ See also Leviathan, 94, where Hobbes said, 'Therefore before the names of just, and unjust can have place, there must be some coercive power, to compel men equally to the performance of their covenants, by the terror of some punishment, greater than the benefit they expect by the breach of their covenant.'

¹² Hobbes is occasionally mentioned in Bentham's letters. See, for example, Correspondence (CW), vii, 25 and 136.

of pain as 'punishment', and the argument was accordingly directed towards discussion of quantities of pain rather than concentrating on the more traditional debate regarding specific forms of punishment.¹³

Other thinkers also showed that proportionality was a subject discussed in England before the works of Montesquieu or Beccaria rose to prominence. In a little known work by Sollom Emlyn, for instance, the early advocacy of proportionality in punishment was to be found repeated.¹⁴ Yet Emlyn continued to make considerable use of religious justifications, particularly for his ardent defence of the death penalty, and his maintenance of connections between crime and sin revealed a continuing relationship with his more distinctly anti-reform contemporaries. With this connection with sin in mind it may be supposed that the fact that Hobbes was similarly blunt in his conviction that '... every crime is a sin' may go some way towards explaining Bentham's avoidance of reference to Hobbes despite their connections.¹⁵

In comparison, Bentham's discussion was sharply

¹³ Bentham went even further by preferring the word 'value' to 'quantity' since, 'the word quantity will not properly include the circumstances either of certainty or proximity'. IPML (CW), 169.

¹⁴ Sollom Emlyn, State Trials, 'Preface to the Second Edition of State Trials', vol. i, (London, 1730). For further discussion see Beattie, Crime and the Courts, 453.

¹⁵ Leviathan, 190. Mandeville appears to be the first English advocate of a clear separation between crime and sin.

distinguished in its use of a wholly secular approach, already common amongst the originators of utilitarian thought. Men such as Hutcheson and Helvétius provided the impetus for penal thinking which avoided any association with religious justification, and paved the way for Bentham's extension of rational calculation.¹⁶

B. The Thirteen Rules of Proportion and the Production of of Milder Punishment

The development of specific rules for the purpose of proportioning punishments to offences was clearly Bentham's most obvious contribution to a theory of proportion. With nine of his rules he established the foundations for increases in amounts of pain provided as punishment.¹⁷ Three others protected against excesses: rules five and six limited increases in pain, whilst rule twelve provided for a positive diminution. Finally, a thirteenth rule was given which stressed the point that precise calculation was not required and small

¹⁶ Francis Hutcheson maintained that 'right' action depended solely on material consequences, saying, 'That action is best, which procures the greatest happiness for the greatest numbers: and that worst, which in like manner, occasions misery', Inquiry Concerning Moral Good and Evil, 1726, 177-7. Helvétius asserted that all men are driven only by self-interest, and their despotic tendencies must be checked by tangible motives, De l'esprit, 284-289.

¹⁷ See IPML (CW), Ch. 14, rules 1-4 and rules 7-11, pp. 166-171.

disproportions might be ignored. With this plan Bentham sought the formation of a mechanism for the controlled assessment and application of pain that was unknown to earlier analysis.

The crux of the theory was an overwhelming emphasis placed on quantities of pain:

... the four first, we may perceive, serve to mark out the limits on the side of diminution: the limits below which a punishment ought not to be diminished: the fifth, the limits on the side of increase: the limits above which it ought not to be increased.¹⁸

Not only was this fifth rule, limiting the increase, of profound importance in Bentham's scheme for the reduction of punishments as observed in contemporary legal practice, but each of the first four added quantities of pain in such a way as to constantly preserve their increase relative to the perceived increase in the severity of the offence.¹⁹ Seeking such control in the infliction of pain revealed Bentham to be on common ground with the prominent strain of contemporary English reform represented by Eden's use of Beccaria's work. Yet, as has been shown,

¹⁸ Ibid. 169.

¹⁹ One of the biggest criticisms of punishment was that the law provided no reasonable limits to its infliction, beyond the protection provided by Article 10 of the Declaration of Rights against excessive fines and cruel and unusual punishments. See L.G. Schwoerer, The Declaration of Rights, 1689, (Baltimore, 1981), 86. Ignatieff has noted, though, that proportionality was exercised by victims, jurors and judges regardless of the law: 'obviously, a complex calculus ordered a prosecutor's, judge's, or juryman's conception of the proportionality of punishment to crime. We do not know enough about this calculus to explain why it changed during the eighteenth century'. A Just Measure of Pain, 19-20. Bentham's approach was closely connected with this popular desire for proportion.

more lenient punishment could only ever be expressed by Bentham as a reduction in the quantity of pain linked proportionately to a new, lower assessment of the pain spread by the offence.²⁰ Less pain could only be justified once his theory of the distribution of pains had discovered the degree of mischief to be, in fact, lower than that conventionally assumed. In these terms it can be seen that Bentham's theory of the distribution of pains was as important in his demand for a reduction in levels of severity as was his novel theory of proportion.

Beccaria's and Eden's pro-lenency theory may be seen, therefore, as a precursor to Bentham only in terms of its attack on the destructive consequences of contemporary severities, and in locating Bentham's relationship within the English debate where common support could be found for proportioning.²¹ Bentham paid considerable attention to Beccaria's demands for milder punishments, although the simple concept of proportionality as embodied in Beccaria's vision of a fixed scale of punishments to offences was not reflected in Bentham's variable, flexible embodiment of proportion

²⁰ See Ch. 4 'Distributions of Pain' above.

²¹ For the English debate Francis Bacon was of great and continuing influence, not only for reform in terms of a Digest, but also as a precursor to eighteenth-century attacks on severity. 'For roughness, it is a needless cause of discontent: severity breedeth fear, but roughness breedeth hate'. See Francis Bacon, *Essay XI, 'Of Great Place'*, The Essays or Counsels Civil and Moral of Francis Bacon, ed. A.S. Gaye, (Oxford, 1911), 46. He was also popular across Europe, indeed, Beccaria honoured him by placing a line from his essay 'Of Negotiating' on the title page of On Crimes and Punishments.

within his thirteen rules.²² With Beccaria, as with Eden, the basis for proportion was frequently sentimentalism - for Bentham this was an example of the erroneous establishment of political argument on principles of sympathy and antipathy.²³ Bentham's theory was thus a direct response to the inadequacy of existing penal concepts provided by prominent advocates of proportioned leniency.

Bentham was well aware of the potential charges against his system from such supporters of sentimentalism. He might be accused, he suggested, of offering a calculative system fatally flawed on the grounds that the ignorant, or those roused by passion, did not calculate. He provided an emphatic response:

When matters of such importance as pain and pleasure are at stake... 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 irritability of their minds: according to the nature of the motives by which they are acted upon.²⁴

And although in an early manuscript Bentham outlined a

²² It is shown above that Eden also disagreed with Beccaria on this point.

²³ See UC xvii. 48, 'Antipathy on the side of lenity'. See also the first paragraph of UC xxvii. 60, given here as Appendix, paragraph 1. Though, of course, Beccaria also used utilitarian arguments which unquestionably redeemed his analysis in Bentham's opinion.

²⁴ IPML (CW), 173-4. He added, as proof of the calculation of madmen, that, 'There are few madmen but what are observed to be afraid of the strait waistcoat'. Ibid. 174 n.

distinction which suggested that poor men might be driven by 'the physical appetite of hunger' rather than by 'the appetite for riches', he still regarded such poor men as calculating, though he emphasised that they were 'less qualified for the task'.²⁵ With such an understanding of the intrinsic nature of rational calculation, a system which itself emphasised calculation was not only suitable but, indeed, necessary. Consequently, Bentham formed a system in which more moderate punishments were sought via an application of logic, rather than upon any sentimental or religious grounds. Appropriate quantities of pain, delivered by various punishments, were sought via an empirical assessment of the effectiveness of past punishments. The consequences of existing punishments were searched for their proven deterrent value, and a sense of mathematical precision was stressed throughout.²⁶

C. Leniency as the Fourth Objective of Punishment

At every point during his discussion of proportion Bentham kept his attention on the prime goal of deterrence, as expressed in his objects of punishment, but here too we find an important, and less well analyzed,

²⁵ UC xxvii. 63. See also the fuller extract given below. Bentham stressed that all men do not calculate equally. The poorer men are, the more they are naturally driven by their physical appetites of lust and hunger and the less able are they to calculate.

²⁶ A full description will be given in the following chapter on modes of punishment. See also UC xxvii. 24a, on calculation.

element.²⁷ The first three of his objects have often been discussed in previous commentaries, and of greatest importance for Bentham was the attempted prevention of crimes - the first object of punishment. He also made it clear, as his second object, that if an offence was to be committed then the penal code must seek to prevent the worst; and thirdly, such a code ought to dispose the offender to keep mischief bound to be caused to a minimum. But of particular interest here is the fourth object of punishment, which stated that mischief must be prevented 'at the least expence'.

Whilst it is possible to view this as an economic object, and this view was encouraged by Bentham's use of the term 'cheap', it also provides a clear reference to his model for crime prevention. In this respect 'cheapness' meant nothing more than the 'least quantity of pain' possible, or in other words, as lenient a punishment as possible. Thus, whilst the first three objects of punishment concentrated on prevention, his fourth object of punishment was leniency, assessed as minimum pain or indisposition to severity. Leniency was, therefore, one of four key goals for Bentham. And these four goals governed, collectively, the application of his rules of proportion:

Subservient to these four objects, or purposes, must be the rules or canons by which the proportion of punishments to offences is to be governed.²⁸

²⁷ IPML (CW), 165.

²⁸ Ibid. 165.

In accord with his objects, Bentham's first four rules established additions in pain to outweigh the profit of the offence, to move against the greatest offences, to encourage preferment of the lesser of two competing offences, and to assign additions of punishment for each particle of mischief found to have been spread. Much can be related to Beccaria here, and Bentham specifically referred to Beccaria when he stated his first rule of proportion.²⁹ Although the equivalent expression of punishment as outweighing the profit of the offence is not to be found in Beccaria's text, what is found is a justification of proportion expressed such that,

... the obstacles that restrain men from committing crimes should be stronger according to the degree that such misdeeds are contrary to the public good and according to the motives which lead people to crimes.³⁰

Beccaria went on to offer a critique of notions of honour, vice and virtue as foundations for punishment which changed through the ages, and he called for the establishment of a 'universal scale of punishments and crimes'.³¹ As Montesquieu had done, he suggested that the same punishment for crimes causing differing degrees of

²⁹ See ibid. 166. Bentham referred to section six of Morellet's 1766 French translation, Traité des délits et des peines.

³⁰ Beccaria, On Crimes and Punishments, 14-16. For Beccaria punishments were seen as 'political obstacles'.

³¹ Ibid. 15. It has been noted above in Ch. 2 that neither Blackstone, Eden nor Bentham agree with the idea of a fixed scale of punishments.

harm was counter-productive.³²

Bentham incorporated Beccaria's notion of proportion succinctly in his first rule that, '*the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence*'.³³ Profit in this sense meant not just pecuniary profit, but as part of the economic model for punishment it referred to the whole pleasure, or advantage, gained by the offender from the offence. Similarly Bentham incorporated the distinction between greater and lesser crimes, as was first found in Montesquieu, in his second and third rules.

Where he made substantial developments in the concept of proportion as a provider of leniency was with the fifth and sixth rules which, for the first time, established a limit to increases in pain. Whilst it was vital, as the fourth rule said, to '*punish for each particle of the mischief*' the novel restraint on Bentham's infliction of pain was given by the emphasis in his fifth rule, that prevention be secured with minimum pain. Thus, stressing the importance of his objective of leniency, Bentham said,

The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore *The punishment ought in no case to be more than what is necessary to bring it into*

³² Ibid. 16, '*If an equal punishment is meted out to two crimes that offend society unequally, then men find no stronger obstacle standing in the way of committing the more serious crime if it holds a greater advantage for them*'. Compare, Montesquieu, The Spirit of the Laws, Bk. 6, Ch. 16, 91-2.

³³ IPML (CW), 166.

conformity with the rules here given.³⁴

With this fifth rule of proportion the justification for any excess severity in punishment was rejected.

Yet it was not only on rule five that the assessment of leniency within Bentham's theory depended. With the need to incorporate the essence of the more sentimental, or 'humanitarian', approaches of Beccaria and Eden, Bentham provided for the protection of individual sensibility and circumstance within his rules of proportion. Thus, rule six stated:

That the quantity actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always to be taken into account.³⁵

The centrality of circumstances and sensibility were vital to Bentham's theory if he was to achieve the same end as Eden of protecting the individual within a logical system involving the assignment of pain. In practice Bentham indicated that this must involve delegating a considerable sphere of action for the judge. For, whilst his first five rules were intended to guide a legislator alone, with the sixth rule he attempted, quite specifically, to guide the judge, 'in his endeavours to conform, on both sides,

³⁴ Ibid. 169. He emphasised the importance of the fifth rule later when discussing the properties to be given to punishment, 'the punishment ought in no case to be more than what is required by the several other rules: since, if it be, all that is above that quantity is needless'. Ibid. 175.

³⁵ Ibid. 169.

to the intentions of the legislator'.³⁶ And the intentions of the legislator, as prescribed within the first five rules, were to inflict the mildest possible punishments which prevent mischiefs. Such concessions in favour of judicial interpretation stood in stark contrast to the desire of Beccaria to avoid any leeway for judicial discretion.³⁷ Yet Bentham's inclusion of such discretion was found essential to achieve the necessary scope to establish minimum punishment as the standard.

D. The Calculation of Milder Punishment as an Aid to Deterrence

So far emphasis has been placed on the fourth object of delivering punishment at as cheap a rate as possible. In this sense minimum punishment was a key goal. However, this fourth object did not detract from, but supported, the first three objects which together aimed for prevention.³⁸ Once again, debts were incurred here to both Beccaria and Eden. Beccaria, in particular, relied principally on arguments concerning certainty to support

³⁶ Ibid.

³⁷ See Beccaria, Crimes and Punishment, chapter 4, 'Interpretation Of The Law', where he reacted vehemently against the extreme judicial discretion characteristic of the Europe of his day. Such discretion was the product of the simultaneous operation of Roman law, local custom, royal decrees and judicial practice.

³⁸ It supported them only in the sense of emphasising the minimum necessary deterrent.

his position, and to remove the need for pardons or exemptions. So he wrote,

... one of the greatest checks on crime is not the cruelty of punishments, but their inevitability.³⁹

Importance was clearly placed on the sureness of the infliction of punishment on the guilty. William Eden argued similarly, but added that mildness in punishing protected the public virtue of all - victims, witnesses, juries and judges.⁴⁰ This emphasis on mildness was a development from the notion prominent in Montesquieu and Beccaria that harsh punishments corrupted the citizenry, and that once a citizen body was accustomed to severe punishments such severity no longer shocked into preventative obedience of the law.⁴¹ The most damaging criticism of the deterrent power of severe punishment was provided by Beccaria when he showed that it was extremely difficult to maintain 'the essential proportion' between offences and punishments when severity was high, and that impunity arose from the very savagery of severe punishments.⁴²

Thus, mild punishments aided deterrence via their

³⁹ Beccaria, On Crimes and Punishments, 46.

⁴⁰ In that under severe regimes 'jurors are taught to trifle with their oaths', and to lie by 'a kind of pious perjury', in order to protect minor offenders from grossly disproportionate penalties. Such behaviour was due, Eden said, to impulses of benevolence. With mild punishments there was no need for deceit, hence no-one was corrupted by the judicial process. Principles of Penal Law, 268-70.

⁴¹ Beccaria, On Crimes and Punishments, 46-7.

⁴² Ibid. 46.

conduciveness to proportioning and by their ease and certainty of application. The scope for graduated proportionality within Bentham's theory has been shown above to have been considerable, via his emphasis on calculative quantification. And although Bentham did not demand the removal of judicial freedoms, he clearly expected punishment always to be applied.⁴³ Judges were not free to recommend a pardon. With Bentham, they simply had discretion to adjust quantities of pain applied; yet this discretion was intended to allow better proportioning of punishment to offence, and hence improve the quality of the punishment as a deterrent for others. His objective of graduated, minimum pain therefore allowed, firstly, no reason for the restraint of prosecution on the part of the victim and jury, and secondly, the certain application of punishment, on the part of the judge.

The superiority of Bentham's system in its effectiveness as a deterrent relied completely on the accuracy of its calculation of the quantity of punishment relative to the offence. As a standard rule Bentham held with the general dictum that 'the quantum of the punishment must rise with the profit of the offence'.⁴⁴

However, determining the profit of the offence was by no means a simple matter although, 'the profit of the

⁴³ To be applied, that is, where justification existed, i.e. not where the conditions for 'Cases unmeet for punishment' applied.

⁴⁴ IPML (CW), 167.

offence is commonly more certain than the punishment'.⁴⁵ To compensate for this accepted, but awkward fact, Bentham introduced three further rules within his theory of proportion which enabled additions to be made to the quantity of punishment:⁴⁶

To enable the value of punishment to outweigh that of the profit of the offence, it must be increased, in point of magnitude, in proportion as it falls short in point of certainty.

Punishment must be further increased in point of magnitude, in proportion as it falls short in point of proximity.

Where the act is conclusively indicative of a habit, such an increase must be given to the punishment as may enable it to outweigh the profit not only of the individual offence, but of such other like offences as are likely to have been committed with impunity by the same offender.

With these supplements to his first rule of proportion we find Bentham developing precise guidelines for an improved correlation between punishment and offence. In attempting to account for any mischief caused, and profit provided, by other likely offences of the same type, and in assessing whether an offence was indicative of a habit, Bentham substantially modified proportion theory by extending his assessment beyond any single offence.

Yet these three further rules look as if it they could easily tend towards gratuitous harshness; indeed, Bentham himself suggested that it may well be a 'severe'

⁴⁵ Ibid. 169.

⁴⁶ Rules 7, 8 & 9. Ibid. 170.

and 'random' way of calculating.⁴⁷ And although Bentham emphasised that the rules might only be used in certain cases, such as frauds of coin, where similar offences were almost guaranteed to have occurred without detection, one is still left with the sense that the infliction of a greater quantity of pain, than was known for certain to be justified, did provide grounds for excessively severe pain. This sense is only increased by rules ten and eleven which stated that if a quality, or mode, of punishment is especially appropriate, and particularly if this is well calculated to provide a 'moral lesson', then quantity could again be increased.⁴⁸ Accordingly, his closely calculative theory of proportion seems undermined, and with it any pursuit of leniency. However, in the manuscripts, Bentham suggested that,

If the rules of evidence be clear from over-scrupulous subtleties, if the system of procedure be simple, and the administration of Justice pure, a small quantity of punishment is enough to make up that deficiency of force which results from the uncertainty of execution.⁴⁹

The point to note is that only a small quantity of additional pain was envisaged within the supplements to punishment provided by rules seven, eight and nine above.

⁴⁷ Ibid. This suggestion appeared to provide material for those who suggested that Bentham continued to favour severe punishments, see Radzinowicz, English Criminal Law, 391.

⁴⁸ Here Bentham seems to revert to giving undue weight to the manner of the offence, rather than the manner of the motives.

⁴⁹ UC xxvii. 63. With 'uncertainty of execution' Bentham was here referring to the uncertain profit from executed crimes.

