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AN EXAMINATION OF  
JEREMY BENTHAM'S  
AN INTRODUCTION TO THE  
PRINCIPLES OF MORALS AND  
LEGISLATION

By  
Sidney Wayne Chapman

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## ABSTRACT

### AN EXAMINATION OF JEREMY BENTHAM'S AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION

By

Sidney Wayne Chapman

Jeremy Bentham's An Introduction to the Principles of Morals and Legislation is generally considered to be written in simple, clear English. Even though it is dry and dull at points, it is readable and easily understood. Although certain sentences are long and convoluted, and at least one chapter is far too long, even Bentham's critics focus their attention on possible inconsistencies, not on lack of clarity. They understand what Bentham is saying even if they do not agree with it.

This work agrees that An Introduction to the Principles of Morals and Legislation is fairly easy to understand. It contains no surprises, nor intricate logical maneuverings. However, this work will claim that Bentham's Principles of Morals and Legislation has suffered from interpreters with tunnel vision. Far too often, the focus on The Principles of Morals and Legislation has been only on the hedonistic calculus (Chapter IV) and portions of Chapter I. These chapters are evaluated for their ethical import, shown to be lacking, and then Bentham is dismissed as a shallow thinker.

In this work The Principles of Morals and Legislation is shown to be primarily an introduction to a penal code. Evidence supporting this view is drawn from the entire work - from the preface to the last chapter. Even the calculus chapter will be shown to have as its intellectual foundation a work on punishment. The analysis of actions, motives, and intentions is included in The Principles of Morals and Legislation so that the legislator may identify a mischievous act, i.e., one which calls for punishment. Having identified such an act, Bentham then discusses punishment, and a necessary condition for punishment - an offense.

Supporting all this discussion of legislation and punishment is Bentham's basic assumption: the principle of utility is the only adequate guide for human action. This assumption directs Bentham's entire book. It could more appropriately have been named: An Introduction to a Penal Code from a Utilitarian Perspective.

This dissertation serves a corrective function. Bentham's Principles of Morals and Legislation was originally written as an introduction to a penal code. When this is kept in view, the book is shown to have a unity, coherence, and clarity of purpose, which has not been generally acknowledged.

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## CHAPTER I

### INTRODUCTION

#### Historical and Social Conditions

In the 1700's England underwent two revolutions and observed a third. The French Revolution, viewed from across the channel, impressed some Englishmen, and the phrase, "Liberty, equality, and fraternity," was even spoken with approval in Parliament. However, any final approval for the French Revolution was lost due to the excesses of the participants and the protracted war between France and England.<sup>1</sup>

The agricultural and industrial revolutions which took place in England in the 1700's had a profound and lasting effect on English society. In the middle of the century, the village was the center of English life. In at least half the villages, the acreage surrounding the village was farmed on a communal basis. In general, the residents of the village did not own the land, and yet they decided by an annual vote whether the land would be tilled or remain fallow for that year. Some people of the village eked out their living farming for the squire and caring for a personal plot near their cottage. Any paupers among them were cared for - albeit probably reluctantly - in the parish

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poor house.<sup>2</sup>

With the advent of the agricultural revolution this peaceful pastoral picture began to change. Men, such as Tull and Bakewell, advocated "horse hoeing" and selective breeding of livestock, and suddenly enclosed land became very valuable. Such land could be used for grazing by one's own cattle or sheep - to the exclusion of other villagers' animals - or for producing a rich crop of wheat or barley. Prior to this time the land may have been left fallow, but now it was valuable as property to rent, or as a source of direct income. Under the communal system of agriculture the land could not be put to full use, so the landlords appealed to the government for the necessary changes. Landowners, in large numbers, requested the enclosure of the fertile land. Such requests were generally granted. In one forty year period some nine hundred bills which granted the enclosure of approximately a million acres were passed by Parliament.<sup>3</sup>

The enclosure of the land plus different farming techniques increased the productivity of the land. However, the number of laborers needed was reduced. The small landowners who could not afford the cost of enclosing their lands and the cottagers generally faced three options: become laborers in the village, emigrate to America, or become factory hands.<sup>4</sup>

Many left their villages for the city and jobs in the new industries. This exodus shifted the population from the



rural to urban areas. Cities became the centers of English life and the manufacturing of textiles and the mining of coal became major industries. Many women and children entered the labor force. Their hours were long, working conditions were poor, and the pay was often meagre. Housing, when available, was of inferior quality, and the streets in front of the houses often became the depository for both sewage and garbage.<sup>5</sup>

The agricultural and industrial revolutions in eighteenth century England created both good and ill. Farms increased their yield per acre, and cattle and sheep, on the average, weighed more when butchered. Many people, however, were forced to leave the agrarian way of life or face starvation. Since they lacked any other skills, they became the wards of society or factory workers. The prior option was risky because society provided very little support for these unfortunate people. The second option provided some immediate relief for in the cities entire families could often find work. The rise of industry created more jobs and capital, and this in turn added to the wealth of England. However, as has been stated, living conditions in cities were very poor, the work hours were long, the pay low, and a day's pay - in all, or part - could be lost at the whim of an overseer.<sup>6</sup>