The implication was, that the additions from these rules, for unknown elements in the calculation of punishment, were substantially less than the quantities of pain justified by the first and most important rule.

Yet, though the manuscript in question gives some clarification of the issue of supplementary pains, it raises new problems not treated in IPML. While it seems to be the case, in theory, that Bentham argued only small quantities of punishment were needed to achieve a deterrent effect, in practice it was shown to be more complicated. An important distinction was introduced with the claim that there was a significant difference between the deterrent effect of a given lot of punishment when faced with various motives to offend.

It is clear that in Bentham's early penal theory a particular amount, or mode, of punishment had a better chance of deterring when it operated against, what was described as, the appetitive motive of 'amour' or 'affection', rather than when confronted with a motive of physical desire or ill-will. Thus he is found to say:

There are some appetites which are circumspect and reflective; such are the appetites for riches for power, and for honour. There are others which are precipitate and blind, such are the physical appetites (of lust and hunger) and the appetite of revenge. The former can be combated with much more advantage than the latter: with much greater probability of success...

The poorer a man is, the nearer is the appetite for riches to the physical appetite of hunger: it is the more precipitate: it is the less qualified for the task of calculation. On this account it is necessary to be severer against crimes of indigence than against crimes of avarice although the nominal profit to the criminal and the mischief to the party injured

be to the same amount in the one case as in the other.⁵⁰

The implications of this passage were far-reaching.⁵¹ What is of interest here is the considerable emphasis placed on the principle that quantities of punishment restrain motives, rather than prevent specific offences. The countering of various motivating forces was given new importance in the calculation of punishment.⁵² But recognition was also given, for the first time, to the entirely inconsistent preventative ability of a given quantity of punishment, when faced with a variety of motivating 'appetites'.

The consequence of this appreciation of the varied effects of a given lot of punishment on distinct motives produced a number of difficulties for Bentham. By linking economic weakness, i.e. poverty, with essentially 'precipitate' motives to offend, Bentham assumed that the poor must calculate less, and hence would require a greater threat of punishment to prevent them from

⁵⁰ UC xxvii. 63, sheet headed 'Common Measure', uncertainly dated, but probably 1777.

⁵¹ See above for discussion of men's various abilities to calculate. On the relationship of this passage to the contemporary discussion of disposition and temptation, see below.

⁵² This was a considerable distance from Beccaria's understanding, which suggested a fixed scale of punishment to offence and appeared unable substantially to accord with motivating circumstances in particular instances. Eden, on the other hand, did appreciate something of the variety of forms of motivation, since he called for the legislator to put himself in the situation of the offender, and to take account of the offender's circumstances before assigning punishment. Yet he could only offer vague, incalculable sympathy in response.

offending. So he envisaged the situation where exactly the same offence might be committed simultaneously by an indigent poor man and by a middle-class man, and where they might both receive the same quantity of profit of pleasure. However, not only would they require different quantities of punishment, but, as the quote above emphasised, the indigent man ought generally always to receive the more severe. Thus, as the quantity had to rise with the profit of the offence, so it must also apparently rise with the involvement of 'precipitative' physical appetites.

This concept held damaging implications for the presentation of Bentham's theory as one which supported leniency. Since the most prosecuted group of individuals, the poor, were hereby prescribed greater quantities of pain than their middle-class compatriots, it appears that the continued concentration of severity upon the most disadvantaged sections of society was not only countenanced but justified. And although Bentham's twelfth rule of proportion operated to reduce quantities of pain, by allowing for circumstances to prove punishment for any crime to be unprofitable, the weight given to the physical, 'precipitate' motives of hunger and lust apparently removed all hope of any general leniency for the poor within his penal code.

However, Bentham spent much time considering motivation, both in psychological and economic terms, and it is clear from the structure of his theory, as presented

in IPML, that many ideas and positions were well established before he came to consider the application of his rules of proportion. Of particular importance was the chapter on dispositions, for it was on the basis of this element only, that motives otherwise requiring severe pain for their restraint could be said to be deterred by a lesser.⁵³

Thus, when considering in what proportion an offence was to be punished, Bentham took the following three aspects into account, and apparently in the following order:

1. the quantity of pain inflicted on society by the offence
2. the quantity of profit received by the offender
3. the disposition of the offender

It can be seen that his thirteen formal rules of proportion dealt essentially with the second aspect in that their prime object was to outweigh the profit of the offence at minimum expense; they also dealt with the first aspect by emphasising that every particle of mischief must receive a quantity of punishment. These thirteen rules did not, however, have any relation to the third aspect, that of the disposition of the offender. Yet, his theory of proportion had also to incorporate increments of pain relative to the character of the offender's disposition if this was found to be 'bad'.⁵⁴ Similarly if 'disposition' was found to be other than positively 'bad' then this

⁵³ See Ch. 11 in IPML (CW).

⁵⁴ There was a clear separation between motivation, intention, disposition and the rules of proportion.

aspect would provide grounds for restraint in punishment. It is suggested therefore, that it was emphasis on this element which prevented Bentham's logical addition of quantities of punishment from uncontrollably undermining his interest in greater leniency, especially for the indigent poor.

E. The Role of 'Disposition' in the Reduction of Legal Punishment

As an integral part of Bentham's discussion of human dispositions he confronted the problem of how to assess the depravity of an offender. In the late eighteenth-century debate this question of depravity revolved around, and was inescapably linked with, the question of how temptation should be dealt with in any theory of proportioned punishment.⁵⁵

The problem of a reduction in blame when accompanied by an increase in temptation was a peculiarly English development. It was not prominent in Beccaria's discussion, yet Blackstone spent much time considering the question. And William Eden sought to confront the problem of temptation directly in suggesting that the 'malignity' of an offence should be established before assigning

⁵⁵ Blackstone sought increases in punishment for increases in temptation. Eden, on the other hand, sought proportionate reductions in punishment in relation to increases in temptation.

punishment.⁵⁶ Eden's analysis has been contrasted with the approaches of Blackstone and Paley, both of whom sought in varying ways to justify severe punishments, since they drew conclusions of depravity from the susceptibility to temptation.⁵⁷ In both Blackstone and Paley it was argued that the nature of the offence took precedence over the motives of the offender, and over the consequences of his actions. Hence the most tempting offences, that is to say, those which were most easily committed and most difficult to detect, ought to be assigned the severest punishments.⁵⁸ Eden's analysis has, conversely, been shown to be exceptional in its valuation of the particular circumstances of individual offenders, and in its demand for a clear reduction in punishment in proportion to any increases in temptation.⁵⁹

Bentham unmistakeably engaged with this debate when he assumed 'disposition' to be associated with the

⁵⁶ Eden, Principles of Penal Law, 10.

⁵⁷ Radzinowicz is one amongst many to have noted the variety of views on punishment for an increased temptation to offend. English Criminal Law, 250, 385.

⁵⁸ On simple grounds of deterrence - greater deterrence needed for crimes which were easier to commit.

⁵⁹ Eden's argument was that simple crimes showed less depravity, and consequently deserved less punishment. He used a concentration on leniency in punishment to justify a system in which offences for which there was greatest temptation should be punished less severely. It was Eden's view - against the accepted understanding of the law as expressed by William Blackstone - that the application of Beccaria's theory of proportion in punishment could provide for no other conclusion. It was inherently unjust to punish more severely those who committed the simplest and most tempting crimes. See Ch. 1 above.

question of temptation.⁶⁰ He regarded a disposition to be either beneficent or depraved, and his position of the late 1770s was summed up in IPML as follows:

So far then as the absence of any aggravation, arising from extraordinary depravity of disposition, may operate, or at the utmost, so far as the presence of a ground of extenuation, resulting from the innocence or beneficence of the offender's disposition, can operate, the strength of the temptation may operate in abatement of the demand for punishment. But it can never operate so far as to indicate the propriety of making the punishment ineffectual, which it is sure to be when brought below the level of the apparent profit of the offence.⁶¹

Here, he clearly stated his rejection of Blackstone's and Paley's calls for automatic increases in punishment with increases in temptation. And in this sense Bentham can be said to follow Eden's thought. Nevertheless, he placed strict limits on the extent to which temptation was used to reduce punishments in that it ought never to fall 'below the level of the apparent profit of the offence'. Here we see that although disposition must be taken into account it was not of prime importance; it must follow a calculation of mischief spread, and a valuation of the profit of the offence. Nevertheless a basis was provided for the reduction in punishment.

However, paradoxically, the above text, which supported the strength of temptation as a ground of

⁶⁰ This can be seen in a number of texts. See IPML (CW), Ch. 11, and p. 138 in particular, where Bentham discussed, 'what is to be understood by the *strength of the temptation*, and what indication it may give of the degree of mischievousness in a man's disposition in the case of any offence'.

⁶¹ IPML (CW), 167.

abatement, apparently contradicted the analysis given just one sentence earlier:

The strength of the temptation, *coeteris paribus*, is as the profit of the offence: the quantum of the punishment must rise with the profit of the offence: *coeteris paribus*, it must therefore rise with the strength of the temptation. This there is no disputing.⁶²

Clearly there is ample room for confusion. Bentham's position in this respect has been discussed by both Elie Halévy and Leon Radzinowicz; but although they both ultimately conclude that Bentham's theory does allow for some, limited extenuation of punishment upon certain occasions of increased temptation, they remain unconvinced that Bentham sought any substantial reduction on these grounds.⁶³

Radzinowicz, for instance, has taken Bentham's position to mean that,

... penalties should be adjusted to every degree of temptation, but the courts should have the power to mitigate them in cases where the presence of temptation indicates the absence of a confirmed depravity, or where the offence has been committed under the influence of a benevolent stimulus.⁶⁴

In other words he sees Bentham's argument as being in favour of reducing punishments.

Elie Halévy, however, reflecting the quote from IPML above, begins his analysis saying that Bentham thought, 'punishment must increase with the profit from the crime;

⁶² Ibid. 167.

⁶³ They also remain uncertain as to how to specify exactly which occasions may qualify for mitigated punishment.

⁶⁴ Radzinowicz, English Criminal Law, 385.

therefore, other things being equal, it should increase, ... with the strength of the temptation.⁶⁵ Halévy acknowledges the fact that Bentham knew this appeared harsh and he sees that Bentham made an allowance for the element of temptation, 'so as to lessen the punishment in so far as the stronger influence of a slight temptation indicates a worse disposition in the agent.'⁶⁶ But Halévy emphasises that this is to be seen as an exception, and must not be 'confused with the rule'. He continues,

To say that the proof of a depraved disposition is less conclusive is not to say that the depravity is less. For in spite of contrary indications it is always possible that the crime would have been committed even if the temptation had been less strong. The attenuating circumstance is only a matter of presumption; the crime is a matter of certainty.⁶⁷

It seems that Halévy is saying that it will be a rare occasion when an increased temptation will actually, in practice, lead to any attenuation of punishment. But from a further statement of Bentham's it also seems possible to question whether his theory actually leads to any mitigation at all?

In summing up the use of his chapter on human disposition Bentham said,

The depravity of disposition, indicated by an act, is a material consideration in several respects. Any mark of extraordinary depravity, by adding to the terror already inspired by the crime, and by holding up the offender as a person from whom there may be

⁶⁵ Halévy, Philosophic Radicalism, 69. Compare IPML (CW), 167.

⁶⁶ Halévy, Philosophic Radicalism, 69.

⁶⁷ *Ibid.*

more mischief to be apprehended in future, adds in that way to the demand for punishment.⁶⁸

This seems to be implying that any indications of extra depravity should produce an addition to the quantity of punishment, which is something very different from looking for ways of reducing punishment. It does not seem difficult to extend this calculation of depravity, especially if it is deemed to be an 'extraordinary depravity' as above, to conclude that the least likely effect of assessing disposition in Bentham's terms would be any reduction in punishment applied.

Similarly, Radzinowicz has also argued, despite his earlier comments given above, that Bentham was in accord with Blackstone in supporting the punishing of the most tempting crimes more severely so that the principle goal of deterrence be achieved. He says, that Bentham, 'suggests that punishment should be increased in proportion to the temptation, irrespective of the gravity of the offence'.⁶⁹ Clearly there is uncertainty amongst

⁶⁸ IPML (CW), 141.

⁶⁹ Radzinowicz, English Criminal Law, 391. Radzinowicz had also earlier said, 'When, owing to a combination of circumstances, the temptation to commit a certain crime is particularly great, the punishment should be correspondingly more severe', *ibid.* 384. And, likewise, he notes Bentham's comment in IPML that, 'To say, then, as authors of great merit and great name [Beccaria and Eden] have said, that the punishment ought not to increase with the strength of the temptation, is as much as to say in mechanics, that the moving force or *momentum* of the *power* need not increase in proportion to the momentum of the *burthen'*, IPML (CW), 166 n; also at Bowring, 87 n. Radzinowicz continues, 'Paley and Blackstone both considered increased temptation a reason for enhancing the severity of the punishment. Eden objected both to an increase and a mitigation'. See English Criminal Law, 384.

commentators regarding Bentham's precise meaning,⁷⁰ and Radzinowicz tries to clear the confusion by sharply stating that what it all indicates is that Bentham was, 'by no means in favour of lenient penalties'.⁷¹ Both commentators agree there is a theoretical basis for the mitigation of punishment on the basis of increased temptation, but it is reckoned, in practice, to be more an exception rather than a rule.

Yet, it seems to be claiming too much to say that Bentham was against lenient sentences. He certainly said that deliberately mild punishments were cruel to both offender and the public at large:⁷²

The partial benevolence which should prevail for the reduction of it below this level, would counteract as well those purposes which such a motive would actually have in view, as those more extensive

This, however, seems wrong since Eden objected only to an increase.

⁷⁰ Hart also finds Bentham's views on temptation to be apparently contradictory: 'For Bentham a strong temptation points in two opposite directions: on the one hand it shows that the offence manifests a less generally maleficent disposition needing less to correct it than the same offence committed for some trivial gain. So punishment may in principle be abated on this account. But it must never be lowered to the point at which it fails to outweigh the apparent profit; if it does the offender will be punished to no purpose and his punishment will be so much useless cruelty...'. See H.L.A. Hart, 'Bentham's Principle of Utility and Theory of Penal Law', an interpretative essay, IPML, (1996), pp. cv-cvi.

⁷¹ Radzinowicz, English Criminal law, 391.

⁷² In his discussion of human dispositions Bentham arrived at the conclusion, '... the aversion we find so frequently expressed against the maxim, that the punishment must rise with the strength of the temptation; a maxim, the contrary of which, as we shall see, would be as cruel to offenders themselves, as it would be subversive of the purposes of punishment'. IPML (CW), 142.

purposes which benevolence ought to have in view; it would be cruelty not only to the public, but to the very persons in whose behalf it pleads... Cruelty to the public ... by suffering them, for want of adequate protection, to lie exposed to the mischief of the offence: cruelty even to the offender himself, by punishing him to no purpose.⁷³

However, believing it cruel to be positively mild was not at all the same thing as being outrightly opposed to lenient punishments. His only prerequisite was that the minimum pain of the punishment must outweigh the profit of the offence. And he defended this position strongly against those who regarded this as a harsh tenet, saying, 'the above rule has been often objected to, on account of its seeming harshness: but this can only have happened for want of its being properly understood'.⁷⁴ On the question of quantities of pain in general he said quite simply in the Traités,

The question is not whether a penal code is more or less severe; this is a bad way of looking at the subject. The whole question can be reduced to judging whether or no the severity of the code is necessary.⁷⁵

It is more appropriate to say, then, that Bentham did not agree with Eden in supporting lenient sentences simply because they were lenient, but that he did agree with Eden in regarding existing systems of punishments to be inhumane in their lack of proportion; consequently he sought to establish a far closer proportioning of

⁷³ Ibid. 167-8.

⁷⁴ Ibid. 167.

⁷⁵ 'Rationale', Bowring, i. 398.

punishment to offence.⁷⁶

Clearly then, Radzinowicz is mistaken in ultimately grouping Bentham together with Blackstone simply because they both mention that punishment ought to be greater for more tempting crimes. Bentham did not argue, as Blackstone and others did, that tempting crimes demanded greater punishments because they were easy to commit. Neither did he say that the most tempting crimes should be severely punished because they were more difficult to prevent. His argument for all crimes was the same. They will only be prevented once the pain of punishment outweighed the profit of the offence. He took the view that neither too great nor too small a punishment was required but only one correctly measured.

To move the debate beyond the analysis of Halévy and Radzinowicz it is necessary to return to the manuscripts.⁷⁷ Here Bentham was found to have expressed the desire that those of good disposition ought not to be punished more severely solely because they were exposed to temptation. In the sense that beneficence might be seen as a characteristic of individual disposition, Bentham's use of the term 'disposition' here appears synonymous with

⁷⁶ As Halévy rightly says, 'It is true that Bentham happens to find himself in agreement... with the sentimentalists when he denounces the excessive severity of punishments. But an agreement about principles must not be inferred from a partial agreement about conclusions'. Philosophic Radicalism, 74.

⁷⁷ And to UC xxvii. 60-3 in particular, given here as the Appendix.

the conventional notion of individual virtue. Indeed, where Eden spoke of virtue,⁷⁸ Bentham suggested beneficial conduct.⁷⁹ Disposition thus became closely linked to intentionality. If an individual's actions had no intention of harming society, or if they positively meant to benefit society, then, although harm might be unwittingly produced, the disposition had to be good or beneficent. Although such actions could not be encouraged, at the very least they could be taken to show the absence of any future threat from the offender.

F. The Nature of Disposition as an Indicator of Future

Mischief

This future threat was of key importance to Bentham's theory. To make sense of his analysis we must return to the model of the shapes of mischief discussed in his chapter on 'Consequences of a Mischievous Act'.⁸⁰ Using the same understanding of the 'danger' of future pain Bentham reassessed disposition, in cases of high temptation, in terms of its indication of a potential future threat to the community.

Bentham established that a divided assessment of the

⁷⁸ See Ch. 1 above.

⁷⁹ See the discussion of disposition at IPML (CW), 167.

⁸⁰ Discussed in Ch. 4, 'Distributions of Pain', above.

future threat must be made when seeking grounds for a reduction in the levels of punishment. Thus we find in the manuscripts a distinction between a 'general' and a 'particular' future threat.

Of the individual offender of 'less bad' disposition it could be said:

It is certain also that as far as he alone is concerned there is the less reason, even on the principle of utility for punishing him: for there is the less reason to apprehend that in his disposition the selfish or dissocial affection will in the general tenor of his conduct maintain an undue ascendancy over the social...

Now in proportion as the temptation is strong, the less depraved is it necessary a man's disposition should be in order to admit of his yielding to the temptation...: in proportion therefore as the temptation is strong, the less has the community to fear from the general behaviour of the delinquent, abstracted from his behaviour in the particular sort of case in question.⁸¹

With high temptation indicative of less depraved disposition a society was said to have less to fear from the general behaviour of an individual. Hence Bentham could support the argument of Eden that high temptation demanded more lenient punishment. Thus he gave the example:

A man with a numerous family of children, on the point of starving, goes into a baker's shop, steals a loaf, divides it all among the children, reserving none of it for himself. It will be hard to infer that that man's disposition is a mischievous one upon the whole.⁸²

In general it could be said that such a man would only give in to the temptation to steal when his family was on

⁸¹ See Appendix (UC xxvii. 60), paragraphs 2 and 3.

⁸² IPML (CW), 128.

the point of starvation, and this was done in an extra-regarding manner, i.e. he ate none of the stolen bread himself. This was assessed to be of little threat to society and a reduction in punishment could be justified. To emphasise the point Bentham gave a further example:

Alter the case, give him [the man with the family] but one child, and that hungry perhaps, but in no imminent danger of starving: and now let the man set fire to a house full of people, for the sake of stealing money out of it to buy the bread with. The disposition here indicated will hardly be looked upon as a good one.⁸³

Clearly, in this case, the temptation was in no way as extreme as the first, and the action taken was directly harmful to others in a considerable degree. The general threat from an individual prepared to take such action was considered to be high, and a correspondingly high threat of punishment was required to counter such an offence.

But it was also established that, as far as the particular behaviour of both offenders in the examples were concerned, they was extremely likely, perhaps even certainly likely, to succumb to future temptations similar to the 'particular sort of case in question'. The crucial importance of this point was carried to a logical conclusion with the suggestion that 'as often as a temptation of the magnitude in question falls in his way, so often will he committ the offence in question'. Hence Bentham also claimed that,

If then it be seriously intended to find a stop to the offence in question it is evident that an addition must be made to the punishment; and that not

⁸³ Ibid. 128-9.

in the inverse proportion to the strength of the temptation.⁸⁴

Bentham continued, saying that to do otherwise would be cruelty to both the community and to the offender, thus, apparently neutralising once again his earlier argument that temptation recommended abatement of punishment.

This divided approach to the assessment of offences of strong temptation exemplifies the way Bentham's theory was able to tackle existing questions in a new fashion. But it also shows how the complexity he introduced necessarily removed the possibility of establishing any simple line of argument in respect of temptation. He could never provide a fixed rule which demanded either an increase or a reduction when faced with high temptation. Commentators have clearly had difficulty in reconciling the conflicting ideas Bentham presented on this point. Yet consistency is provided in both his manuscripts and published work.

From his first view Bentham argued that society had, in general, little to fear from the individual who succumbed to an offence of high temptation. Whilst from the second 'particular' view, he was certain that society had a great deal to fear from the same offender. By dividing his analysis, and producing such a dual assessment of the future threat from offenders lured by high temptation, Bentham found grounds for supporting both a reduction and an increase in any corresponding

⁸⁴ See Appendix, paragraph 4.

punishment. This does not imply, however, that one cancels out the other, for the quantities involved always vary.

The problem for Bentham was that as long as there remained the chance of a similar temptation occurring again, the political sanction had to take some action to prevent it.⁸⁵ It was certainly not free to remit punishment altogether as he believed was the case as far as the moral sanction was concerned.⁸⁶ And, again Bentham accorded with William Eden, for even Eden never suggested that offences of high temptation ought to go unpunished altogether. With division into a 'general' and 'particular' threat it seems plain that Bentham's theory was able to establish a considerably reduced threat from such offences. For, since the greater threat must come from 'general' behaviour, once this was detached from the specific 'particular' threat, it was indeed possible for Bentham to argue for the supply of a lower quantity of pain as punishment.⁸⁷ The obvious problem for Halévy and Radzinowicz in deciding which occasions were appropriate for mitigated punishment and which were not, is resolved. Mitigation was now seen to depend on the establishment of

⁸⁵ Even if the political sanction was able to effect reform in the offender's behaviour when confronted with the temptation to offend any such reforming sanction must first be applied as part of the mischief of punishment. See IPML (CW), 147 n.

⁸⁶ See Appendix, paragraphs 5 and 9, where a sharp contrast is revealed in the approach of the moral and political sanction to cases of high temptation.

⁸⁷ Appendix, paragraph 10.

no future threat from the 'general' behaviour of the offender.

The point was clarified in the manuscripts by an example of the opposite position, where temptation was weak and mischief from the offence very great.⁸⁸ An offender was said to require the most severe punishment when, like the 'Roman Tyrants', he displayed 'a disposition which upon the slightest impulse of desire threaten'd to plunge him into the commission of the most atrocious offences'.⁸⁹ In such instances, the future threat of further widespread mischief appeared very great and hence the demand for punishment was at its strongest. To justify the opposite - for punishment to be at its lowest level - it was, therefore, necessary to envisage a high temptation which was productive of low mischief.⁹⁰ Mischief, or the spread of pain, was again the key. If mischief was low, then in circumstances of high temptation,⁹¹ punishment could be reduced, though never below the profit received by the offender from the offence.

The confusion found in existing commentaries appears

⁸⁸ Ibid. paragraph 7.

⁸⁹ Ibid.

⁹⁰ Presumably high temptation with high mischief demanded a medium application of pain of punishment.

⁹¹ 'Thus,' said Bentham, 'if a poor man, who is ready to die with hunger, steal[sic] a loaf of bread, it is a less explicit sign of depravity, than if a rich man were to commit a theft of the same amount'. See IPML, 140.

to be due also to a false association between 'temptation to offend' and Bentham's rules of proportion. The analysis of 'disposition' was connected with Bentham's concern with temptation, and this formed a discussion distinct from his rules of proportion, which sought essentially to outweigh the quantity of pleasure provided as profit of the offence.

The emphasis on temptation, though useful, was hereby greatly diminished. It helped only in the establishing of the goodness or badness - the beneficence or depravity - of an offender's disposition, and was a secondary element. Of most importance was the mischief created by the offence, then came the degree of temptation experienced by the offender, and finally, of less weight in the scale of calculation, came the nature of the offender's intention. Each of these factors was only relevant in their indication of the possibility of any future threat, either 'general' or 'particular', from the individual under enquiry.

Bentham's rules on disposition can now be viewed in a clearer light:⁹²

Rule 1. The strength of the temptation being given, the mischievousness of the disposition manifested by the enterprise, is as the apparent mischievousness of the act.

Here Bentham aimed solely at assessing what constituted a mischievous disposition, emphasising how his prime concern

⁹² IPML (CW), 140-1.

was with the spread of mischief.⁹³

Rule 2. The apparent mischievousness of the act being given, a man's disposition is the more depraved, the slighter the temptation is by which he has been overcome.

Here Bentham gave the example of the violence of the Emperor of Morocco, showing that unpredictable offences spread the most fear at all times.⁹⁴ Again, once the mischief had been established, any indication of low temptation showed a greater likely threat from the offenders future 'general' behaviour; more of a threat - more need to punish.

Rule 3. The apparent mischievousness of the act being given, the evidence which it affords of the depravity of a man's disposition is the less conclusive, the stronger the temptation is by which he has been overcome.

Here Bentham came closest to Eden's position, agreeing that a strong temptation showed evidence of less depravity. He illustrated this rule with the example of a poor man, ready to die with hunger as being less depraved when stealing a loaf of bread than a rich man who might do likewise. Here we find the classic argument for reductions in the spread of mischief linked with reductions in punishment. The essential difference was that in Bentham's theory this arose only as a secondary

⁹³ Aspect 1, identified above - the quantity of pain inflicted on society by the offence.

⁹⁴ Muley Mahomet was said by Bentham to have killed great numbers of men for sport. The same interest in killing for sport was shown in the manuscript text given in the Appendix, where gladiatorial sufferings were seen to be indicative of a ruler's tyrannically depraved disposition. See Appendix, paragraph 7.

factor, to be considered once mischief inflicted had been provided for. For Eden the calculation of mischievousness was far less sophisticated.⁹⁵ Thus 'particular' assessment came into play, and since it suggested a considerably reduced threat compared to either 'general' behaviour or action under low temptation, less danger was threatened. With less danger there was a lower demand for pain of punishment.

The point was emphasised, both in IPML and the manuscripts, that high temptation offered only a 'negative presumption' of the depravity of the disposition.⁹⁶ In other words, the offender was assumed not to be showing any extraordinary depravity, and punishment should, accordingly, not be increased. It is important to note, however, that since Bentham found increases in temptation only 'less conclusive' evidence of depravity, the assumption was that an offender had always to be depraved to some degree.⁹⁷ Once again it must be emphasised that

⁹⁵ Eden took account of 'malignity' by apparently concentrating on the immediately harmful consequences obvious at the time of the act. Eden did make it clear, following Plato (De Legibus, II, 977), that criminals 'are punished, not because they have offended, for what is done cannot be undone; but that for the future the criminals themselves, and such as see their punishment, may take warning, and learn to shun the allurements of vice'. See Principles of Penal Law, 6. There was, however, clearly no sense of any 'particular' or 'general' threat in Eden as is found in Bentham.

⁹⁶ See Appendix, paragraph 8. Compare IPML (CW), 140-1.

⁹⁷ If the offender were not depraved then presumably he would deserve no punishment and the case would be 'unmeet'.

this rule still allowed pride of place in punishment calculations to the quantity of mischief caused.

Rule 4. *Where the motive is of the dissocial kind, the apparent mischievousness of the act, and the strength of the temptation, being given the depravity is as the degree of deliberation with which it is accompanied.*⁹⁸

This rule emphasised the added depravity assigned to premeditation and did not emphasise temptation. It was related to intention, which was linked with the question of an offender's disposition.

Thus, individual disposition was assessed in terms of its inclination to produce future pain within society, and therefore formed the last of three key aspects in Bentham's theory of proportion. With the above rules he provided a mechanism which could justify the reduction, or at least the restraint, of punishment. He attempted to provide a logical method for justifying the milder punishment of those driven to crime by circumstances, where no positive indication of depravity was found, and where high temptation was operative. In this way Bentham established a method of valuing Eden's popular, sentimental call for a reduction in severity for simple, tempting crimes, and developed an analysis for the calculation of depravity.⁹⁹

⁹⁸ Ibid. 141. For the equation of the 'dissocial' motive with 'displeasure', see IPML (CW), 116.

⁹⁹ What Eden would call a lack, or failure, of virtue, Bentham described as bad disposition.

PART III

**THE APPLICATION OF
BENTHAM'S THEORY OF PUNISHMENT**

CHAPTER SIX

THE SELECTION OF MODES OF PUNISHMENT

It has been shown how Bentham's theory embodied new methods for the assessment of the distribution of pains and for the proportioning of punishments to offences. What has yet to be provided is evidence of how such developments in penal theory related to his suggestions for the development of penal practice. In other words, what implications did these theories hold for Bentham's recommendation of certain kinds, or modes, of punishment?

Modes of punishment were, for Bentham, synonymous with 'qualities' of punishment; a quality being a shape, type, or form of punishment.¹ Such words were used interchangeably throughout his discussions on the methods of punishment, and it is clear that, as a general rule, any particular type of punishment bore little relation to the actual amount of pain it inflicted. Using his broad understanding of the nature of individual sensibilities, Bentham had no difficulty in establishing that 'kinds' of punishment could never be experienced equally; a similar 'quantity' of pain could never be certainly delivered to different convicts solely by relying on the form of

¹ 'A particular mode of punishment, [is] a punishment of a particular quality', IPML (CW), 179.

punishment used.² This distinction between quantity and quality of pain lay at the heart of Bentham's choice of punishments, and clearly influenced the kinds of punishment he was able to consider appropriate in response to various types of offence. But it also raised a more fundamental question: was the 'type' of punishment of prime concern, or was only the result of its use paramount?

From the beginning of Bentham's analysis strong emphasis was placed on the complete lack of distinction, in both English language and English law, between an act of punishment itself and its consequent result. Utilising, and praising, the distinction provided by the French language, where the word 'punition' described the act of punishment, whilst 'peine' was assigned to the result,³ Bentham was explicit in stressing his prime concern to be with the results of punishment.⁴ As shown by the frequent headings of 'peine' in the manuscripts, it was punishment as the supply of a quantity of pain from which beneficial results were expected which was of most significance. The actual method of supply, the shape the punishment takes, was, accordingly, of secondary

² See the numerous varieties of experiences of imprisonment in UC cxl. 56 for example. Also see the discussion below.

³ The subjective pain, the expense, suffered by the offender, is thus distinguished from the objective concept of an act of punishment delivered.

⁴ See UC clix. 1, 'In French, punition, the act: peine, the result. This good.' Compare with Rationale, 1.

importance.

Eventually, of course, Bentham did single out at least one manner of punishment for special favour. By 1790 his great confidence in the use of supervised imprisonment was obvious from the determined promotion of the panopticon penitentiary scheme.⁵ Recent commentaries have concentrated attention on this element of his penal writings, and sustained scholarly interest has tended to imply that this particular mode of punishment lay, naturally, at the centre of Bentham's thought.⁶ This chapter will highlight, however, the marked contrast found between Bentham's support, and comprehensive claims, for the panoptic form of punishment as presented in the 1790s, and the emphasis placed on the appropriateness of a broader range of punishments in earlier manuscripts.⁷ In his work of 1776-8 there is very little evidence to suggest that he regarded imprisonment, including penitentiary imprisonment, as anything other than one amongst a profusion of potentially adequate modes of

⁵ But for his subsequent interest in the moral sanction of disrepute, and banishment as a form of punishment see below.

⁶ Foucault has provided the greatest impetus for such a concentration in recent discussion. See Discipline and Punish, *passim*. Janet Semple goes farthest in acknowledging that, in Bentham's early writings, justifications are provided for a variety of conventional (and sometimes unconventional) punishments; but, as one would expect from a study dedicated to the panopticon prison, penitential imprisonment is still emphasised. See Bentham's Prison, 26 ff.

⁷ Both the Théorie and the Rationale provide general discussions of the range of forms of punishment discussed by Bentham.

punishment.⁸

Though Bentham refined his choice regarding the most suitable means of applying punishment, there was, throughout the manuscripts, great consistency within his theory of punishment. This consistency will be shown to rest upon the guiding principle that it was the quantity of pain required which provided the foundation of the infliction of punishment, and this, always, had to control the quality of any punishment, or 'punition', prescribed.⁹ Dumont emphasised such consistency when stating in 1811, in his important editorial preface to the Théorie des peines, that Bentham did not change his mind on the substance of his penal theory during the period 1776-1811:

... he [Bentham] has authorised me to add, that any change which he might make, would bear only upon the form; as respects the principles, his opinions have not changed: on the contrary, time and reflection have given them additional strength.¹⁰

⁸ Although penitentiary imprisonment was certainly a topic of debate in Bentham's writings at this time. See, for instance, UC cxliii. 16, c. 1776. And the references to his View of the Hard Labour Bill in IPML show that his penal theories certainly could support imprisonment with hard labour. With the lead given by Eden as framer of the bill, it is suggested that imprisonment was of growing importance in his thinking by 1778. See IPML (CW), 177 n, and 184 n.

⁹ IPML (CW), 175, 'the quality will be regulated by the quantity'.

¹⁰ Translation by Richard Smith, Rationale of Punishment, (London, 1830), 6, from Dumont's, Théorie, (Paris, 1811). It is also interesting to note that Dumont was sure of Bentham's approval of his recensions when he stated in the same Preface, 'It may be believed that the author has not found his ideas disfigured or falsified, since he has continued to entrust me with his papers'. Bentham may, however, have thought otherwise. See Introduction above.

So we are told that whilst, in 1811, the form of Bentham's preferred punishment had changed, to the panoptic method of reformed imprisonment, he continued to regard the same principles of penal law as the foundation for both the variety of modes suggested in the 1770s, and for the later discussion of the panopticon.¹¹ The fundamental theory of punishment had not changed though his preferred forms had. This view of consistency in Bentham's principles of punishment will be discussed below, as the basis on which his analysis of forms moved through the conventional variety of eighteenth century punishments, towards a closer examination of imprisonment, to the development of the panopticon as a 'complex' punishment, and finally to a re-emphasis on variety with special attention to 'disrepute' and 'banishment'.¹²

A. The Quantity of Pain as the Control of Quality

Within Bentham's theory all pains were said to be identical, there could be no distinction between a good or bad pain, and all pain was evil. Quality of punishment was, therefore, simply a synonym for a form or mode of inflicting pain. A given quantity of pain produced by one

¹¹ His principles also supported his preferences beyond the panopticon debate. Discussed in a manuscript from 1823 given below.

¹² 'Disrepute' was a punishment closely linked to the operation of the moral sanction, and became increasingly discussed by Bentham in the early nineteenth century.

mode of punishment can never be more 'useful' in deterring offences, than exactly the same amount of pain produced by another mode of punishment.¹³ Bentham's theory required that sufficient pain be provided, firstly in proportion to the mischief of the offence, secondly to outweigh the profit of the offence and thirdly to accord with the disposition of the offender. Any form of punishment that provided the required quantity of pain ought therefore to be regarded as an appropriate 'quality' of punishment.

Far from encouraging a theory of panopticon imprisonment as a widely appropriate form of punishment, the basic principle of closely proportioning the punishment to the offence was most easily seen as supporting a wide variety of modes or 'qualities' of punishment. Accordingly, in his early writings Bentham discussed the conventional range of pains of punishment, with the categories he discussed appearing particularly close to those provided in William Eden's Principles of Penal Law.¹⁴ His analysis moved through purely corporal punishments, such as whipping and branding, to punishment

¹³ A type of punishment may be more appropriate in that it may display additional, desirable properties, but the 'kind' of pain delivered can only ever differ in quantity.

¹⁴ Punishments discussed by Eden and Bentham c. 1776 included, capital punishment, and secondary (non-capital) punishments of transportation, mutilation, imprisonment, hard-labour, fining, flogging, pillory, loss of civic rights and shame. In comparison with Eden Bentham can be said to have supported a slightly wider variety of punishments. See also UC clix. 223 and 224, where Bentham orientated his discussion via a critique of Eden's categories rather than Blackstone's.

by fining and transportation, and ultimately he examined the newest addition to the range of eighteenth century punishments, penitentiary imprisonment. These 'forms' of punishment were all acceptable to Bentham as long as the pains they provided displayed the characteristics necessary for identification as a pain of the political sanction. In order, therefore, to understand how Bentham made decisions about the suitability of various modes of punishment it is necessary to recognise the importance he attached to the particular properties of legally applied pain.

i) The Variability, Equability and Commensurability of Punishment

For Bentham, as with other theorists, the pain of punishment, the 'peine',¹⁵ possessed specific qualities which distinguished it from other pains that could be described as non-legal evils or harms.¹⁶ However, Bentham went some considerable way beyond contemporary conceptions of the properties needed, by formalising the necessary elements required in pain of punishment. In IPML he listed eleven properties, and emphasised throughout the need for these properties to be governed by the same rules of proportion which underpinned his entire theory and

¹⁵ The 'real' pain of punishment, rather than the mode of infliction.

¹⁶ See, for example, the discussion of Hobbes's view of punishment at Ch. 5 above.

provided for its concentration on quantities of pain.¹⁷

A satisfactory mode of punishment had, firstly, to be able to provide a variable quantity of pain in response to the varying quantities of mischief caused by the offences.¹⁸ This stress on quantification was clearly the guiding rule throughout Bentham's assessment of what may be considered an appropriate pain of punishment.