The government did very little to minimize the shock the populace underwent. Pauperism was a continuing problem,

and the changes of the eighteenth century tended to exacerbate it. Laws establishing poorhouses and pauper care had been enacted in the seventeenth century. Yet these laws failed to face the realities of the times. These laws treated the poor as members of a parish, but in the eighteenth century it was not always clear to which parish - if any - the uprooted villager actually belonged. Manufacturers would often assume responsibility for children, primarily because children were an excellent source of labor. Very few citizens were concerned that working children were not being educated, and that they were not always treated humanely.<sup>7</sup>

The common law of the nation afforded little or no protection, and suffered from weaknesses of its own. "By unsystematic and spasmodic legislation the criminal law became so savage as to shock every man of common humanity."<sup>8</sup> In 1800, English law contained some 220 capital offenses. The death penalty could be voted for stealing turnips or associating with gypsies, and thus, juries were often not willing to convict a defendant for such a frivolous offense. The technicalities of the law often worked in favor of the alleged criminal. For example, a man was indicted under an act which prohibited stealing from ships on navigable rivers, yet he was freed "...because the barge from which he stole happened to be aground."<sup>9</sup> Witnesses could be "bought" and/or threatened; knowledgeable lawyers would win acquittal

for clients because of the vagaries of legislation; and juries acquiesced, especially "...when the penalty for coining six pence was the same as the penalty for killing a mother."<sup>10</sup>

Jeremy Bentham (1748-1832) performed his life's work surrounded by these problems and changes. In his writing he devoted himself to reforming the law, developing a penal code and a model prison. He failed in the latter and there are varied assessments as to whether he succeeded or failed in the former. He and his followers were responsible for much of the theory behind the Reform Bill of 1832. This extended the right to vote to many of the new middle class, and insured the selection of members of Parliament on a more equitable basis.<sup>11</sup>

Bentham is acknowledged as a reformer, and is often considered as an intellectual precursor to John Sutart Mill. He wrote voluminously, but rarely refined his first drafts. Were it not for the work of friendly editors, much of what he wrote would not have been published. One work for which he was personally responsible is his best known work, An Introduction to the Principles of Morals and Legislation (hereafter IPML).<sup>12</sup> This work is usually not read in its entirety, but if one knows anything of the work, it is the so-called hedonistic calculus of Chapter IV.

According to the usual interpretation the calculus was designed to determine the value of pleasure and/or pain,

and thus indicate whether or not one ought to perform a certain act. Bentham contended one ought to perform that act which would produce the most pleasure, or the least amount of pain. According to Bentham the calculus could apply to every act of which there was any question about its production of pleasure and/or pain. The two primary areas of application were morals and legislation, however.<sup>13</sup>

In the years since Bentham's death the interpretation of IPML and the calculus have undergone a subtle shift. The calculus is explained as a means of evaluating ethical actions, and often no mention is made of evaluating legislative actions. IPML is often considered as a poorly written ethical treatise, and the legislative or penal aspect is seldom mentioned.

#### The Need for this Study

Jeremy Bentham was a man of his times. He was aware of some of the social conditions of his day and found many of them appalling. Recognizing his own limitations, he decided to spend his life working on problems for which he had, or could provide, possible solutions. He trained for a career as a lawyer, but never actually practiced law. He did, however, devote his time to changing some aberrations of the penal law and establishing penal theory on a solid base. IPML was his introductory statement to his contemporaries about the penal law. In fine, IPML was/is an introduction to a penal code. From the first paragraph of

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the preface to the last footnote, its primary focus is legislation and punishment on a utilitarian basis. That foundation is established in the first two chapters, but even there the bulk of the discussion is not about moral issues, but legislative matters.

Thus, this dissertation will examine Bentham's IPML very carefully, and hopefully, somewhat meticulously. It will be shown that the work is an introduction to a penal code, and not primarily a work in ethics. Thus interpreted IPML demonstrates a coherence and unity which is not generally acknowledged. One may not agree with Bentham's method or conclusions, but in this manner IPML will be given a thorough and fair hearing. Such is all Bentham would have asked.

Any proposed re-examination of Bentham's IPML might be met with skepticism. Bentham is supposed to write clearly and simply, and is not considered to be difficult to understand. It may seem that the proposed re-examination is creating an interpretive dispute where there is none. Bentham's IPML is not interpreted uniformly, and this is most readily shown by a cursory examination of some of those philosophers and intellectual historians who have explained the work.