Closely related to this key element of variability were the second and third properties of equability and commensurability. The first identified the equalisation of pain applied by the same punishment to different men, so ensuring that offenders received the same pain if they committed the same offence. But it was the third property of commensurability on which great importance was placed, for this allowed punishments to be proportioned to other punishments. Bentham saw commensurability as being achieved in either of two ways:

1. By adding to the lesser punishment another quantity of punishment of the same kind.
2. By adding to it another quantity of a different kind.¹⁹

This concept of two punishments, one greater, one lesser, being perfectly commensurable was a continuing problem for Bentham. The basic difficulty arose because 'punishments

¹⁷ A twelfth property of being 'simply described and easily understood', is added in Smith's Rationale, Bk. I, Ch. 7. Compare, 'Rationale of Punishment', Bowring, i. 405.

¹⁸ IPML (CW), 175.

¹⁹ Ibid. 177.

of different kinds are in very few instances uniformly greater than one another'. Or, in other words, comparing the quantities of pain provided by two different modes of punishment was almost impossible.

The two solutions given above were important in that they emphasised that commensurability could be provided equally well by either the additional, repetitive use of one single mode of punishment, or, alternatively, by the use of a different kind of punishment, but only as an addition to the original, lesser mode. In both instances it was the practice of addition to the original quantity of pain inflicted that was required. One mode of punishment standing alone could not be seen to be commensurably greater than another, different mode of punishment used alone. Bentham was stressing that for different modes of punishment to be made commensurable both must be combined in a single assignment of punishment.

The only certain and universal means of making two lots of punishment perfectly commensurable, is by making the lesser an ingredient in the composition of the greater.²⁰

So, for example, if theft was punished by imprisonment, theft with violence might be punished either by a) the original imprisonment plus a further term of imprisonment, or, b) by the original imprisonment plus whipping.²¹ The important element was that the extra punishment had to be

²⁰ Ibid.

²¹ Any other different mode of punishment may be specified.

a definite addition of pain to the first punishment regardless of modes used, in order for the two punishments, in both cases, to be commensurable.²² This concept was a clear advancement in penal theory, but although it certainly provided theoretical support for the wide, incremented use of one mode of punishment, as was seen later with panopticon imprisonment, it also provided a justification for the continued use of a variety of modes of punishment. The only provision being that modes used in lesser punishments ought to be incorporated into the composition of greater punishments.

Thus, in his early material, indeed, up to 1790 when the first volume on the panopticon was published, it is clear that a variety of punishments was considered perfectly acceptable. Yet, Bentham went further, and said in IPML that in order to obtain all the properties required in a lot of punishment it was necessary to provide a range or mix of methods for inflicting pain:

Upon taking a survey of the various possible modes of punishment, it will appear evidently, that there is not any one of them that possesses all the above properties in perfection. To do the best that can be done in the way of punishment, it will therefore be necessary upon most occasions, to compound them, and make them into complex lots, each consisting of a number of different modes of punishment put together; the nature and proportions of the constituent parts of each lot being different, according to the nature of the offence which it is designed to combat.²³

²² They would be incommensurable, for example, if theft was punished by imprisonment, but theft with violence was punished by whipping. There is no means of determining how much more pain, if any, is provided by whipping alone for the more serious offence.

²³ IPML (CW), 185.

This interest in the value of a variety of modes lay behind Bentham's examination of the whole range of types of punishments in use, or previously in use. However, we find here the identification of such combinations as 'complex' punishments.²⁴ This certainly corresponded with later analysis of modes of punishment but in the early manuscripts simpler modes of punishment were still deemed to have a substantial role to play.

From his examination of the results from the applications of existing punishments Bentham drew conclusions regarding their further inclusion within his revised penal scheme. In doing so he introduced the central theme of his theory, that punishment consisted of both 'real' and 'apparent' pain.²⁵ The above discussion of variable and commensurate properties concentrated on the real pain suffered by the convicted offender on whom the sentence was carried out. But other important properties identified by Bentham emphasised the apparent pain of punishment.

ii) Analogous Punishment: the role of Characteristicalness and Exemplarity

The first aim of legal punishment was the prevention of similar offences in future, and, as such, it was directed at potential offenders. To be effective in this

²⁴ See the quote above regarding 'complex lots' of punishment.

²⁵ For more detail on 'real' and 'apparent' pains see Ch. 4 above.

sense it could be said that 'punishment cannot act any farther than in as far as the idea of it, and of its connection with the offence, is present in the mind'.²⁶ Bentham concluded that a fundamental property of punishment ought to be its easy connection to the type of offence it wished to deter, and this was most easily found to be the case when a punishment was analogous, or 'characteristical', to the offence. Here Bentham took his lead from Montesquieu's notion that punishment should be drawn from the nature of the crime.²⁷

The centrality of this property enabled Bentham to play freely with the idea of analogous punishment, and the illustrations he provided in early manuscripts leaves little doubt that he was convinced, at the time of writing, that they ought to form a substantial part of any effective scheme of punishment.²⁸ Thus he suggested punishments such as 'half-roasting' for those taking advantage of fire; he provided for an 'artificial precipice' on which offenders were balanced in order that 'he now trembles who made his neighbour tremble'; and a particularly tortuous example was described, which Bentham called the 'riding of the iron horse', which was a

²⁶ IPML (CW), 177-8.

²⁷ See Ibid. 178 n, where Montesquieu's, 'Esp. des Loix, L. xii. ch. iv.', is cited. Compare, Spirit of the Laws, Bk. XII, Ch. 4, p. 189, 'It is the triumph of liberty when criminal laws draw each penalty from the particular nature of the crime'.

²⁸ The Rationale gives many shocking examples of possible forms of analogous punishment. See also UC cxliii. 38.

punishment envisaged for highwaymen.²⁹ It is quite apparent that Bentham was very much in favour of analogous punishments in the mid-1770s. Heavy emphasis was given to characteristicalness throughout the discussion in IPML.³⁰ Characteristicalness was a particularly useful property in three ways:

1. It renders a mode of punishment, before infliction, more easy to be borne in mind:
2. It enables it, especially after infliction, to make the stronger impression, when it is there; that is, renders it the more exemplary.
3. It tends to render it more acceptable to the people, that is, it renders it more popular.³¹

Bentham went so far to say that retaliation, in the sense of applying the same hurt or damage in punishment as was embodied in the offence, was the most perfect form of analogous punishment. But he did limit this desire for analogous punishment and in the case of retaliation, saw it as appropriate to only a few cases where it might be, in the language of his felicific calculus, 'not too expensive'.³² Bentham clearly thought Montesquieu went too far in his assignment of value to the analogous nature of punishments, saying that he attributed 'extravagant

²⁹ This involved straddling the convict over a 'thin-backed' iron horse, weighting his legs with heavy iron boots, then dragging the contraption a certain distance. UC cxliii. 18-28. This idea clearly derived from dragging on a hurdle - a frame on which traitors were dragged to execution.

³⁰ See IPML (CW), 178, 182-3, and 183 n.

³¹ Ibid. 183 n. See also below for a discussion of the property of popularity.

³² Ibid. 178.

'advantages' to it.³³ Nevertheless, Bentham did support such punishments, and there is little doubt that his emphasis on analogous, corporal punishments, especially in the manuscripts,³⁴ provided difficulties for his later editors who struggled to reconcile his eager support for penitentiary imprisonment with a theory that plainly promoted a much wider variety of modes of punishment. The numerous suggestions of brutal corporal punishments look distinctly out of place amongst the early nineteenth century emphasis on the reformation of criminal character. Both Dumont and Smith stressed that any benefit provided by analogous punishment ought not to be taken too far.³⁵

Yet the value of analogous punishments was that they were the methods best suited to providing a deterrent example. His fifth property, of exemplarity, was thus intrinsically linked with the characteristical nature of

³³ *Ibid.* 183 n.

³⁴ In IPML Bentham does not stress analogy.

³⁵ The discussion of analogous punishments was tempered in Dumont's work by a line emphasising that such forms of punishment ought always to be controlled by other factors. See the translation at Rationale, 56, 'It is not a sufficient reason for the adoption of a punishment that it is analogous; other considerations ought to be always regarded'. Dumont added that, 'everything ought also to be avoided which has an appearance of great study and refinement. Punishment ought only to be inflicted with feelings of regret and repugnance. The multitude of instruments possessed by a surgeon, may be contemplated with satisfaction, as intended to promote the cure and lessen the weight of our sufferings. The same satisfaction will not, however, be felt in contemplating a variety of punishments, and they will most likely be considered as degrading to the character of the legislator'. This translation is taken from Smith's, Rationale, 63. In the manuscripts Bentham often did contemplate varieties of punishment with great satisfaction.

punishment.

The deterrent examples provided by such analogous punishments did inflict real pain on those who witnessed them, this being the secondary pain of alarm and danger.³⁶ However, in Bentham's theory, it was not the quantity of 'real' pain inflicted as punishment which determined the extent of the deterrence but the 'apparent' pain as perceived in the mind of potential offenders. His substantial interest in analogous punishment rested, accordingly, on the principle that,

It is the apparent punishment, therefore, that does all the service, I mean in the way of example, which is the principle object.³⁷

To increase the effectiveness of punishments he thus felt obliged to explore those modes of punishment which bore an analogy to the offence. For only these could be said to provide, by less painful means,³⁸ the necessary deterrent effect which was the prime end of punishment. Clearly there was a distinction between the usefulness of analogous punishment in outweighing the profit of offence for those on whom it was inflicted, and its usefulness as an example to other potential offenders. Bentham was discussing only the latter example to potential offenders when he stated that in terms of exemplarity enabling 'less expensive' punishment, a 'particular mode of punishment'

³⁶ See Diagram 2, 'The Shapes of Mischief', where the secondary pain of 'danger' is the deterrent pain.

³⁷ IPML (CW), 179.

³⁸ Less painful in the sense that a more exemplary effect is obtained from a smaller quantity of pain.

may be chosen 'independent of the quantity'.³⁹ This was the first of only two occasions when Bentham stated that quality should precede quantity; that a type of punishment be chosen for its properties of analogy, rather than for the quantity of pain it inflicted.⁴⁰ But it was crucial to note that in such cases individuals witnessing these punishments were said to be given a more powerful lesson whilst the offender punished did not, in fact, receive any greater 'real' pain.⁴¹

Thus, there is a sense in which a qualitative difference was found between modes of punishment. But the emphasis was that this occurred only in relation to benefits of example, that is, in relation to the 'apparent' punishment.⁴² It was not the case, for Bentham, that closely analogous punishment could be justified if it involved the infliction of excesses of 'real' pain of punishment.

iii) The Restraints of Frugality and Popularity

Such uncontrolled exercise of analogous 'real' punishment was prevented by the sixth property of

³⁹ Ibid. 179.

⁴⁰ Reformation was the second occasion, see below.

⁴¹ The offender was actually expected to require less 'real' pain.

⁴² And he went on to say that a second method of avoiding additional 'needless' real punishment was by 'a particular set of solemnities distinct from the punishment itself, accompanying the execution of it'. All was for the 'apparent' example.

frugality. Frugality marked the point at which Bentham's concept of properties linked with the concern for restraint central to his proportion theory.⁴³ No particle of pain should be produced which did not contribute to the deterrent effect proposed.⁴⁴

... if any mode of punishment is more apt than another to produce any such superfluous and needless pain, it may be styled *unfrugal*.⁴⁵

It is obvious, therefore, that there was no implication that a 'quality' of punishment could ever be used as a control of 'real' quantities of punishment. Of vital importance was the need for punishments not to be excessive. The consequence of existing, excessive punishments informed Bentham's discussion throughout his analysis of the necessary properties of legal pain. On an empirical basis he concluded that grossly excessive punishments, even if they be analogous, were detrimental to the working of the system of legal restraint. Severity had been seen to fail in its attempt at deterrence; therefore Bentham demanded that the property of exemplarity ought to be used only if it increased the 'apparent' quantity of the punishment, whilst frugality was concerned with keeping the 'real' punishment always at

⁴³ See the discussion of Bentham's fifth rule of proportion in Ch. 5 above.

⁴⁴ The deterrent effect consisted in the close and effective connection between the exemplary, material punishment and the punishable offence. See IPML (CW), 178, for the importance of material circumstance. See *ibid.* 179, for frugality.

⁴⁵ *Ibid.* 179.

its lowest possible level.⁴⁶

Although Bentham was interested in re-introducing more analogous forms of punishment, for he was convinced they brought with them valuable properties of characteristicalness and exemplarity, he was constantly concerned with the quantity of pain being provided. A connection is found here between the desire of Bentham to restore restraint in the infliction of penal suffering, and similar expressions of the need for reductions in severity from other critics of the existing penal regime. In a particularly important passage which dealt with the need for an element of popularity in punishments, Bentham made it clear that he was in agreement with reformers such as Beccaria and Eden who emphasised the need for the penal laws to be supported by the citizen body over which they are to exert control. Eden and Beccaria asserted that public favour of law promoted its observance and respect.⁴⁷ Bentham regarded this as more an aspect of assistance, saying:

When the people are satisfied with the law, they voluntarily lend their assistance in the execution: when they are dissatisfied, they will naturally withhold that assistance; it is well if they do not take a positive part in raising impediments.⁴⁸

But unpopularity was incorporated even more deeply into Bentham's thinking. For unpopularity of a law amongst the public at large was a form of mischief, a form of evil.

⁴⁶ Ibid. 180.

⁴⁷ Eden, Principles, 284.

⁴⁸ IPML (CW), 183.

It was a prime requisite of a mode of punishment that it should not spread unnecessary mischief. Thus the absence of *unpopularity*, as this property was more precisely defined, was found to be vital to any lot of punishment.⁴⁹

iv) Properties in Pursuit of the Subordinate Ends of Punishment

As punishments had to display properties which aimed at providing an efficient deterrent force, so they should also enable progress towards the three other ends of punishment: reformation, disablement and compensation.

With reformation it can be noted that the case was again put, as with characteristicness aiding exemplarity, for the particular quality of punishment to play a role in deciding the choice of punishment selected. Of course, it was clear that any punishment 'is subservient to reformation in proportion to its quantity', for the more pain inflicted on an offender the greater will be the tendency to create an aversion to the offence. But Bentham also claimed that there were certain punishments which were able to improve such effects by their quality. Thus he presented the punishment of penal labour as an example of a specifically reformatory mode of punishment, since it worked against the motive of indolence which might often be the cause of offending.⁵⁰

⁴⁹ Bentham found the property of characteristicness closely linked with popularity.

⁵⁰ Ibid. 181.

Such modes of punishment, however, whilst using the benefits of their form still did inflict pain. And any beneficial, reformatory effects were providers of good rather than evil and could not be described as punishment. So, whilst it was important to seek to include such properties of subserviency to reformation the essential purpose of punishment was always to provide deterrence by painful example, and in comparison the object of reformation was subordinate.⁵¹

A punishment had also to show the property of efficacy with respect to disablement. This was easier to locate in a mode of punishment than many other properties in that if a man was confined, banished, or in the extreme, capitally executed, then clearly he was disabled from doing further mischief.⁵² The danger, as Bentham succinctly pointed out, was that this property was in general likely to go against the property of frugality. And an interesting point to bear in mind when considering Bentham's later concentration on the panopticon is that in 1780 he was extremely concerned that, on confinement, offenders were not only prevented from doing harm but also from doing good.⁵³ For with their removal from society

⁵¹ Ibid. 185.

⁵² Other less serious examples of disablement included banishment from certain areas; or in offences of breach of trust disablement was achieved simply by forfeiture of such trust. Bentham was particularly critical of the death penalty on this point, which he described here as being 'in an eminent degree unfrugal'. Ibid. 182.

⁵³ Ibid. 181.

any pleasure an offender's future behaviour might have brought was impeded along with any future mischief. Bentham concluded that the mischief spread by an offence needed to be considerable in order for a punishment as severe as confinement to be applied simply for the purpose of disablement.

Subserviency to compensation, as the ninth property, was also sought in a lot of punishment. This was of little importance to Bentham, for he viewed compensation very much as a vindictive element, and hence, a 'kind of collateral end'.⁴⁸ In such terms it was, again, the quantity of pain that was inflicted which met this end. Types of punishment could obviously be found which provided for more tortuous and hence more painful applications of punishment, but the emphasis on frugality prevented any exploration of such forms simply for the purpose of satisfying the antipathy of a harmed victim. Even though it was recognised that this was a popular form of punishment its demands for severity made it one of the least valuable properties of punishment.⁴⁹

⁴⁸ Ibid. 182, and 158 n, for the collateral nature of affording pleasure to an injured party.

⁴⁹ Compare with Rationale, 66: 'When, however, it happens not to give disgust by its severity, nothing can be more popular than this mode of punishment'.

v) *The Ability to Correct Errors in Application: The Property of Remissibility*

Of particular interest to Bentham, in the context of the contemporary display of excessive punishments in England, was that punishments should in some way be reversible if, after conviction and execution, they were found to be undeserved.⁵⁰ Clearly, with this in mind, his attention was orientated towards those forms of punishment which were most easily corrected, such as fining and imprisonment. And though Bentham found a variety of punishments convenient in order to obtain the full range of properties required, he saw certain 'acute' punishments, such as whipping, branding, mutilation and capital punishment as being flawed in their 'irremissible' nature.⁵¹ This held implications for the development of his later suggested methods of punishment, for without a complete removal of the existing system gross errors in sentencing were regarded as inevitable. This may go some way to explaining his later concentration on penitentiary imprisonment as a compromise in the face of 'the imperfect systems that are as yet on foot: and therefore, during the continuance of those systems, the property of remissibility may... be deemed a useful one'.⁵²

⁵⁰ IPML (CW), 184-5.

⁵¹ Bentham's severity on this flaw of capital punishment is examined below.

⁵² IPML (CW), 185.

B. Early Conceptions of the Modes of Punishment

The emphasis found in early manuscripts on analogous punishments is more easily understood when one considers Bentham's early view of punishment in general. He said that all punishments could be divided into two simple categories, either corporal or privative.⁵³ This distinction permeated his whole thinking concerning modes of punishment; and punishment was presented not only as an evil, but as a specifically physical evil.⁵⁴ In different drafts on the general principles of the modes of punishment this categorisation was often displayed in different fashions, but it was always the case that Bentham sought physical inflictions of pain in order to identify a mode of legal punishment.⁵⁵ The distinction was solely in the way punishments produced pain: corporal punishments applied pain to the offender, privative punishment withheld pleasures, which the offender felt as the pain of privation.⁵⁶

As part of his critique of criminal jurisprudence Bentham discussed three modes of punishment: corporal,

⁵³ See Rationale, 18; and also the substantial body of Richard Smith's manuscripts for the Rationale at UC cxli. 1-141.

⁵⁴ 'Punishment then is an evil - that is, a physical evil'. See Rationale, 2.

⁵⁵ Compare for instance UC cxliii. 36-40, cxl. 21-2, cxli. 93-122 and clix. 19-86.

⁵⁶ On pains of privation, see IPML (CW), 46.

pecuniary and infamous.⁵⁷ Yet this remained in line with the basic dual division, since corporal punishment remained established in its broadest sense, and included all manner of punishments which affected the body, and both pecuniary and infamous punishments were seen to be privative in an actual physical sense.⁵⁸ Many variations were provided in his categorisations of modes of punishments.⁵⁹ By examining one corporal afflictive mode - capital punishment - and his early views on imprisonment, a corporal, privative mode, it will be shown that a general consistency can be found in Bentham's regard for punishment as a physical pain.

i) *Corporal Afflictive: the Quality of Capital Punishment*

As seen above, Bentham showed a positive preference in his earliest writings for those particular forms of punishment which provided the property of characteristicalness. He found such punishments to be both popular and analogous, hence many corporal afflictive

⁵⁷ See UC cxl. 7, fo. 184.

⁵⁸ Bentham was to later re-classify 'infamous' punishments yet again to include both transportation and imprisonment, in that there was a withdrawal of moral support from those on whom such punishments were inflicted. Punishments of the moral sanction were always regarded as physically privative.

⁵⁹ See for example, lxxiii. 4-31, xcix. 1-3, cxl. 1-20, cl. 336 - five chronological punishments listed, cxli. 131-6, clix. 94-5, clix. 97-103, clix. 108-242, clxvii. 1-32. Much distillation was carried out by Bentham's editors, although the texts left by Dumont and Smith appear to reflect Bentham's general principles and categorisation.

punishments received early support. Capital punishment, as a response to murder obviously fitted well into Bentham's established consideration of characteristic punishment.⁶⁰ Bentham was not alone in seeing value in this form of punishment, since very few eighteenth-century reformers ever completely withdrew their support for death as a punishment for murder.⁶¹ However, any value that might have been attached to corporal afflictive punishments, which included methods such as mutilation, whipping and branding, was seriously undermined when the full notion of Bentham's properties of punishment was developed.[ref to bow rat] It was found that corporal punishments, and certainly the most extreme versions, lacked the most essential properties required for modes of punishment to be effective in achieving their ends.

By constructing a detailed plan of the necessary properties of punishments Bentham was able, as his theory developed, to form a coherent critique of every mode of punishment with which his theory was presented.⁶² Capital punishment was immediately discovered to be lacking in the

⁶⁰ See UC cxli. 90 for an examination of capital punishment.

⁶¹ Beccaria was one who did, see Crimes and Punishments, Ch. 28. Eden said much the same as Bentham - that it should only be reserved for extreme cases.

⁶² See 'Of Corporal Punishment', Bowring, i. 413-6, where a comprehensive variety of disabling and mutilating punishments is assessed.

properties of variability and commensurability.⁶³ It also, obviously, provided no property of subserviency to reformation since its tendency to disablement was so great that any offender subjected to this punishment would never again perform another action, good or bad. Similarly it was without any property of remissibility - this proved to be one of the principle reasons for Bentham's eventual abandonment of all forms of this 'acute' form of punishment.⁶⁴

All the modes of corporal afflictive punishment were of such a quality that, before being applied, there ought to be certainty that no error had been made in calculating of quantities of pain spread by the offence and proposed to be inflicted by the punishment. Since this guarantee could never be provided within an imperfect system of legislation, such irremissible modes of punishment lost much support within Bentham's theory.⁶⁵ With lesser corporal, afflictive punishments permanent changes to the body of the victim might be produced, but since the offender usually survived the punishment some slight compensation might still be possible, 'although the

⁶³ On lack of commensurability see IPML (CW), 177 n; and Bowring, iv. 29, 'I cannot help entertaining some doubt of the expediency of capital punishment in case of escapes. Punishments that a man has occasion to choose out of should be commensurable'. 'Escapes' apparently meaning the avoidance of the pain by some means, whether through pardon or commutation or delay.

⁶⁴ See IPML (CW), 184, 'The most perfectly irremissible of any is capital punishment'. Bentham did not, however, abandon capital punishment in IPML.

⁶⁵ Ibid. 185.

unfortunate victim cannot be put into the same condition'.⁶⁶ With capital punishment, however, not even a minimum level of compensation was available, and this provided a substantial motive for Bentham's increasingly forceful rejection of capital punishment.

In a further charge against capital punishment Bentham was clear in his assertion that since it lacked the important property of frugality, this common mode of punishment appeared still more objectionable. Whilst its continued use was supported in 'extraordinary cases' its value became increasingly undermined:

... this punishment [capital], it is evident, 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.⁶⁷

Previous commentators have already shown how Bentham came to consider the question of the death penalty at three separate periods during his career:⁶⁸ in the mid-1770s, as part of his early work on the theory of punishment; in 1809, as a critique of the views of William Paley; and finally, in 1831, as a public declaration addressed to his fellow citizens of France.⁶⁹ From his

⁶⁶ Ibid.

⁶⁷ Ibid. 182.

⁶⁸ See Crimmins, 'Strictures on Paley's Net: Capital Punishment and the Power to Pardon', 23-34; and Bedau, 'Bentham's Utilitarian Critique of the Death Penalty', 1033-65.

⁶⁹ Following the dating in, Taylor Milne, The Catalogue of the Manuscripts of Jeremy Bentham, Crimmins mentions 1775 as the date for the first discussion. 'Strictures on Paley's Net', 23. It is more likely to have been produced between 1776-8. See 'Textual Note' in the

manuscripts and correspondence it can be seen, however, that his consideration of capital punishment was by no means dormant in the periods in between. In 1803, for instance, he was actively gathering advice and information on the validity of the death penalty and his contact with contemporary discussion is made particularly clear by a letter from Thomas Brownlow Forde, Ordinary of Newgate Prison, who responded to a request for information from Bentham by saying,

Pursue then, I beseech you, to the abolishing of Executions, and you will deserve ten thousand times more from that country, then ever Howard did.⁷⁰

There can be no doubt that Bentham changed his views on the most appropriate and practical methods of punishment as he worked and re-worked his analysis into ever greater detail. Despite the general benefits still popularly ascribed to the death penalty in the early years of the nineteenth century Bentham continued to establish, independently of popular opinion,⁷¹ the precise relationship of this form of punishment to his own penal

Introduction above.

⁷⁰ UC ix. 25, dated 8th January 1803. It is interesting to see how Brownlow Forde regarded Bentham as being highly influential in the penal reform movement, placing him, potentially, on a par with John Howard. Brownlow Forde continued, 'My situation in life is too insignificant, to have any attention paid to my opinions'. For the full text of this letter see Correspondence, vii (1802-8), ed. J.R. Dinwiddie (Oxford, 1988) (CW), letter 1772, p. 181.

⁷¹ Opinion was so strongly in favour of capital punishment for most of Bentham's career that its abolition appeared entirely unrealistic. See Crimmins, 'Strictures on Paley's Net', 33-4.

theory.

His work of 1809 obviously developed on the back of earlier researches, yet, the stimulus provided by Paley's Principles of Moral and Political Philosophy could not have been better designed to spur Bentham into action. Paley's analysis gave strong support to the continued threat of capital punishment for a wide range of offences, on the basis that it provided an effective deterrent for all whilst only a few offenders, deemed to have committed the most depraved offences, were ever actually executed.⁷² The system depended on the power of judges and magistrates to pardon from or commute capital sentences and this, in turn, depended on arbitrary decisions which Paley regarded as 'the glorious uncertainty' that deterred crimes.⁷³ Such a theory, where all offenders were caught by the same 'net',⁷⁴ but where most were subsequently released, or provided with a lesser punishment than the law prescribed, was abhorrent to Bentham's principles.⁷⁵ In his reply to Paley he clearly set out his understanding that without the knowledge that the prescribed punishment would be

⁷² 'The Principles of Moral and Political Philosophy', The Complete Works of William Paley, ed. R. Lynam, 4 vols. (London, 1825), ii.

⁷³ Crimmins, 'Strictures on Paley's Net', 26.

⁷⁴ Paley likened such a system to a fisherman's net, which 'sweeps into the net every crime, under any possible circumstances, [which] may merit the punishment of death'. Paley, Complete Works, 373.

⁷⁵ The arbitrary nature of such a system was seen only to produce further confusion and hence evil, and Bentham strongly attacked this defence of the widespread power to pardon. See Crimmins, 'Strictures on Paley's Net', 29.

certainly applied to all convicted offenders most of the deterrent value of the punishment would be lost.⁷⁶ Bentham was sure and precise in his refutation of Paley's argument, yet still he did not publish his criticism, though his manuscripts were revised and copied up into a clear order.⁷⁷

It was not until 1830 that Bentham applied his principles to an essay which he was prepared to publish. He drew up a pamphlet on the death penalty, specifically for the people of France,⁷⁸ and throughout this text he displayed all the fundamental penal principles first established in 1776-8.

In concise terms capital punishment was denounced for possessing the detrimental qualities of inefficiency, irremissibility, positive maleficence - tending to produce crimes, and for the enhancement of evils produced by ill-applied pardons.⁷⁹ These were described as features of inaptitude, by which the punishment undermined the purpose for which it was applied, i.e. to produce future pleasure by inflicting legal pain. The pains resulting from

⁷⁶ This argument Bentham described as 'Law versus arbitrary power: A Hatchet for Paley's Net'. See *Ibid.* 24.

⁷⁷ See UC cvii. 193-242, and 258-9.

⁷⁸ Published as Jer. Bentham to his fellow citizens of France on death punishment, (London, 1831). The same text was included in Bowring as an Appendix, 'On Death Punishment'. See Bowring, i. 525-32. It is suggested that the pamphlet was brought out so quickly because of the general interest in capital punishment following the events in Paris of 1830. See Crimmins, 'Strictures on Paley's Net', 33.

⁷⁹ See 'On Death Punishment', Bowring, i. 526-31.

capital punishment were therefore found to be considerable, yet by 1830, still further inaptitude was added, for Bentham now believed he could show that the death penalty had been proven to be 'needless'.⁸⁰ Using evidence gained from an examination of crime rates in Tuscany,⁸¹ Bentham explained how capital sentences provided no deterrent, but rather, did precisely the opposite and encouraged crime. In the Grand Duchy of Tuscany the Emperor Leopold had abolished capital punishment, only for it use to be later resumed. The resumption inadvertently provided the foundations for a more considerable undermining of the punishment of death, since it was thereby discovered that the average number of crimes had been less during the period of abolition than after its re-establishment. This practical example served to underline the force of Bentham's theory, and he openly declared his support for abolition of the death penalty: 'The Punishment - shall it be abolished? I answer Yes'.⁸²

By his analysis of the properties of punishment, which formed the essence of his selection of modes of punishment, Bentham can therefore be seen to accommodate many of the concerns and demands produced during the eighteenth century for better proportioned and more

⁸⁰ Ibid. 531.

⁸¹ Bentham said the information was provided by way of John Howard, presumably this meant from Howard's, An Account of the Principal Lazarettos of Europe, (Warrington, 1789).

⁸² 'On Death Punishment', Bowring, i. 525.

effective punishments. By isolating the properties of a widely used, but what was increasingly coming to be regarded as a severe punishment, Bentham showed that its key supports lay in its characteristical and popular nature, and that, without doubt, it was an absolute method of disabling an offender from committing further offences. But these three benefits were insufficient to satisfy those reformative and demanding conceptions of punishment which were seeking more than an excessive infliction of pain.

It is interesting to note how Bentham, guided by the application of his theory, developed a clearer justification for forms of punishment than did his contemporaries and immediate successors. Thus Eden, whilst demanding more lenient punishments, continued to recommend the use of the death penalty, and even where he suggested its replacement he regarded flogging as a perfectly adequate alternative. Such replacement of one form of corporal afflictive mode by another lesser mode of the same type could not, however, offer any benefits when viewed from Bentham's standpoint. What was needed was an alternative to such simple modes of punishment.⁸³

ii) Early Assessments of Imprisonment

Imprisonment was not, originally, a sophisticated punishment for Bentham. In a powerful passage headed

⁸³ These would be provided by the development of the idea of complex forms of punishment which combined the valuable properties found in simpler methods.

'Penitentiary or quasi-parental' he described imprisonment as a solitary and dark mode of punishment, and one where the convict survived, barely, on the bread and water 'of affliction'.⁸⁴ These 'dark dungeons', ought preferably to be built underground, and Bentham went to some lengths to illustrate how best to construct and ventilate them.⁸⁵ The use of such punishment was plain:

The objects of this trend[?] of punishment are to break the spirit of the patient, and make him suffer the pains of hunger as much as may be without any lasting prejudice to his health. The business, therefore, will be to make his food as nauseous as it can be so as to be edible and not unwholesome.⁸⁶

This form of punishment was described as penitential or quasi-parental presumably in the manner in which it sought to 'break the spirit of the patient', and in this sense it aimed at something more than a simple infliction of pain. Yet there can be no doubt that such imprisonment was, for Bentham, a distinct form of corporal affliction. It was a mode of punishment designed to inflict pains of hunger on the victim and subdue a certain form of behaviour. Bentham gave no more attention to this method of punishment than to any other, and neither did its characteristics appear to offer any particular advantages.⁸⁷ Above all, the central element of public

⁸⁴ UC cxli. 66-9.

⁸⁵ UC xli. 66-9, and cxliii. 16

⁸⁶ UC cxliii. 16.

⁸⁷ A distinction is only made between simple imprisonment and afflictive imprisonment which involved the use of solitary confinement and shackles. UC cxliii. 38.

display was absent and this formed the largest problem for a theory which placed example in a prime position.

Bentham clearly did not envisage incorporating any of the reforms suggested by John Howard in this notion of imprisonment. Was he then unaware of the detail of Howard's work when he wrote the passage above? This appears to be so, especially since Bentham was such an ardent admirer of Howard, and could have been expected to have approved of the suggestions for cleanliness and order in imprisonment had he been aware of them:⁸⁸ the absence of such notions in Bentham's early manuscripts suggests they were written before the publication of Howard's State of the Prisons... in 1777. Yet the prominent emphasis on solitary confinement and the spare diet strongly recalled the ideas and language of Jonas Hanway.⁸⁹ There was, however, no mention in Bentham's early discussions of any connection between imprisonment and forced labour. It could be concluded, therefore, that in 1776-7 Bentham saw imprisonment as quite distinct from punishments of penal labour.

Yet, manuscripts have been found from the same period where Bentham examined imprisonment more closely. As he progressed with the construction of his theory of

⁸⁸ For Bentham's discussion of the work of both Howard and Hanway see UC clix. 204.

⁸⁹ The fuller title of Hanway's work was, Solitude in Imprisonment, with proper profitable Labour and a spare Diet, the most humane and effectual Means of bringing Malefactors, who have forfeited their Lives, or are subject to Transportation, To a right Sense of their Condition..., (London, 1776).

punishment imprisonment began to take on a more prominent position amongst his preferred modes. In a manuscript which looked at imprisonment with reference to Insolvent Debtors it can be seen that imprisonment was no longer regarded solely as a dark, solitary experience.⁹⁰ Rather, he now envisaged a significant variety of forms of imprisonment, and he proceeded to analyse how individuals might respond to confinement. His thinking on the subject of imprisonment had apparently advanced enough for him to hint at a complete 'plan of permanent regulation' for the imprisonment of debtors:

Sir
Underneath you will find a few hints relative to that branch of the Law which concerns Insolvent Debtors. the benevolent attention you have paid in your legislative capacity to a branch of the Law in which humanity has so []⁹¹ a concern is my warrant for presuming you will pardon this intrusion from a stranger.

I know not whether these hints, supposing you should think any of them worth attention would some time enough to be of any use on the occasion of the Bill now depending. The truth is, as you will find, they apply rather to a plan of permanent regulation, than to a measure of occasional relief.

If the outline here sketched should meet your approbation, it would be a pleasure to me to enter into any explanation you might wish for with respect to the details. These I have avoided altogether that I might avoid giving you any unnecessary trouble. I have the honour to be

with respect, for
Your very Obedient
humble Servant

⁹⁰ Bentham also referred to an unknown work on debtors titled 'Essay on Imprisonment for Debt'. See Correspondence (CW), ii, letter 248, p. 102.

⁹¹ Left blank by Bentham.

What is clear from this letter is that Bentham did have a plan for permanent regulation in mind, that he was aware of some public discussion and was willing to enter it; and perhaps most importantly, he was now discussing punishment by imprisonment on a wider scale.

Bentham was not yet looking at imprisonment as an alternative to transportation or capital punishment, and debt was not, of course, considered a felony.⁹³ Nevertheless, in this address, or prospective address, to some legislator, imprisonment came under close examination with Bentham assessing the benefits and defects of imprisonment. Whilst he was still convinced that imprisonment was a very uncertain mode of punishment, this

⁹² UC cxl. 53-4. Although the letter was respectfully concluded on the first page it actually continued for several more, including the table and passages that follow below. The addressee is unknown: however, the specific formal closing used was repeated in further unsolicited correspondence addressed to James Wallace the Attorney-General. See Correspondence (CW), ii, letter 361 a (8 June 1780), p. 459. There is no evidence that this letter was ever sent, nor has it been published in Bentham's Correspondence (CW).

Bentham's concern with debtors in relation to the 'occasional relief' of the penal system may relate to several Bills presented during the 1770s. One such was the Hulks Bill of 1776 - introduced by Eden for the emergency relief of gaols following the curtailment of transportation to America late in 1775. Convicts, usually transported, were redirected to London's gaols, prisons and houses of correction. These were the normal destinations for lesser offenders such as insolvent debtors, and their rapid overburdening may explain Bentham's interest.

⁹³ At UC clix. 223 Bentham provides a table listing Insolvent Acts, which is continued only to 1776 - a further indication that this was the year he examined Insolvency Debt.

discussion marked a significant point in his progression towards the development of imprisonment as a satisfactory mode of punishment for the serious offender. He began his analysis of imprisonment by stating that:

Of imprisonment one can scarce say any[thing] in general. Everything depends upon the particular manner in which it may be managed. Imprisonment is more or less severe according to the privation attending it: according to the objects (instruments of pleasure) of the enjoyment of which a man is deprived by means of it.⁹⁴

and he added in the margin:

In speaking of Imprisonment one can never know what account of it; till one knows the regimen of the prison.⁹⁵

Clearly, he still harboured significant reservations about the ability of imprisonment to fulfil the conditions he regarded as necessary in an effective penal solution.⁹⁶ There was as yet no confirmation that he believed the uncertainties of prison could be removed by a standardised regime. But one does find an indication that Bentham was starting to see imprisonment as a method of punishment that could, in the right circumstances, adequately apply the key properties of variability and equability. For he said,

If the general idea should be fortunate enough to meet your approbation it will then be time enough to enter into details. It will then be time to think of settling the proportion between the quantity of the debt in all cases and the duration of the

⁹⁴ UC cxl. 56.

⁹⁵ Ibid.

⁹⁶ His concern was that a variety of carceral regimes inflicted a variety of unknown pains.

imprisonment.⁹⁷

As a further step in the direction of establishing the nature of the evil inflicted by imprisonment Bentham undertook an assessment of its conditions, regarding how it might affect a debtor subjected to it. What follows is a particularly illuminating analysis of the specific objects or 'instruments of pleasure', which he supposed might be lost when an individual was subjected to imprisonment:

These objects are

1. Sufficient nourishment
2. Light
3. Wholesome Air/Roomy lodging
4. Society of the other sex
5. Society of relations
6. Society of friends
7. Society of men in general
Liberty of avoiding disagreeable society
8. Liberty of beholding variety of Rural objects and other objects agreeable to the Eye.
9. Pleasureable occupations Pursuit of Occasional pleasures.
10. Liberty of exercising lucrative occupations
11. Liberty of pursupty of the means of avoiding occasional pains.
12. Liberty of putting one's self in the way of occasional opportunities of advancing one's fortune

Observe likewise
The means of securing
one's self

1. From filth
2. From bites of vermin
3. Means of performing necessary functions without an offence to Modesty [&] Delicacy
4. Means of defending himself against the excesses of cold & heat

[no more entries given]

[UC cxl.56]

This early attempt at an assessment of the possible material privations of imprisonment was followed by a few

⁹⁷ UC cxl. 54.

paragraphs where Bentham expanded on the implications of the analytical table he had constructed.⁹⁸

These privations are more or less penal to a man according as he has been more or less used to the enjoyment.