The edition of IPML which was used as the basis of this study demonstrates a traditional approach to the work.<sup>14</sup> In Laurence J. Lafleur's introduction he discusses the



"proper" topics: the calculus, the sanctions, the greatest happiness principle, and the lack of proof of the principle of utility. These topics are presented in the first four chapters of IPML, and thus, the last thirteen chapters are neglected in Lafleur's introduction. Lafleur does acknowledge Bentham's plan "to apply the greatest happiness principle to all social and political problems,"<sup>15</sup> but he fails to develop this thesis. No mention is made of punishment, or even the division of offences, and yet the former permeates the book, while the latter comprises nearly one-third of it.

In his work on utilitarian ethics, Anthony Quinton considers the first five chapters of IPML as being the sum total of Bentham's "strictly ethical" writing. He correctly identifies IPML as "the introduction to a plan for a rational penal code," and then discusses the first five chapters of IPML as if his view that they are strictly ethical has been accepted. A careful review of these chapters will show they are not "strictly ethical." As will be shown, Chapter IV begins with advice to the legislator. Chapter V ends with an application about punishment, as does Chapter III. Both Chapters II and III begin with words about government, and even Chapter I has several paragraphs devoted to government and politics. If these are Quinton's only candidates for "strictly ethical" chapters in IPML, then there are none, and that, in effect, is what this



dissertation will show.<sup>16</sup>

David Baumgardt's massive tome on Bentham's writings is nearly 600 pages in length. Entitled, Bentham and the Ethics of Today,<sup>17</sup> it refers to and acknowledges Bentham's influence as a prophet of democratic citizenship, as a democratic reformer, and as the philosopher of the industrial age. The question which Baumgardt wanted to answer in 1952 was, "But can Bentham claim the same or even comparable importance as a moralist?"<sup>18</sup>

Throughout the discussion on the principle of utility, pleasure and pain, and the analysis of acts, Baumgardt's one concern is ethics. He does mention politics and government in his reaction to asceticism, but this is only a "momentary lapse." Even when he quotes from a sentence of IPML which has obvious legal implications, e.g., "the most abominable pleasure which the vilest of malefactors ever reaped for his crime," he asks a moral question. The lists of pleasures and pains are called "ethical reasoning."<sup>19</sup>

According to Baumgardt, Chapter VII of IPML, which begins the analysis of acts, gives a "foreshadowing of the whole contents of the Introduction,..." This chapter is crucial, the hub around which the rest revolves. And after discussing motives, intentions, and dispositions, Baumgardt concludes:

Taking all this together, we see constantly confirmed how all ethical judgments have to be based primarily on the analysis

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of facts, particularly on the character of the consequences of acts...performed independently of the objective circumstances of the consciousness of the actor, all moral valuation of mere intentions, of mere motives and human dispositions, must be considered to be ethically futile.<sup>20</sup>

In another place, Baumgardt states:

The central theme of Bentham's ethical inquiry is, as the Introduction shows, his analysis of the relations observable between the consequences of acts and all the previously mentioned elements, concomitants and antecedents of actions.<sup>21</sup>

Baumgardt does acknowledge in his discussion of the consequences of acts that "this part of the inquiry is of primary concern to the jurist." However, he does not relent for he hastily adds, "But {it} is of particular importance in ethics too,..."<sup>22</sup>

In the main, Baumgardt's interpretation of IPML is one-sided. IPML does consider morals and ethics. For example, the principle of utility is said to apply to every action, and this obviously includes an ethical or unethical action. The moral sanction is discussed, and the infamous hedonistic calculus is said to apply to morals. However, each of these points in IPML is also included to make a point or points about legislation and punishment, and Baumgardt ignores this. This silence and the emphasis given throughout the work leaves the impression that IPML is primarily an ethical treatise. It applies to ethics, but it is also clearly an introduction to a penal code.



David Lyons' recent work considers a different approach than Baumgardt's.<sup>23</sup> Lyons argues for a re-examination of IPML and then focuses his re-examination primarily on two chapters: I and XVII. This approach, coupled with Lyons' insistence on the dual thrust of IPML, renders Lyons' work a more insightful treatment of IPML than the usual "ethics only" approach.

In the Interest of the Governed begins innocently enough. It pleads with the reader; it apologizes or makes excuses for Bentham's style, and includes an argument which indicates how Bentham could have been consistent, even though he was an egoist and a utilitarian. Slowly, almost imperceptibly, the argument begins to shift. Lyons has another question in view and that becomes the focus of much of the rest of the text.

The question Lyons raises and answers concerns a phrase from I, 2. In that paragraph the explicit and determinate account, or definition, of the principle of utility is given. It is:

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or what is the same thing in other words, to promote or to oppose that happiness. I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government.<sup>24</sup>

Lyons asks, "But whose interest is 'in question'?" Since Bentham writes both in this paragraph and the one which follows it of individual action and community action, the focus of interest is never fixed. In some instances one only considers the interest of a particular individual, in another the interests of the community. Since these are the only ranges of interest noted, one can conclude, according to Lyons, that Bentham does not require everyone's interest to be considered, but neither does he require "that the interests of the entire community always be considered - ..."<sup>25</sup> Neither the interests of everyone, nor the interests of the entire community need be considered in all cases.