To a man who has been accustomed to live on bread and water, the obligation to live [on] bread and water in future might perhaps be no punishment at all, [or] could not be a very great one. In China, in Indostan and many other countries of the East, there are millions who never taste any other food than rice.⁹⁹

He continued in this fashion through several more examples; identifying how privation from light and air would not be so great a punishment to miners who were used to the dark; how privation of sex would be no punishment to those of a 'cold constitution'; how a hermit would find no punishment in being deprived of society; and how those living in a large city would not be punished by the privation of the sight of rural objects.

We can see very clearly here that Bentham still had an unreformed concept of imprisonment set firmly in mind throughout the whole discussion. Incarceration, as he saw it, was still of the kind that was dark, cold and disease-ridden, and where sustenance was provided only by bread and water. In short, and just as in the manuscripts used above, he envisaged precisely the confined environment that was to be so heavily criticized by Howard in 1777.¹⁰⁰

⁹⁸ The table, but not the text, has been later abrogated, or cancelled - apparently as the contents were incorporated elsewhere.

⁹⁹ UC cxl. 56.

¹⁰⁰ This in itself supports the argument that the manuscripts numbered UC cxl. 53-56 predate 1777, and accords with prominent indications, from Bentham's

Clearly the variability of privations in existing prison conditions would have caused him much trouble when contemplating how effective such a punishment might be, and certainly when considering the need for proportion across a range of offences.¹⁰¹ Indeed, in the same manuscript he compared the position of those imprisoned for punishment, with individuals obliged to serve at sea for a living, and the hardships and privations listed for sea-farers look very similar to those suffered by prisoners under punishment.¹⁰² Clearly in 1776, Bentham was concerned that the pain inflicted by imprisonment could not be calculated with sufficient precision or certainty.

C. The Development of the Idea of Complex Punishments¹⁰³

When the above early views of imprisonment are compared to those presented in a manuscript of 1798, where

correspondence, that much of his work on punishment theory was done during 1777.

¹⁰¹ Here, it must be remembered, he was discussing only variations in length of imprisonment for Insolvent Debtors.

¹⁰² UC cxl. 56.

¹⁰³ The panopticon, as a mode of penitentiary imprisonment, was a 'complex' punishment, incorporating elements of both corporal and privative punishment. Other complex punishments eventually defined included transportation, outlawry and excommunication, see Rationale, Bk. V. See cxl. 273, for further prison analysis from the 1790s.

Bentham discussed the origins of imprisonment in both hulks and penitentiaries, the contrast is striking.¹⁰⁴ The conversion to the value of penitentiary imprisonment in the twenty-two year interval is obviously apparent, as the following extract shows:

When upon the revolt of North America the market for forced, transported labour was shut up something was to be established in the room of it. The Penitentiary system, that is forced labour upon a large scale under Masters acting on account of government, and thereby under special control of government was thought of in that view. But the Penitentiary system supposed a prison: and so vast was that prison to be, that five years on the most sanguine computation was to have been employed in the construction of it. Hulks being[?] to be found already in existence presented an immediate and a cheap one [prison].¹⁰⁵

The emphasis on forced labour is quite striking, as is the emphasis that this was imprisonment on a scale unknown only twenty years earlier. This scale is, it seems, the key to understanding how Bentham came to regard imprisonment as a satisfactory punishment that could adequately, and financially profitably,¹⁰⁶ accommodate his theory of proportioning for a range of misdemeanour and felony offences as well as for insolvent debtors. In fact, in the 1798 manuscript Bentham went to considerable lengths to argue, largely in financial terms, for the

¹⁰⁴ Bentham spent much time discussing the detail of imprisonment on the hulks. See UC cl. 343-5 (1798).

¹⁰⁵ UC cl. 343. This manuscript is part of papers relating to Patrick Colquhoun's report to the Police Board of 1798. UC cl. 321-428 includes: 'Police report - Expense of punishment, Hulks, Transportation, New South Wales, Mr. Bentham's Penitentiary Plan', and is firmly dated 1798.

¹⁰⁶ On making financial gain from imprisonment see UC cl(b). 343-4.

superiority of imprisonment at hard-labour. In other words, 'simple imprisonment', that is, ordinary confinement, perhaps in solitude and darkness and certainly without hard-labour, now appeared to be superseded by a more effective mode of punishment. His increasingly sophisticated definition of the nature, objects, distribution and properties of punishment produced a demand for a correspondingly more subtle mode of punishment. With his development of a model for the assessment of profits of pleasure against losses of pain Bentham was, by the 1790s, able to conclude that simple imprisonment without hard-labour was, despite appearances, 'in its own nature a very expensive mode of punishment'.¹⁰⁷ And conversely, whilst complex punishments might seem excessively expensive,¹⁰⁸ their design enabled the most effective application of the variety of pains they were arranged to deploy.¹⁰⁹ Yet of greater interest to Bentham was the ability of complex punishments to include reforming pleasures as well as punishing pains within their application.¹¹⁰

¹⁰⁷ UC cl. 337.

¹⁰⁸ Expensive in both the financial sense and in terms of the utilitarian understanding of pain as an expense.

¹⁰⁹ Thus, whilst simple incarceration provided pains of privation, complex imprisonment provided many other pains in addition, e.g. pains of moral disrepute brought about by better publicity.

¹¹⁰ Thus the element of forced labour provided both pains and pleasures as it insisted on compulsory labour from unwilling individuals, whilst simultaneously, in theory, reforming their habits, for both their own and society's benefit.

But although imprisonment now became a central mode of punishment, a range of methods for applying imprisonment was still envisaged, and variety was still deemed to be necessary. Thus we find the 'chronical punishments in use in this country' being listed as simple imprisonment, transportation to an existing colony, confinement to hard labour on a hulk, the Penitentiary House, and transportation to a new colony.¹¹¹ It must be noted that all of these punishments were for major offences and regarded as appropriate general replacements for the frequent use of capital punishment; and more distinctly, they all involved some element of incarceration. How then did Bentham's confidence in imprisonment develop to such a degree that incarceration was incorporated in all of the above 'chronical' modes of punishment?

There can be little doubt that William Eden and John Howard widely influenced Bentham's valuation of the potential of imprisonment. Eden's Hard Labour Bill, circulated for discussion in 1778, provided a considerable impetus to Bentham's understanding of imprisonment as a national standard of effective punishment.¹¹² And with his rapid preparation and publication of his own A View of the Hard-Labour Bill... in the same year, Bentham can be seen to adopt substantially the arguments provided by Eden

¹¹¹ UC cl. 336 (1798).

¹¹² See Chs. 1 and 2 above.

as a means of implementing his own unique penal theory.¹¹³ It was within Bentham's critique of the Bill that he first listed the properties needed in the pains of punishment.¹¹⁴

The influence of Eden's Bill was explicitly acknowledged by Bentham, in a valuable letter of April/May 1778 to the Reverend John Forster.¹¹⁵ And in this letter one also finds several pages heaping compliments and admiration on John Howard.¹¹⁶ There is no mistaking the fact that in 1778 Bentham came under the direct and prominent influence of Howard's The State of the Prisons in England and Wales.¹¹⁷ The year 1778 was obviously of great significance, for with the decision to support imprisonment, the 'View' showed that an additional, highly

¹¹³ J. Bentham, A View of the Hard-Labour Bill; Being an Abstract of a Pamphlet, intituled, "Draught of a Bill, to Punish by Imprisonment and Hard Labour, Certain Offenders; and to Establish Proper Places for their Reception;" Interspersed with Observations Relative to the Subject of the Above Draught in Particular, and to Penal Jurisprudence in General, (London, 1778). References below are to 'A View of the Hard-Labour Bill', Bowring, iv. 3-35.

¹¹⁴ For example, on 'commensurability' see 'View', 100: for 'remissibility', see *ibid.* 109, etc. The properties of punishment appeared in their final form a year or so later in IPML, printed in 1780.

¹¹⁵ Correspondence (CW), ii, letter 248, 98-115.

¹¹⁶ *Ibid.* 105-108.

¹¹⁷ Bentham himself explained how 'Mr Howard's Book on Prisons... [is] so often mentioned in my View of the Hard-labour Bill', Correspondence (CW), ii. 105. The predominance of references to Howard throughout Bentham's 'View' is striking. As a result of the comments in the 'View' Howard visited Bentham of his own accord, as Bentham was proud to explain. See Correspondence (CW), ii. 106.

valuable, element was associated with this particular mode of punishment. Punishment theory did not necessarily have to operate alone, it could be assisted by the supply of reward. As Bentham said in the 'View':

To extract, therefore, all the labour that can be got from him, it is necessary to apply reward in aid of punishment; and not only to punish him for falling short of the apparent measure of his ability, but to reward him for exceeding it. Thus it is, that the course which recommends itself to sentiment, as the most humane, approves itself to reason as the most useful.¹¹⁸

This was a turning point for Bentham's theory, for from this period the theory of punishment became linked to the theory of reward.¹¹⁹ With this element superimposed on the advances of Eden, Howard and Hanway, Bentham's preferred punishment theory re-orientated almost completely in favour of imprisonment.¹²⁰

¹¹⁸ 'View', Bowring, iv. section xxiii, p. 12.

¹¹⁹ It was only linked tentatively at first - there is very little reference to reward in IPML (CW).

¹²⁰ But this is not at all clear from his published works on punishment simply because the manuscripts on which they were based originate from before 1778. Both the Théorie (1811) and the Rationale (1830) were founded on the analysis of modes of punishment produced between 1776-8, before the connection was made between punishment and reward. Bentham's manuscripts on 'Récompenses' and 'Reward' (UC cxlii. 2-269), later published in English as The Rationale of Reward, ed. R. Smith (1825), were drawn up c. 1785.

It is argued that this re-orientation towards an overwhelming emphasis on imprisonment was only an interim stage (though a substantial one) covering the period c. 1780 - c. 1820. For further developments in Bentham's preferred modes of punishment, following the failure of the panopticon see below.

i) The Introduction of Panopticon Imprisonment

The practical development from Eden's national scheme of penitentiary imprisonment to the proposal for a panopticon penitentiary has been well described by Semple. In terms of theory, the obvious advantage that panopticon imprisonment offered was the greatly improved provision for the property of exemplarity. Prisoners could be seen suffering, and hence the purpose of the specially designed prison could be better fulfilled:

Example, or the preventing others by the terror of the example from the commission of similar offences. This is the main end of all punishment, and consequently of the particular mode [panopticon] here in question.¹²¹

In addition to such improvement, the new notion of reward fitted well with Bentham's early conception of penitentiary imprisonment as also being 'quasi-parental'.¹²² In his poor law writings of 1797 Bentham suggested that any family, whether in a palace or a cottage, could not be kept together in harmony if 'there are not adequate means of repressing misbehaviour'.¹²³ Similarly, he conceived of the panopticon's application of punishment as a method of repressing misbehaviour, but

¹²¹ 'Postscript - Part II. Principles and Plan of Management', Bowring, iv. 122.

¹²² UC cxliii. 14 (c. 1777). Here, in an early use of the term 'Penitentiary' by Bentham, 'quasi-parental' was offered as a synonym for this form of imprisonment.

¹²³ 'Poor Bill Preface', UC clii(b). 544. On Bentham's interest in maintaining order by providing for the indigent poor see M. Quinn, 'Jeremy Bentham on the Relief of Indigence: An Exercise in Applied Philosophy', Utilitas, 6 (1994), 81-96.

also, as in a family, he envisaged convicts gaining reward by their labours and 'correct' behaviour. Because of the opportunity for close observation provided by the panopticon the possibilities suddenly seemed endless and the value of this method of punishment combined with the mechanics of a building sent Bentham into years of determined struggle to turn his plans into reality.¹²⁴

By the mid-1790s, therefore, panopticon imprisonment became without question the dominant mode of punishment envisaged by Bentham.¹²⁵ It offered adequate punishment for most, if not all, serious offences, for it inflicted both simple and complex punishments, as occasion demanded. Additionally, it used the means of reward to increase its properties of reformation. But what of Bentham's original division in his penal theory which stated that punishments were always divided into corporal and privative.¹²⁶ As seen in his early analysis of confinement, imprisonment

¹²⁴ Semple, Bentham's Prison, Chs. 5 - 9.

¹²⁵ As penitentiary imprisonment was envisaged by most commentators. In the last communication found from Eden (now Lord Auckland) to Bentham, Eden made it clear that since 1778 he had hoped for the widespread introduction of large scale penitentiary imprisonment: 'Lord A^d has long doubted whether the system of punishment by hard Labour aboard the Hulks (which He introduced only as an expedient to lessen a temporary pressure) might not be transfer'd to an enlarged establishment of Penitentiary Houses. It was with that View, and with the Aid of Sir W^m Blackstone that He prepared, and proposed the subsequent Acts of Parliament' [Eden's parenthesis]. See Correspondence (CW), vii, letter 1766 (26 December 1802), p. 174. Eden refers here to the Hulks Act of 1776 and the Penitentiary Act of 1779.

¹²⁶ Otherwise referred to as afflictive (corporal) or forfeitures (privative). See Rationale, Bks. II and III.

was always, for Bentham, primarily a corporal punishment, and with considerable properties of disablement it inflicted a considerable quantity of pain. Could the panopticon thus be said to be a suitable mode of punishment for a wide-enough variety of offences to make it into a dominant punishment? Clearly there must have remained numerous categories of offence which did not justify confinement within a panopticon.

Indeed, the panopticon was only ever viewed as a method of punishment appropriate for those driven by the more forceful, more difficult to restrain 'precipitate and blind' motives.¹²⁷ Such 'precipitate' motives of hunger and lust might be found most often amongst less wealthy, less educated or less sensitive individuals, but this was not a class for the poor alone. And similarly the more easily controlled 'appetitive' motives, those which drove offenders to fulfil their desires for riches, power and honour, formed a class into which individuals of any social status could be placed.¹²⁸ Could it be, therefore, that the panopticon, as the corporal punishment par

¹²⁷ See UC xxvii. 63, 'Common measure'. On the similarity between persons entering poor houses and penitentiary prisons see UC clii(b). 290, where Bentham suggested that a poor house encloses 'a good deal of the same company, as are inclosed in Prisons. The identical persons, who at one time are in the one place will at another time be occupying the other'. The point made is that poorer sections of society appear more suited to penitentiary punishment than those wealthier sections which never require poor relief. This was only the case, however, for as long as the poor displayed 'precipitate' and less calculative motivation.

¹²⁸ UC xxvii. 63.

excellence,¹²⁹ lay ready for those of a specific motivational 'class' of society, whilst the privative modes of forfeiture and pecuniary loss were reserved for those of a separate 'class' whose more sensitive, 'appetitive' motives and better calculation, were more easily restrained?¹³⁰ It may well be that there was a division in Bentham's thinking where society was split between those suitable for corporal punishment and those suitable for privative. Such a question might never have arisen had the panopticon been built, for if it had, in practice individuals driven by all manner of motives would soon, surely, have been restrained within it. But as the chance of seeing the panopticon become reality gradually slipped away, perhaps so too did Bentham's overriding interest in imprisonment, for by the early 1820s new modes of 'apt' punishments were being suggested.

ii) The Moral Sanction and Banishment

When Bentham returned to the idea of a Penal Code in the 1820s he prepared a manuscript on what he then regarded as the most 'apt' forms of punishment.¹³¹ It began,

When the existing stock of punishment was first laid

¹²⁹ Even in its most refined form imprisonment was, for Bentham, essentially a corporal punishment. Non-corporal punishment was privative, non-afflictive pain, examples being disrepute and fining.

¹³⁰ UC xxvii. 63, and see Ch. 5 above.

¹³¹ UC lxviii. 287 (2 November 1823). Headed 'Punishment' and 'Quality'.

in, the state of the public mind admitted of little choice; unapt punishments were for the most part employed, the most apt not as yet brought to view. Of those inapt modes the stock, has been already much narrowed and is in a way to be rendered still more narrow. The pillory has already been abolished: flogging seems to be in a way to be abolished. To the utter inaptitude of all mortal punishment the public mind seems to be every day more and more sensible. Two modes of punishment remain as yet unemployed which it is high time should be brought into full view, these are 1. disrepute as effected & encreased by publicity; this and 2. presence banishment.

Notions of simple afflictive punishments such as the pillory and flogging are here discarded, and capital punishment is dismissively classed as a mode of 'utter inaptitude', but the most surprising element of this text is the complete absence of the panopticon or penitentiary imprisonment. Penitential imprisonment was, of course, by now so well established that Bentham may well have thought it warranted no mention, but its absence is made more apparent by his suggestion to introduce a comprehensive form of disrepute and banishment as alternative modes of punishment.

By this period Bentham's hopes of seeing the panopticon built had long since vanished and he was no longer actively pursuing the practical adoption of any recommended form of punishment.¹³² Yet, though he may have resigned himself to never seeing his private penitentiary built in England, it would be suggesting too much to say he no longer valued this form of punishment.

¹³² In 1813 the panopticon scheme had finally come to an end when parliament voted Bentham compensation of £23,000 for non-completion of the project. See Semple, Bentham's Prison, Ch. 11.

What seems more likely is that he maintained his support for imprisonment, though not in the form it was operating, whilst additionally believing a variety of punishments still to be necessary.¹³³

In this sense we find him, in 1823, building on elements of his penal theory which were established forty-seven years earlier. Consistency was maintained as he suggested that other forms of punishment ought to be increasingly practised, parallel with any schemes of national imprisonment. Thus he stressed 'disrepute' as a privative punishment, and 'banishment' as both privative and corporal, as undervalued methods of inflicting legal sanctions.¹³⁴

In concentrating on these forms Bentham revealed the depth of his growing belief in the force of public opinion. With 'disrepute' he was explicit in regarding this as a community wide punishment since, 'in the case of this mode of punishment the power of the Public Opinion

¹³³ It is clear from a note given in the Constitutional Code, that Bentham remained very much in favour of panopticon imprisonment. But whilst it had been variously recommended in France, Ireland and Spain, he believed that 'in England, and perhaps the Anglo-American United States, - the practical adoption of it awaits the death of the two inventors [Bentham and his brother Samuel]'. See Constitutional Code (CW), i, Ch. IX, sect. 26, art. 20 n. In the meantime, with the further deterioration of the existing system, where 'inaptitude soon became so flagrant', Bentham turned to alternative modes of punishment which could satisfy the existing demands of his theory.

¹³⁴ For further details from this manuscript on disrepute see the discussion on punishment from the moral sanction at Ch. 3 above. On his concerns with the unknown 'succedaneous' (i.e. following on) pains of banishment see, UC clix. 238-42.

Tribunal is the instrument employed in the infliction of it'.¹³⁵ With his further suggestion of the effectiveness of 'presence banishment' Bentham returned to ideas explored earlier in his thinking, including transportation, outlawry and excommunication.¹³⁶ This variety of methods of banishment, or exclusion from the community, were revived as suitable methods of imposing complex punishments. Once again the moral disapproval of the community from which the offending individual was banished took on an equal importance with the pain imposed by the actual, physical expulsion from the home environment. Such punishment was now seen to encompass both the privative pain attendant with moral disapproval, and the corporal pain accompanying forcible exclusion. Thus both disrepute and banishment can be seen as typical of Bentham's later thought, in that the power of public opinion became increasingly central to his thinking.¹³⁷

¹³⁵ UC lxviii. 287 (1823). Bentham also indicated here his concern that a community must have reached a certain degree of civilization before such a punishment becomes effective, and he thought the English community was at such a stage. Thus he said, '... as to disrepute, this is a punishment which is become already well assort'd to the actual state of the public mind. In England at any rate, not to speak of the other more or less civilized political communities which are to be found on the surface of the globe'. *Ibid.*

¹³⁶ UC lxviii. 287 (1823). On the use made of 'Transportation', 'Outlawry' and 'Excommunication' see Rationale, Bk. V, where they are all categorized as 'Complex Punishments'.

¹³⁷ On recent interpretations of the importance of public opinion in Bentham's later writings see Rosen, Representative Democracy, Ch. 2; and Harrison, Bentham, 179-81.

Several points can be made, therefore, when examining the development of Bentham's preferences for forms or qualities of punishment. Once the construction of his penal theory is seen to be independent from any modes of punishment suggested, and especially once it is disconnected from a constant association with panopticon imprisonment, his analysis is found to display considerable consistency. The ends of punishment always remain the same; and constant, overwhelming stress is placed on the calculation of the quantity of pain inflicted in pursuit of these ends. For his theory to be applied correctly it is always necessary for there to be an array of types of punishment available. As imprisonment rose to prominence as a response to serious felonies,¹³⁸ Bentham alone returned to the suggestion that such physical pain ought to be supplemented by the privative punishment of disrepute, which provided an effective restraining threat by nothing more than the withdrawal of the affection of an individual's contemporaries.

¹³⁸ On the continuing rise of penitentiary imprisonment in the early years of the nineteenth century, see Ignatieff, A Just Measure of Pain, Chs. 6 and 7.

CONCLUSION

This study has sought to display the most significant developments contained within Bentham's discussions of penal theory. The examination of his substantial archive has presented new views of his thinking on punishment, and provided new insights into the nature of penal debate in the late eighteenth and early nineteenth centuries.¹ The aim has been to provide a critical, balanced approach to Bentham's work, and a constant focus on the texts themselves, both published and unpublished, has allowed many quite unexpected views on the theory and forms of punishment to emerge.

The investigation began with an examination of the historical context, of the contemporary ideas and environment, within which Bentham's thought on penal theory was developed. Connections have been found between the ideas of Bentham and those of his predecessors and contemporaries, and there is no doubt that modern commentators such as David Lieberman are entirely correct in describing Bentham's thinking as one amongst many strands of substantial and original thought occurring in legal and political spheres in eighteenth-century England.

During the examination of the historical environment

¹ It must be remembered, however, that due to the size of the archive, and the quantity of material remaining, considerable work still waits to be done on Bentham's penal writings. This is especially relevant to his drafts of a Penal Code, which have been scarcely touched upon in this study. See UC lxv, lxvii, and lxviii.

this study has emphasised the contributions of William Eden. It has been shown that Eden's work was received in a far more enthusiastic manner than one would imagine from existing discussions of his role in penal theory. The emphasis he placed on the value of leniency in punishment was a fundamental development in the history of English penal theory, and its value is underlined here.

There can be little doubt regarding the relevance of the contacts between Bentham and Eden. The practical introduction of Eden's national scheme of imprisonment was essential to the later interest Bentham showed in this form of punishment. There are grounds for arguing, in fact, that Eden's actions provided the impetus for Bentham's panopticon project; in that it was less contemporary theory, and rather contemporary practice, which underpinned Bentham's application of panopticon architecture to penal uses.

What also emerges from the assessment of Bentham's theory within its historical context is that despite the debts he owed to his contemporaries and predecessors, the radicalism of his theory is once more displayed, but in a new light. He abandoned any concept of the usefulness of common, or judge-made, law; he ridiculed the notion that contract theory was able to provide foundations for punishments inflicted within societies; and he abandoned any support for traditional punishments simply because they were traditional. His political philosophy provided a sharply distinguished penal theory, and early

commentators were led to assume that Bentham's theory started afresh.² What has been established here is that, whilst Bentham did provide a unique penal theory, his thinking nevertheless remained an intrinsic, symbiotic part of the intellectual environment in which it was produced.

Evidence of this permanent union between Bentham's theory and the context in which it was constructed is clearly provided by his engagement in the debate over the reduction in severities of punishments, a topic already selected for discussion by Eden. Whilst disagreeing with the foundations on which Eden built his pursuit of leniency, there can be no doubt that they shared the ultimate aim of introducing milder applications of legal pain. Both theorists worked from the foundation of Beccaria, demanding that the state provide a new respect for the citizen body by revisions in the principles and processes of punishment. Of course, they used Beccaria in different ways - Eden pursuing contractarian arguments for the encouragement of public virtue, whilst Bentham used Helvétian, utilitarian thought, reproduced in Beccaria, to establish a more wholesale philosophical revision. But the key point has become apparent, that together they provided a powerful assertion of the principles inherent in Beccaria's On Crimes and Punishments, and demanded the

² See, for example, Stephen, History of English Thought in the Eighteenth Century, (London, 1962).

wider adoption of those principles in England.³

Bentham's approach sought the reduction of penal severity in a unique manner. He was not content with attempts to amend current practices which might remove some crimes from punishment altogether and allow others to be assigned reduced punishments, as had Montesquieu and Eden. Rather, he provided a new mechanism for the assessment of each and every offence - regardless of the category within which it fell. On the occasion of every offence, Bentham suggested that always it ought to be established that punishment was indeed justified. If any crime, from simple theft to aggravated murder, could be found to exemplify one of the cases he listed as being suitable for exemption from punishment, then that was precisely what should happen. The establishment of the principle that any offence might, under specific circumstances, be deemed unsuitable for punishment introduced a distinctly original element into eighteenth-century punishment discussion.

The justification for such a theory was based on Bentham's assessment of the circumstances of every offence and the sensibilities of every offender. In treating each case of offending as unique Bentham developed a new method for the assessment of any future threat to society and the validity of any corresponding punishment. By defining

³ An assertion shared by many in contemporary eighteenth-century society as is shown by evidence retrieved from the penal debate in the London journals of 1769-70. See Ch. 1, above.

'general' threats and 'particular' threats Bentham's original analysis of the distribution of pain sought more precision in the process of calculating justified quantities of legal pain that could be inflicted.

Bentham presented an essentially consistent theory of punishment. It has been found that the ideas established in the period 1776-80 remained the foundations for his penal thinking in the 1790s and 1820s, and Bentham rarely deviated from concepts established in his earliest punishment writings. Throughout, the aims of punishment were the same, as were the recommended techniques for achieving those aims. Thus the thirteen rules of proportion and the eleven properties demanded of every lot of punishment lasted unaltered throughout his entire career. The details of Bentham's penal theory were continually refined, and certainly his preferred forms of punishment changed as his career progressed, but this only emphasises the strength and flexibility of the fundamental principles of punishment as established in the 1770s.

It was a penal theory that did not set any rigid formulas for the assessment of guilt or the assignment of punishment. Attention was constantly directed towards the need for individual assessment, and this enabled the structure of his system to accommodate evolving attitudes to punishment, as social expectations and penal demands changed over the fifty years during which Bentham's theory was constructed.

Bentham cannot be said to have produced a theory which pursued specifically 'body' or 'mind' orientated punishments. The distinction, made so prominent in the work of Foucault and his followers, is that a fundamental change in penal theory in the late eighteenth-century produced theories which directed punishments at the mind rather than the body.¹ This distinction can, of course, be made, and there is no question that there was a decisive move away from elaborate public execution towards imprisonment during this period. The point noted here, however, is that no evidence of a division between punishment of the mind, and punishment of the body, is found in Bentham's penal theory writings. Indeed, the question appears to be irrelevant to Bentham, since, in the texts examined, he always regarded punishment as being directed at both body and mind. Using his fundamental principle of the variety of motivating sanctions, which operate simultaneously and continually, it was simply not possible to envisage any separation of pain directed at an individual. The continuation, of what may perhaps be termed, a unified understanding of the pain of punishment goes some way towards explaining Bentham's continuous

¹ Foucault describes a 'humanization of the penalties... that authorize, or rather demand, "leniency", as a calculated economy of the power to punish', which '... provokes a shift in the point of application of this power: it is no longer the body, with the ritual play of excessive pains, spectacular brandings in the ritual of the public execution; it is the mind or rather a play of representations and signs circulating discreetly but necessarily and evidently in the minds of all'. See Foucault, Discipline and Punish, 101.

support for physical punishment, even in the 1820s when penitentiary imprisonment was well established.⁵ In Bentham's theory there was never an explicit abandonment of corporal punishment as a justifiable means of inflicting legal pain.

Of course, Bentham did see punishment as acting upon the 'spirit', or will, of punished individuals, yet this was constantly presented as a secondary aspect. The property of 'exemplarity' lay permanently at the heart of Bentham's selection of types of punishment. The difficulty of reconciling a solely mind orientated approach to punishment with Bentham's theory, is that private, internal suffering of an individual's mind can never be seen to provide a satisfactory deterrent example, though it may well assist in an individual's reformation. Example and deterrence were the prime concerns of his punishment thinking; for this reason effective punishments had to provide examples of inflictions of pain which were instantly recognisable to those witnesses of such punishment who might contemplate similar criminal action.⁶ Subtle punishment of the criminal's spirit was regarded as

⁵ Nevertheless, he was always interested in reducing the amount of pain inflicted to the absolute minimum necessary, to outweigh any profit of offence, and in increasing the 'aptness' of punishments. Hence he agreed that tortuous punishments, such as the pillory and whipping, were rightly being abandoned, whilst always remaining interested in the availability of choice between forms of punishment. See UC lxviii. 287 (2 November 1823).

⁶ Hence the theatrical embellishments recommended for punishments, aimed at heightening the exemplary, deterrent effect of the penalty. See Semple, Bentham's Prison, 36-8.

inadequate in the fulfilling of this primary purpose, and in providing a justification for the infliction of yet more social pain by a state.

There seems little in his penal theory, therefore, to accord with frequent modern insistences of Bentham's overwhelming interest in the insidious state control of the wills, spirits, or minds of offenders and potential offenders.⁷ And clearly, Bentham demanded more choice in the forms of punishment than can be offered by any single institution of imprisonment which depends upon surveillance and regimentation in the application of its punishment. Attention must, it seems, be returned to the fact that with the panopticon prison Bentham's first concern was to lock guilty individuals away from the society against which they had offended - they had to be firstly 'disabled' from spreading further social pain, and this action of disablement was always seen as an afflictive, physical punishment.⁸ In fact, because of the great degrees of physical pain thought to be inflicted by

⁷ On the efforts of historians to counter the suggestions of Foucault see Garland, Punishment and Modern Society, 159.

⁸ Though imprisonment in itself is not directly corporal, the many material, physical privations of imprisonment are given above, from an unpublished manuscript. See UC cxl. 56; and Ch. 6.

Sociological assessments of imprisonment identify the fact that imprisonment does not only inflict mental punishment, but 'can also bring about physical deterioration', and 'punishment [imprisonment] ... is nowadays organized in ways which routinely disguise the massive violence which is still employed'. See Garland, Punishment and Modern Society, 242-3. Also see G. Sykes, The Society of Captives, Ch. 4, 'The Pains of Imprisonment', (Princeton, 1958).

imprisonment Bentham has been found to suggest that its use was appropriate only for those displaying the most difficult to manage anti-social motivation.

Such motives were described as 'precipitate and blind', and were perceived as the most forceful motives that faced any social system, since they originated in the most basic, physical desires of human hunger and lust. In Bentham's opinion they required a physical response in order to restrain them, and evidence has been uncovered to support the argument that Bentham envisaged using panopticon imprisonment only for this motivational 'class' of offender. Punishment applied against motivation was said to act against the will of individual offenders, but its effectiveness depended to a large degree on the capacity for individual calculation. If individuals offended because of the most basic of motives Bentham assumed they were also incapable, or unable, effectively to calculate their own interests, and a greater, corrective force was consequently deemed necessary. Thus we can establish a distinction in Bentham's thinking, between those driven by 'precipitate and blind' motives, and those, better calculating individuals, driven to offend by 'appetitive' and more easily restrained anti-social motives.

A distinction is, therefore, provided by Bentham's theory, but not between punishment aimed at the mind and

punishment aimed at the body.⁹ It is between 'afflictive' punishment and 'privative' punishment. Physical pain is inflicted in greater quantities with 'afflictive' punishments, but even 'privative' punishments, such as banishment and fining, are by no means devoid of physical pain, and rigid distinctions between mental and bodily punishments seem inappropriate when examining Bentham's ideas on punishment.¹⁰

Throughout Bentham's theory control is seen to emanate to a considerable degree from public opinion as well as from any manipulation, sinister or otherwise, of state power. This is quite distinct from later nineteenth-century conceptions of punishment as a tool of government being used against the mind. The importance of public opinion in the work of Bentham has been established in recent studies,¹¹ and, in accord with such research, his penal theory has been found also to centre very much upon the action of the moral sanction.

⁹ Though his distinction between simple and complex punishments may indicate a development into a more sophisticated sense of the nature of punishment, both corporal and mental pain is applied in both. Complex may be said to refer more to the introduction of additional aims, such as reformation, and disablement as well as the deterrence.

¹⁰ All imprisonment, including panopticon imprisonment, was seen to be an afflictive punishment, particularly when accompanied by the physical strains of hard labour.

¹¹ See particularly, Rosen, Representative Democracy, Ch. 2; Harrison, Bentham, 179-81; and Gunn, Beyond Liberty and Property, (Kingston, 1983), and 'Opinion in Eighteenth-Century Thought: What did the Concept Purport to Explain?', 17-33.

In terms of increasing the effectiveness of punishment, Bentham worked steadily towards a demand for the efficiency of the moral sanction, as a restraint on anti-social actions, to be fully recognised. This sanction was said to influence behaviour both on its own account, and by incorporation within applications of pain from the legal sanction itself. Thus, moral punishment was said to be inflicted when the public, or citizen body, witnessed state punishments and simultaneously withdrew its respect for the punished individual as the state punishment was executed. However, more importantly, as Bentham's penal theory passed through its revisions, the moral sanction was increasingly seen to function independently of any state assignment of pain.

As Bentham became more democratically inclined in his political theory, he also became more interested in the value of this moral sanction as an integral part of his theory of punishment. Thus whilst 'example' was important in his earliest penal texts, and observation of a guilty individual undergoing punishment found new expressions in his conception of penitentiary imprisonment in the 1790s, by the 1820s he regarded the moral sanction as being capable of such specific, and effective, application that ultimately it came to be regarded as the most accurate of the punishing sanctions.¹² In line with the motivational

¹² 'This mode of punishment... adjusts itself with unexampled accuracy to the demand for punishment'. UC lxviii. 287; and see Ch. 3. The other sanctions were the physical, religious, and legal.

distinctions noted above, Bentham is found to regard such punishments as essentially 'privative', and aimed principally at those middle-class, professional offenders who apparently had most to lose by the withdrawal of the confidence, respect and support of their colleagues and contemporaries.¹³ This shift of emphasis, displayed in manuscripts of 1823, which sought to employ the untapped efficiencies of the moral sanction as applied by public opinion, formed a significant advancement on those contemporary penal theories which regarded only state pain as punishment. It highlights one of the most subtle elements of Bentham's penal theory, namely, an awareness of the variety of sources from which the pain of punishment may be said to originate.¹⁴

The relevance of Bentham's texts to modern penal theory is not difficult to establish.¹⁵ In the period since 1970 western liberal-democracies have witnessed a growing pessimism and dissatisfaction with established penal theory and practice. Empirical data from the social

¹³ See, for example, the concept of banishment, and the public notification of 'disrepute', which he said had not yet been properly used and was 'effected & encreased by publicity', UC lxviii. 287 (1823).

¹⁴ See the discussion of punishment from the physical, religious, moral, and legal sanctions in Ch. 3 above.

¹⁵ General modern commentary has valued Bentham's thinking, to a degree, though tends to limit its use to the definition of punishment as an evil and brief discussions on proportioning. See Lacey, State Punishment, (London, 1988); and Philosophical Perspectives on Punishment, ed. G. Ezorsky (New York, 1977), pp xii-xvii.

sciences have continued to indicate that modern punishment 'has no significant deterrent effect',¹⁶ and the concept of rehabilitation has come to be regarded as 'problematic at best, dangerous and unworkable at worst'.¹⁷

The first of these two noted deficiencies in modern penology is of vital importance in relation to the principles examined within Bentham's theory. Punishment must deter future offending, there is no other substantial justification for it from Bentham's position. To correct this failing, recourse must be made to his cornerstone, his first rule of proportion, which states that 'the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence'.¹⁸ From Bentham's argument miscalculation must be occurring within the present criminal justice system, since there is no doubt, from his theory, that punishment does act as a deterrent if correctly administered. The fault lies, therefore, either with the forms of punishment used, or with an incorrect assessment of the pleasurable profit gained by the criminal offender and the quantities of pain assigned as corresponding punishment.

Variety in punishment was always important for Bentham, and perhaps the conclusion to be reached from his theory is that the use of simple imprisonment does not

¹⁶ Ibid. 2. Modern punishment for serious crime in the west consists predominantly of imprisonment.

¹⁷ Garland, Punishment and Modern Society, 6.

¹⁸ IPML (CW), 166.

offer enough variety, and that the punishment provided is not always of a sufficiently analogous nature. This implies, however, that a return to more physical punishments may be supported, since fining, community sentences, police cautioning and court restraining orders are increasingly regarded as ineffective deterrents. Clearly, direct inflictions of pain, whether by eighteenth-century methods, such as whipping, or by more modern, calibrated equivalents, as with the use of electric shocks,¹⁹ are unacceptable to modern sensibilities, and are regarded in the western democracies as uncivilised, brutal behaviour. Yet, at the same time, the death penalty continues to be used, or has been reintroduced, in various states of the USA,²⁰ - though following modern penal theory it is now applied in private, sanitized situations where the violence of the act is carefully disguised, even denied.²¹ In Bentham's terms this is penal logic turned on its head, where lesser corporal punishments are abolished on grounds of inhumanity - though the visible pain inflicted seems

¹⁹ It has recently been suggested that corporal punishments ought to be reintroduced in the form of electric shock treatment. See C. Newman, Just and Painful: A Case for the Corporal Punishment of Criminals, (New York, 1985). See also the important discussion 'Contemporary Punishments and Modern Sensibilities' in Garland, Punishment and Modern Society, 241-7.