This conclusion is perplexing because Bentham has generally been regarded as a universalistic utilitarian. Moreover, if the range of interests are left unspecified, what is Bentham's actual position? Lyons thinks the answer begins to emerge in Chapter XVII of IPML.

In that chapter Bentham defines "ethics" in this manner:

Ethics at large may be defined, the art of directing men's actions to the production of the greatest possible quantity of happiness, on the part of those whose interest is in view.<sup>26</sup>

Note the similarity between the phrase "those whose interest is in view" in this definition, and the phrase "Party whose interest is in question" from the definition of the principle of utility given earlier. This is not all,

for Bentham indicates that one may direct one's own actions, or the actions of others. The former is called private ethics; the latter, legislation. Thus there is a division between the individual and the community again, but in this instance the emphasis is upon actions directed.

The utilitarianism of IPML has a dual nature, according to Lyons' interpretation. It is either public or private, depending upon whom is being directed. This has major implications for interpreting Bentham's system in IPML. Lyons' summary of Bentham's views is as follows:

The basic principle of utility may be understood as saying, roughly, that one ought to promote the happiness of those under one's 'direction', that is, those subject to one's direction, influence, or control. All free or voluntary human action may be regarded as constituting the 'direction' of one or more human persons (either the agent himself, alone, or others as well), and the fundamental normative idea is that government should serve the interests of those being governed. We may call this a 'differential' principle because the range of relevant interests to be promoted is not fixed in the usual way; they are neither everyone's nor all those within the agent's community. The interests to be promoted are the interests of those being 'directed' rather than those who may be affected.<sup>27</sup>

In the opinion of this writer, Lyons does not consider the totality of the evidence. He does not consider the total definition of the principle of utility and instead focuses on a phrase, "the party whose interest is in question," to such a degree that he tends to bypass



Bentham's explanation of "interest" and completely neglects "tendency which it (an act) appears to have." This latter phrase assumes an important role in the hedonistic calculus, since the tendency of an act is determined by its fecundity and/or purity. In calculating pleasures and/or pains which affect more than one person, Bentham's language is replete with "interests" and "tendency" and, yet, Lyons relegates the calculus to a footnote.<sup>28</sup>

Some political scientists and intellectual historians who have written about Bentham have shown insights about IPML and its purpose. The first paragraph of the introduction of Halévy's intellectual history of Bentham and philosophical radicalism asks a series of questions which are pertinent to the point of this study.<sup>29</sup> Halévy asks

What ideas are aroused in the mind of a student or teacher of philosophy, by the name of the Utilitarian doctrine? He would recall the rules of Bentham's moral arithmetic and the title of an essay by Stuart Mill. He is aware that there is a fairly close connection between the morals of utility and the psychology of the association of ideas,...But is he aware that the moral arithmetic aims much less at founding a moral theory than at founding a science of law, at providing a mathematical basis for the theory of legal punishment?... But can anyone who is not aware of this really claim to be acquainted with the Utilitarian doctrine or even in the principle of Utility itself?<sup>30</sup>

Halévy proposed to, and does, discuss the growth of Philosophical radicalism in an erudite and informed manner. He offers insights about the work which help in its

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interpretation, but the detailed study necessary to substantiate or disprove his points are left to the reader.

For example, he writes

...Bentham distinguished as little as possible between the problem of morals and the problem of legislation.

...Thus Bentham certainly appears to make legislation a special branch of morals; but it is easy to see in what sense he understands morals and why it is legitimate to say that he confuses the notions of morals and legislation.<sup>31</sup>

Halévy briefly discusses the first five chapters of IMPL and later devotes some twenty pages to Bentham's theory of penal law.<sup>32</sup> Most of the latter is based on the punishment section of IPML. Thus Halévy performs, in part, the task which this work sets for itself; however, he does not discuss or examine IPML thoroughly and completely. IPML needs this examination in order that its purpose and unity may be demonstrated.

In the "Introduction" to the two works of Bentham which he edited, Wilfrid Harrison aptly and correctly states the purpose of IPML.<sup>33</sup>

Yet the Principles are not a treatise on utilitarianism, but a separately published introduction to a penal code; and their main concern is again with the science of law, this time with special reference to punishment. This evident in the main structure of the argument....<sup>34</sup>

In the all too brief analysis of the argument of IPML, the essential points are stated. Moreover, Harrison expands on some central themes by critically examining such concepts



as "utilitarianism" and "government." What is written is clear and exact, but there is no systematic exposition of the text. Harrison is not being taken to task for this, for it did not suit his purpose. This work agrees with the basic position of Harrison, as with Halévy, but it will demonstrate the accuracy of Harrison's position by examining IPML from the preface to the final chapter.

M. P. Mack clearly summarizes some of the major points which will be developed in this work. Bentham's critics "concentrate on the opening chapters of The Principles of Morals," or A Fragment on Government. They are disappointed in what they find, but Mack counters that Bentham should not be attacked "for things he did not attempt."

He spoke to legislators about legal reform, and offered for their guidance an encyclopedic map of all human action, a logic of the will. He did not elaborate moral theory.<sup>35</sup>

Mack's observations on IPML are equally pointed.

It was neither finished nor was it a book on ethics, but rather the opening chapters of a gigantic survey of the whole field of law. He added the first pages of ethical definitions in obedience to the eighteenth-century literary convention which demanded that general or serious books begin with moral observations.<sup>36</sup>

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The truth, however, is that Bentham did not offer a systematic theory of ethics based on exact calculation, but a series of prudential rules addressed to legislators and judges based on a new vocabulary and a new logic.<sup>37</sup>

Mack's work is consistent with the general thesis of

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this work. It is more of an intellectual biography, and not an evaluation of IPML per se. This work will, however, focus directly on IPML.

#### Conclusion and a Look Ahead

This chapter has indicated the diversity of the interpretations of Bentham's An Introduction to the Principles of Morals and Legislation, as well as the incompleteness of some of these. The diversity of opinion alone would justify a closer look at IPML, and the lack of thoroughness in exposition emphasizes the point. This study will examine Bentham's IPML from "preface to final footnote." It will be repeatedly demonstrated that IPML was written as an introduction to a penal code. Even those chapters which are generally considered ethical in nature (I-V) will be shown to consider the legislator and legislation. Since the citizens of a state and the criminal law meet each other at the point of sanctions or coercion, punishment based on a utilitarian standard comes to the fore over and over. Thus, IPML might have been more aptly named "An Introduction to a Penal Code: From a Utilitarian Point of View."

Some may consider this only a change of emphasis, viz. from ethics to legislation. It is a change of emphasis, but not only that. This new interpretation gives IPML a sense of purpose, and a consistent thesis which it has not been regarded as possessing. A complete, and insofar as possible, consistent interpretation will show the unity of the work.



## END NOTES

- <sup>1</sup> Robert Greenhalgh Albion, Walter Phelps Hall, Jennie Barnes Pope, A History of England and the Empire-Commonwealth, 4th ed. (Boston: Ginn and Company, 1961). Chapters 17 and 19, and p. 358.
- <sup>2</sup> Ibid., pp. 327-331, and Leslie Stephen, The English Utilitarians, Vol. I (New York: Peter Smith, 1950), pp. 87-99.
- <sup>3</sup> A History of England, pp. 331-333, and The English Utilitarians, pp. 69-86.
- <sup>4</sup> A History of England, pp. 332-333.
- <sup>5</sup> Ibid., pp. 333-340.
- <sup>6</sup> Ibid., pp. 337-343.
- <sup>7</sup> The English Utilitarians, pp. 87-99.
- <sup>8</sup> Ibid., p. 25.
- <sup>9</sup> Ibid., p. 104.
- <sup>10</sup> Ibid., and M. P. Mack, Jeremy Bentham (New York: Columbia University Press, 1963), pp. 72-73.
- <sup>11</sup> A History of England, p. 413. As this work says, "Benthamism or utilitarianism...set the direction of government policies and reform - legal, social, economic, and political - for most of the century."
- <sup>12</sup> Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, introduction by Laurence J. Lafleur, The Hafner Library of Classics (New York: Hafner Publishing Company, 1948). The edition will be cited hereafter, unless otherwise noted.
- <sup>13</sup> Ibid., pp. 29-32.
- <sup>14</sup> Bentham, Introduction to the Principles.
- <sup>15</sup> Ibid., p. ix.



- <sup>16</sup> Anthony Quinton, Utilitarian Ethics (New York: St. Martin's Press, 1973), pp. 27-35.
- <sup>17</sup> David Baumgardt, Bentham and the Ethics of Today (Princeton New Jersey: Princeton University Press, 1952).
- <sup>18</sup> Ibid., p. 8.
- <sup>19</sup> Ibid., pp. 188-236 passim.
- <sup>20</sup> Ibid., p. 282.
- <sup>21</sup> Ibid., p. 285.
- <sup>22</sup> Ibid., p. 283.
- <sup>23</sup> David Lyons, In the Interest of the Governed (Oxford: Clarendon Press, 1973).
- <sup>24</sup> Bentham, Introduction to the Principles, p. 2.
- <sup>25</sup> Lyons, Interest of the Governed, p. 28.
- <sup>26</sup> Bentham, Introduction to the Principles, p. 310.
- <sup>27</sup> Lyons, Interest of the Governed, pp. 31-32.
- <sup>28</sup> Ibid., pp. 78-79.
- <sup>29</sup> Elie Halévy, The Growth of Philosophic Radicalism, trans. Mary Morris, with preface by A. D. Lindsay (New York: Augustus U. Kelley, 1949).
- <sup>30</sup> Ibid., p. xv.
- <sup>31</sup> Ibid., pp. 26-27.
- <sup>32</sup> Ibid., pp. 54-75.
- <sup>33</sup> Jeremy Bentham, A Fragment on Government and An Introduction to the Principles of Morals and Legislation, ed. Wilfrid Harrison (Oxford: Basil Blackwell, 1948).
- <sup>34</sup> Ibid., p. xxxiv.
- <sup>35</sup> Mack, Jeremy Bentham, p. 20.
- <sup>36</sup> Ibid., p. 6.
- <sup>37</sup> Ibid., p. 18.