²⁰ It is justified both by individual states and by the Federal government.

²¹ Garland, Punishment and Modern Society, 244-5.

effectively to deter;²² whilst the most corporal, irremissible punishment of all, 'virtually painless' legal execution,²³ has continued to be justified - though its inadequacy as an effective deterrent has been proven.

As society forbids the infliction of violence in 'civilised' punishment it also denies the infliction of pain. In Bentham's view, without a recognition of the infliction of pain on offenders, whether or not it is there in reality,²⁴ there will never be a sufficient deterrent example, and the punishment is bound to fail to deter. For Bentham punishments applied in private, professionally 'caring' surroundings are a wasted, unjustified infliction of legal pain. Punishments must inflict pain; they are evils and not cures.²⁵

If modern, 'civilized' punishments do not deter, then it is either because the application of the punishment is

²² Compare with the severe penal codes found in middle-eastern and Asian states where corporal punishment is successfully used as a penal deterrent.

²³ For an example of a modern, 'decent' and 'painless' form of capital execution, see the description of the intravenous 'lethal injection', of barbiturates and paralytic agents, used today in several US states, in F.E. Zimring and G. Hawkins, Capital Punishment and the American Agenda, (Cambridge, 1986).

²⁴ For Bentham the application of pain had to be convincing but need not be real. Paradoxically, modern penal theory denies any application of pain, whilst actually inflicting great pain in practice. See above for the argument that modern punishments inflict great, secreted violence.

²⁵ Bentham's theory cannot regard rehabilitation as punishment unless it involves the infliction of pain. Caring rehabilitation is treatment not punishment. This does not mean to say, however, that Bentham would be against treatment if it could prevent further offending.

not certain or speedy enough, or that the punishments do not threaten sufficient pain. Bentham's solutions to the first case would be as plain today as they were when he confronted William Paley. If a punishment is prescribed and an offender is convicted, then the execution of the punishment must be certain to follow the conviction and it must do so without excessive delay. If the guilty do not suffer the legal punishment then yet more social harm may well be spread. In the second case, if punishments simply do not threaten sufficient pain to outweigh the profit of the offence, then the whole punishment is, for Bentham, unnecessary and wasted. There is, therefore, no justification for leniency simply on grounds of sympathy with the offender. Such leniency, Bentham believed, was the great flaw in the theories of Beccaria and Eden.

Whilst he might have approved of corporal punishment, Bentham denied the deterrent value of gross severity. With his concept of proportioning, a punishment ought only to be as severe as each criminal act demands in order that the marginal outweighing of profit by punishment is achieved. In contrast to this theory, the all too frequent reaction of modern politicians, faced with ineffective legal sanctions and perceived increases in disrespect for the law, has been to introduce drastic measures based on an unchanged and flawed penal theory.²⁶

²⁶ Present legislative proposals from Michael Howard, the UK Home Secretary, build on previous measures announced at the 1993 Conservative party conference where he stated, 'there is a tidal wave of concern about crime in this country... I am going to take action. Tough

Such measures apparently seek to adopt more severe scales for the application of punishments to offences, swinging back in reactionary manner to ideas of punishment more in line with much earlier thinking. Following the present course of extensions in conventional punishing one can expect yet more increases in the use of imprisonment.²⁷ But whilst offering yet more hidden pain to prisoners and their families, unseen behind the walls of a flourishing prison system,²⁸ such increases in the evil of legally applied pain will be lost, unwitnessed. They will not deter, and will be wasted.

Open and disproportionate increases in severity singularly failed to deter crime in the eighteenth

action'. B Jones et al., Politics UK, (London, 1994), 524.

Howard's recent Crime (Sentences) Bill has been described as 'draconian'; seeking, amongst other things, to introduce mandatory minimum three-year sentences for adult burglars, mandatory minimum seven-year sentences for class A drug dealers, automatic life-sentences for second serious or sex offenders, and the total abolition of the present parole and early release systems. For the huge increase in the number of prison inmates expected the Home Secretary plans to construct twelve new private prisons providing 11,000 extra places, creating by far the largest national prison population in Europe. Alan Travis, The Guardian, (London, 26 October 1996), 1 and 7.

Michael Howard's belief that 'prison works' as a deterrent threat has been attacked by many senior judges including Lord Justice Woolf, Lord Ackner, Lord Justice Farquharson, and Lord Bruce Laughland. See B. Jones, et al., Politics UK, 524.

²⁷ Before Michael Howard took office as Home Secretary, England had 89 inmates for every 100,000 population, currently there are 114, and it is expected to rise to 142 following the introduction of presently proposed legislation.

²⁸ The introduction of the private prison system does not, in itself, provide any problems for Bentham's theory, after all he saw the panopticon as the ultimate private prison. The question is does the prison deter?

century, there is no reason to suppose that hidden increases will do otherwise today. What can be learnt from Bentham's theory is that if effective deterrent action is to be taken by the state, it must be visible.²⁹ Bentham would therefore see the biggest problem for modern penal theory to be to find some way of overcoming the modern, selective distaste for violence, which recoils from certain forms of inflicted pain, as in corporal punishment, but tolerates 'routine violence and suffering... that is discreet, disguised, or somehow removed from view'.³⁰

The decision of politicians to move towards tougher, mandatory sentencing only moves further from Bentham's desire to keep sentencing proportionate to the offence, for close proportioning provides the justification of the punishment. If the justification of punishment is doubted then respect for the rule of law declines. A section of the community - always the poorer, less educated - becomes

²⁹ Recent attempts to take effective visible action have included in certain southern US states, the re-introduction of the chain-gang, and community service orders being completed in full public view in the locality where offences took place. Revised styles of policing have also been attempted - 'community policing' in New York, and 'zero tolerance' policing in London - which stress certainty and speed in the prosecution of every minor offence discovered. The effectiveness of such policing has, however, been questioned by senior police officers, who suggest that the sustained use of these methods has resulted in the targetting of minorities, and created social tension and serious public disorder. See C. Pollard, Chief Constable of Thames Valley, essay on 'Zero Tolerance', in Zero Tolerance: Policing a Free Society, Institute of Economic Affairs, (London, 1997).

³⁰ Garland, Punishment and Modern Society, 243.

alienated, and yet more law-breaking ensues. The threat of the law becomes irrelevant for those at whom it is aimed, neither deterring, nor reforming, and failing to encourage any coherent social morality. Bentham is clear - needless severities do not maintain systems of law.

Popular clamour for more severe penalties on their own amounts to a demand for revenge, whether from the state or the individual. In pluralistic, liberal societies vengeful punishment has been found to be incompatible with individual liberty. If citizens in western democracies wish to return to state vengeance as the basis for punishment, they must, it seems, be prepared to surrender the liberal-democratic rights on which their communities are established. Neither Montesquieu, Beccaria, Eden nor Bentham would suggest this alternative, though they surely do recommend that visible, proportioned inflictions of pain are essential in the maintenance of individual protections and freedoms expected from a modern state.

APPENDIX

UC xxvii. 60-3 (Bentham's folio numbers 101-8)

[Para.]

Of the Proportion between Punishments & Offences

- [1] To reward those whom one hates, to punish those whom one admires and loves, to reward in short or to punish in any other proportion than as one loves or hates, is a task very irksome to a feeling mind. But that it is so is only because as yet men have not yet thoroughly weaned themselves from the principle of antipathy nor brought themselves under an entire and unreserved subjection to the only one that ought to govern, that of utility.
- [2] It is certain that the less bad a man's disposition appears to be when the circumstances of an offence he has been committing are taken into the account, the less strongly we are prompted by our general antipathy against vice to punish him.
- [3] It is certain also that as far as he alone is concerned there is the less reason, even on the principle of utility for punishing him: for there is the less reason to apprehend that in his disposition the selfish or dissocial affections will in the general tenor of his conduct maintain an undue ascendancy over the social; that is that his conduct and character will be mischievous upon the whole.
- [4] Now in proportion as the temptation is strong, the less depraved is it necessary a man's disposition should be in order to admit of his yielding to the temptation, that is of his committing the offence to which that temptation prompts him: in proportion therefore as the temptation is strong, the less has the community to fear from the general behaviour of the delinquent, abstracted from his behaviour in the particular sort of case in question. I say abstracted from his behaviour in this particular sort of case: for here by the supposition it has every thing to fear from him: and as often as a temptation of the magnitude in question falls in his way, so often will he committ [sic] the offence in question; in short so often as the same can occur so often will he offend. If then it be seriously intended to find a stop to the offence in question it is evident that an addition must be made to the punishment; and that not in the inverse proportion to the strength of the temptation. To do otherwise would be a double

cruelty: cruelty to the community, (that is cruelty to the innocent), in suffering them to lie exposed, for want of an adequate protection, to the mischief of the offence: cruelty even to the offender in punishing him to no purpose, and without the hope of compassing that beneficial end, which can alone justify the introduction of the evil of punishment.

- [5] In what way then and to what purposes can the strength of the temptation operate with propriety as a plea for the mitigation of a man's punishment? To these two purposes: to reduce within certain limits the demand for what commonly goes by the name of punishment, the punishment that belongs to the political sanction: and to mitigate in still greater degree the demand for those general and voluntary sentiments of disapprobation which constitute the punishment belonging to the moral sanction.
- [6] Nor is the necessity there is of adding to the quantum of punishment on this ground attended with any peculiar hardship. Many are the cases in which we are reduced to the necessity of punishing even when the motive is positively a good one. It is a much less hardship to punish in proportion as the temptation is strong, which it may be in the highest degree at the same time that the motive is at the worst.
- [7] To what purpose then does it lessen the demand for punishment commonly called? punishment at the hands of the magistrate. To this purpose. It tends to shew that setting aside the offence in question, it is not the less necessary to have recourse to violent methods for the sake of securing the community against other offences of the same delinquent in the case where the mischief would be greater or the temptation not so great: for instance to the putting him to death, to the depriving him of any member he may have abused, or to the confining him for life. Were the temptation by which he suffer'd himself to be overcome a very weak one, at the same time that the mischief of the offence was very great, for instance were he to expose a man to death like the Roman Tyrants who exhibited shows of gladiators, merely for the amusement of seeing how he would behave in his dying moments, there might possibly be a ground for exposing him to a severe measure of suffering were it only to rid society of the danger with which so depraved a disposition might seem to threaten it: a disposition which upon the slightest impulse of desire threaten'd to plunge him into the commission of the most atrocious offences: offences not only of the same kind as that in question, but any one of a multitude of others to which his unbridled appetites might lead him. But

the temptation, we will say, was a very strange one, and such as a man might yield to in the case in question, and yet retain in general a very strong repugnance against such actions as are seen manifestly to be prejudicial to society: insomuch that had the temptation been less, the visible mischief of the action remaining the same, or the visible mischief of the action greater, the temptation being the same it does not appear but that the delinquent might have restrained himself from giving way to it.

[8] I say it does not appear: for it is to be observed, that this negative presumption is all that the strength of the temptation, where the mind has actually given way to it, can afford: so far is it from affording a certain and conclusive indication of the propriety of mitigating the punishment at all events.

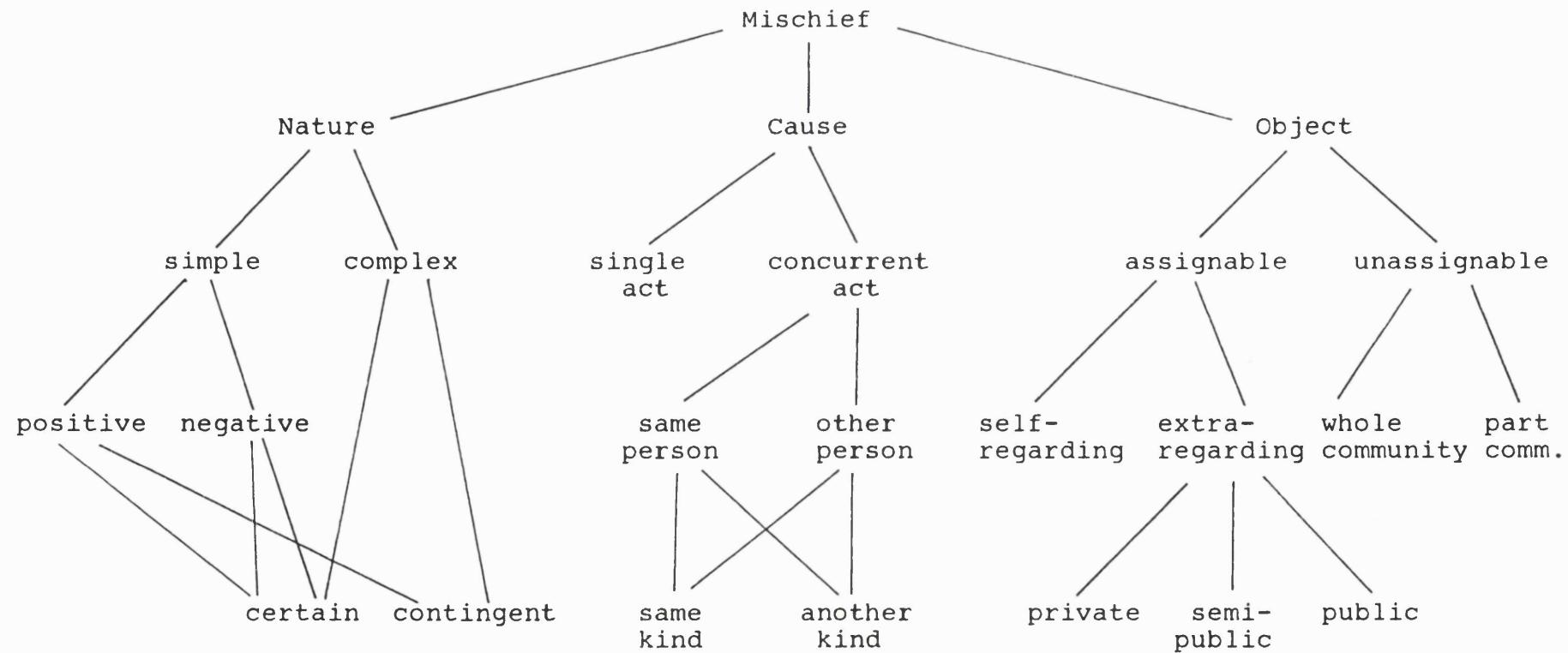
[9] Next and lastly in what respect does the strength of the temptation operate to reduce the demand for punishment at the hands of the moral sanction: that is for the free and voluntary displeasure of the world at large? The world at large, which in a case of this sort amounts to nothing more than that very small part of it which immediately encircles the offender, is in a way to be acquainted with his individual character, with the individual circumstances of the individual transaction, and to proportion their displeasure to the precise degree of facility manifested by him upon that individual occasion with respect to the violation of the rules of innocence and good behaviour. To this part of the world then it may be open to conclude and to be satisfied that notwithstanding the misconduct he fell into upon that occasion, he will not only avoid falling into other like species of misconduct in future, but even that he will keep clear in future of all other individual instances of the same species of misconduct; and that under every degree of temptation which is likely to come in his way. This is a conclusion which the political magistrate can scarcely form to himself with propriety, for want of being in a way to come at that information respecting the particular circumstances above mentioned, which seems necessary to ground it.

[10] Upon the whole therefore this circumstance of the strength of the temptation may, as well by the political magistrate, as by the world at large be laid hold of not without reason as a ground of mitigation with regard to the sort of punishment which is respectively at their disposal: Leaving the former at liberty to reduce it within certain bounds:

and the latter to go so far as even to remit it altogether. But then this mitigation must not extend beyond certain limits which limits have been already pointed out.

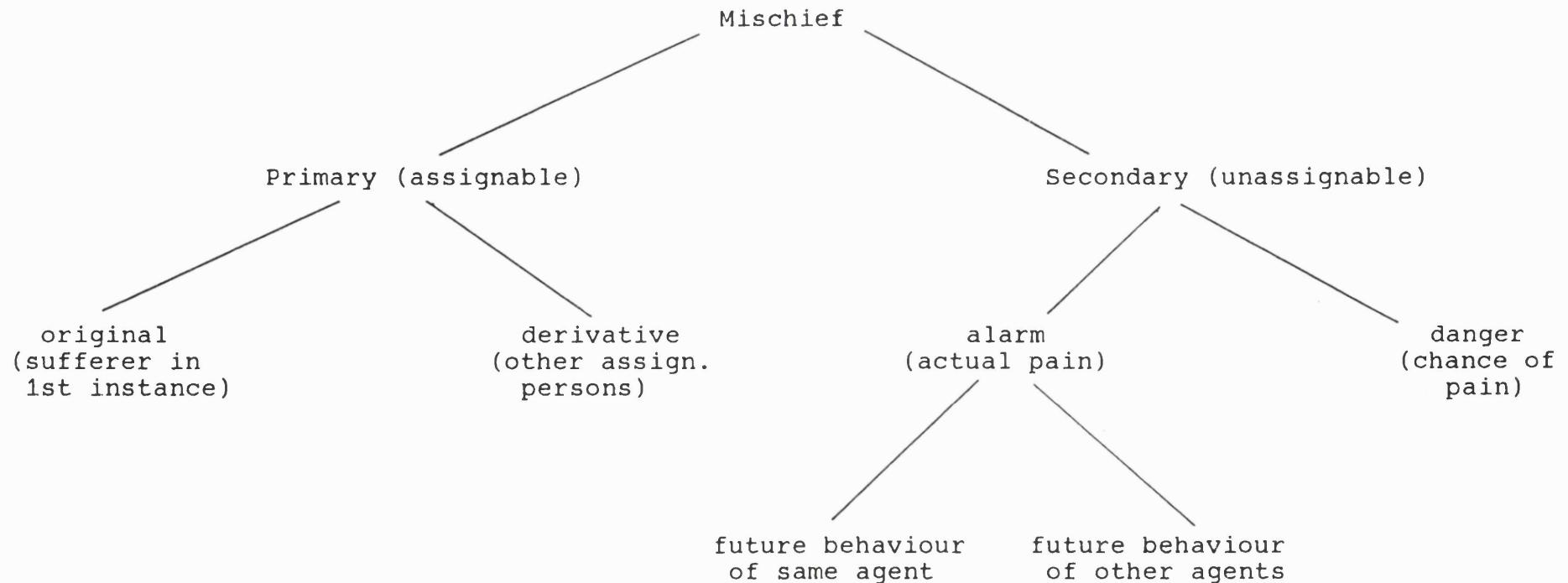
[11] In such case then it may be sufficient, for ought that appears to the contrary to allott to the offence such a measure of punishment and no more, as promises to make it appear in his eyes to be no longer his interest to committ it: beneath which line as has been already shown it is impossible with any sort of propriety to sink the punishment, if any at all is to be employed.

DIAGRAM 1. Three Views of Mischief



IPML (CW), p. 148, note h.: 'There may be other points of view, according to which mischief might be divided, besides these: but this does not prevent the division here given from being an exhaustive one. A line may be divided in any one of an infinity of ways, and yet without leaving in any one of those cases any remainder'.

DIAGRAM 2. The Shapes of Mischief



IPML (CW), pp. 143-4. The distribution was said to be appropriate to pains both of offences and punishments.

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