## CHAPTER II

### THE PREFACE AND OUTLINE OF IPML

#### Introduction

The book now known as An Introduction to the Principles of Morals and Legislation, by Jeremy Bentham, was printed in 1780, but was first published in 1789. This is not the only surprising feature about the book for it was originally written as an introduction to a penal code, and had other titles before it was given the one under which it was finally published. It is an introduction to a penal code and devotes most of its attention to punishment. Its sequel was discovered only in this century and it has been published under two different titles.<sup>1</sup>

Idiosyncrasies are not merits: they generally only create some temporary interest. The real interest of this chapter is the preface, outline, and general topics discussed in IPML. By concentrating on these a foundation will be laid for the general thesis of this work: IPML is an introduction to a penal code, and is not primarily a text on morals and/or ethics.

#### The Preface

Bentham explained the limited purpose of IPML in the first paragraph of the preface. It was first printed in 1780



with "no other destination than that of serving as an introduction to a plan of a penal code, in terminis, designed to follow...in the same volume."<sup>2</sup> Later when discussing the present title, IPML, he acknowledged the book's failure to meet the expectations which that title raised. However, he could think of no other, he claimed, which would have been any more suitable. He then added:

...nor in particular would so adequate an intimation of its actual contents have been given, by a title corresponding to the more limited design, with which it was written: vis. that of serving as an introduction to a penal code.<sup>3</sup>

Considering this last quote, one wonders why Bentham believed this. Even in Bentham's time there was a wide disparity between "morals and legislation" and "a penal code." If this work was written as an introduction to a penal code it would seem that the title could reflect the content in some way.

Further, Bentham acknowledged the incompleteness of the work vis-a-vis its current title. In order to serve as an introduction to morals it needed some discussion of "emotion, passion, appetite, virtue, vice," and some other terms. With respect to legislation in general "it ought rather to have included matters belonging exclusively to the civil branch than matters more particularly applicable to the penal:..."<sup>4</sup> The discussion of punishment should have been preceded by a set of axioms or propositions which would have constituted "a standard for the operations performed by government."<sup>5</sup> Even these acknowledged lacunae did not, however, convince

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Bentham to change the name.

In Bentham's master plan IPML would have introduced a series of texts which would have included discussions of civil, penal, constitutional, and international law, as well as universal jurisprudence. This ten part work would be propaedeutic "for the body of law itself" which any state could adapt according to its particular needs. However, this list of ten proposed works contains no mention of "morals." Given this omission, again one wonders about the reason for "morals" in the title of the introductory work.<sup>6</sup>

There are at least two possible explanations for joining morals and legislation in the title. The simpler one is that this was done with regularity in Bentham's day. Paley's Principles of Morals and Political Philosophy is a prime example.<sup>7</sup> Another possible explanation is that many people in Bentham's time thought some view of morality was necessary for legislation, i.e., legislation was based on morality. Bentham does introduce his moral principle, and immediately indicates its legislative implications. However, the focus or thrust, or primary topic of IPML, is not morals or ethics; it is legislation. And more specifically, it is aimed at equitable treatment of citizens who breach a statute of law, i.e., it is aimed at punishment of legal offenders according to a utilitarian standard.

In a passage near the end of the preface of IPML Bentham turns somewhat speculative or theoretical about his

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work. He is attempting to establish "a logic of the will;" which is more important, according to Bentham, than the logic of the understanding which comes from Aristotle. This logic of the will is susceptible to being governed by rules which one would assume would be universal in application. The science of law is the most important use of the logic of the will, and "it {a science of law} is to the art of legislation, what the science of anatomy is to the art of medicine: with this difference, that the subject of it is what the artist has to work with, instead of being what he has to operate upon."<sup>8</sup> A logic of the will would apply to morals, but Bentham passes the opportunity to make that point and emphasizes the major issue of interest in IPML: legislation.

According to the evidence introduced to this point, IPML was originally written to serve as an introduction to a penal code. Moreover, Bentham hoped to establish a "logic of the will" which the legislator would work with to produce legislation. Bentham's purpose is clearly stated; however, the title of the book is at odds with his proposed subject.

### The Original Title

Before considering some general evidence from IPML about Bentham's intent in writing the work, another issue from the preface is worthy of examination. That the work had another title prior to 1780 is well attested in the Preface.<sup>9</sup> This original title, if disclosed, could give

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some indication of the content of the book which Bentham was writing.

A prior title or an original title does not constitute irrefutable evidence about the content of a book, but it would be a part of the total evidence. A title for an unpublished work is not necessary, in the first place, and is certainly not irrevocable or unchangeable after it has been given. However, such a title could give some indication of the content of a work in progress, especially as it may direct the author in the inclusion or exclusion of subject matter.

At two different places in the preface of IPML, Bentham notes that this work was originally written as an introduction to a penal code. In both the paragraphs where this is mentioned, reference is made to the "present title," or "title...now given it."<sup>10</sup> In another paragraph Bentham again uses the phrase "present title."<sup>11</sup> Using this evidence alone, one might argue for or assume an original title, yet apart from some other indication from Bentham, or other corroborating evidence, this might commit the informal fallacy of arguing from ignorance for the "present title" may have been the first and only title. However, Bentham is helpful at this very point. He writes:

It will thence be observed how in some respects it fails of quadrating with the design announced by its original title, as in others it does with that announced by the one it bears at present.<sup>12</sup>

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So the work did have an original title, and if there remains any doubt that this was not the same as the present title

Bentham adds:

Several causes have conspired at present to bring to light, under this new title, a work which under its original one had been imperceptibly, but as it had seemed irrevocably, doomed to oblivion.<sup>13</sup>

One should not make too much of one or two sentences in two separate paragraphs of a preface. Bentham apparently did not think the original title actually helped the work the way another title might. No direct causal relationship is claimed here, i.e., the defective title was not the cause of the work being doomed to oblivion. However, a new title seemed necessary for some reason.

The book now called IPML had an original title, but it was given the new title, An Introduction to the Principles of Morals and Legislation, when it was published in 1789: this has been established. The new title is well known: what was the original? The new edition of IPML and the new edition of Bentham's correspondence are sources of information which provide a possible answer to that question.

The edition of IPML by Burns and Hart includes a "History of the Work" in the introduction.<sup>14</sup> According to this history, Bentham is credited with outlining the essential history of the work in the preface to the first edition. Additional information concerning the history of the

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text - primarily from the correspondence - is included in order to complete Bentham's outline.

In 1770 Bentham began work on his first major literary project: "Elements of Critical Jurisprudence or The Principles of Legal Polity." This work was interrupted in 1774 for the writing of A Fragment on Government and the Comment on the Commentaries. Bentham returned to the writing of the Elements of Critical Jurisprudence in late 1776. With the hiatus "the general treatise was beginning to bifurcate."<sup>15</sup>

One of its branches became the work on the Theory of Punishment which absorbed most of Bentham's energy in 1777,....The other branch developed more slowly. Conceived at first as a treatise on offences to match that on punishments, it was from the outset intended to 'comprize the text of a Code of Criminal Law.' In the summer of 1778 Bentham at last decided to enter the competition announced by the Oeconomical Society of Berne in the autumn of 1777 for a 'Plan of Legislation on Criminal Matters.' From then on the work on his Penal Code advanced steadily, part of the product being An Introduction to the Principles;...<sup>16</sup>

If this is correct - and I think it is - then Bentham intended from 1770 on to write about jurisprudence, legislation, punishment, and offences. Little is said about morals per se, for Bentham did not regard it as a separate subject. Even his times of interruption were spent writing about government and legislation. An author is not required to be, nor is he actually confined to one topic, but this shows where Bentham's interests lay. He was not an ethicist, in the normal sense of that term, but a legal

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reformer.

Burns and Hart may be complete enough for their purpose, but nothing is said, nor is any interest taken, in the possibility that the book which was named An Introduction to the Principles of Morals and Legislation in 1789, originally had another title. The evidence from the preface has already been cited, but information from Bentham's correspondence indicates what the original title was. Moreover, the context in which this "original title" is most obviously stated, suggests a possible rationale for the new title, IPML.

In a letter to George Wilson, which Bentham wrote from Russia in December 1786, Bentham stated:

You and Trail passed sentence on my Introduction to a Penal Code, alias Principles of Legislation, alias I don't know what besides, and there's an end of it.<sup>17</sup>

This is prima facie evidence that IPML was originally titled Introduction to a Penal Code,<sup>18</sup> or Principles of Legislation. The former title is consistent with the evidence of the preface of what is now IPML, i.e., "...a title corresponding to the more limited design, with which it was written: viz. that of serving as an introduction to a penal code."<sup>19</sup> The latter title agrees with the Burns and Hart introduction to IPML.

In order to strengthen the position that the work being referred to in the last quote is the current IPML,

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some additional historical information is necessary. This information will also be used as the basis for a conjecture about the rationale for the title, IPML.

In Bentham's correspondence of 1776-1780 one finds ample evidence of his literary plans. He planned to revise the field of law, and at first, he was full of confidence. The passage of time without the proposed works being produced dampened his enthusiasm a little, and he did seem to become more realistic about his career as a reformer and writer.

In late 1776 he wrote his father

I am now at work upon my capital work: I mean the Critical Elements of Jurisprudence. I am not now as heretofore barely collecting materials but putting it into the form in which I propose that it should stand....a much clearer and more natural line will be drawn between the offences that respectively come under those divisions than the technical mode of considering the subject would admit of Blackstone's drawing. Previous to these details will come that part of the work which the execution of these details is governed.<sup>20</sup>

At twenty eight years of age Bentham's master work was in progress. It would contain information on offences which would be more effective than Blackstone's,<sup>21</sup> and be based on general principles. The general principles would be utilitarian if they were consistent with those stated in the proposed letter to Voltaire.<sup>22</sup> Utilitarian principles and the division of offences assume prominent places in IPML, so this portion of the Critical Elements of

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Jurisprudence may have been first printed there.

In February of 1777 Bentham reported that he "done upwards of 300"<sup>28</sup> pages on his Punishments. He shared a chapter or two with his friend George Wilson and received some corrections on the work from a Dr. Fordyce.<sup>24</sup> He wrote to the Reverend John Forster in May of 1778 that he should be sending his Theory of Punishment to "press in the course of two or three months." He also mentioned working on a Treatise on Offences, and this, along with the principles from his book on punishments, were to become a Code of Criminal Law.<sup>25</sup> Thus begins the bifurcation which Burns and Hart noted.

The next year he claims "In the next few days I shall sit down again to Code and Punishment."<sup>26</sup> So the topics remained together, but only a month later he wrote to his brother, Samuel:

Useful Metaphysics you will have some of in the Intro. to Code and in title Evidence in the Book {of} Procedure. 1. Actions. 1. Intentionality. 3. Cons{cious}ness. 4. Motives. 5. Dispositions. 6. Consequen{ces} form so many chapters in the Introd: and all {fin}ished.<sup>27</sup>

These chapters comprise Chapters VII-XI of IPML and they appear in that work in the very order listed above. The Introduction to the Code was beginning to take on a life of its own.

The next March-April Bentham wrote his brother about his progress. He had taken some of the Code to the printer,



and he promised to send Samuel "The Introduction...before the rest. The Introduction contained "what is common to Jurisprudence and Ethics" in addition to "all the general principles."<sup>28</sup> Later in the same letter, under a heading "Code," Bentham suggests that the Introduction to (the) Code "will make a little bit of a work by itself: and who knows? probably it might be advisable to present that first."<sup>29</sup>

On April 10, 1780, a passing comment was made to Samuel about "the uncertainty there is whether any more of it will be published than the introduction."<sup>30</sup> As subsequent events show this is what transpired, and the introduction became a separate entity.

The April 10, 1780 letter from Samuel is of further interest for it indicates the topics of the first two chapters of the introduction: "The Principles of Utility" and "Principles adverse to that of Utility."<sup>31</sup> These are the topics of the first two chapters of IPML.

To summarize: from February 1777 to April 1780 no less than nine different actual or possible chapters for Bentham's Introduction to a Penal Code are mentioned. These chapters correspond to chapters of the work which was published in 1789 as An Introduction to the Principles of Morals and Legislation. The work remained the same only the name was changed.

The work was finally printed in 1780, but not before

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Bentham puzzled over a problem in connection with Chapter XVII from the beginning of August until the end of October of that year.<sup>32</sup> The problem was resolved and the work which consisted of some "350 pages, besides Preface" was "finished" until it was published in 1789.<sup>33</sup>

In 1781 Bentham wrote Lord Ashburton a lengthy letter and sent him a copy of his book. He indicated his intention "to publish what is printed of the Introduction by itself: ..." This is a change from his earlier position, but a possibility which he had entertained. He also expressed his reservations about Chapter XVII and his manner of concluding it. However, even with those problems Bentham was confident this work would serve as "an introduction to principles of legislation in general as well as to the penal branch in particular."<sup>34</sup>

On September 24, 1786 George Wilson wrote to Bentham in Russia. This letter included some local, political, and personal news, and then turned to a subject of apparent interest to Wilson. He wrote:

While you are making Fermes Ornées in a country which is not to be found in our maps, other people here are invading your province of a reformer. There is a Mr. Paley, a parson and archdeacon of Carlisle, who has written a book called Principles of Moral and Political Philosophy, in quarto, and it has gone through two editions, with prodigious applause. It is founded entirely on utility, or as he chooses to call it, the will of God, as declared by expediency, to which he adds, as a supplement, the revealed will of God....it is a capital book, and by much the best that has been written on the

subject in this country....Paley's book is written in a clear, manly, simple style and he reasons with great accuracy.<sup>35</sup>

So a usurper or challenger had arisen in the form of a clergyman; but one who preached utility and its function as part of the revealed will of God. His well written and well received book, Principles of Moral and Political Philosophy, was, by 1786, in its second edition. This was not all, for according to Wilson

...Almost everything he says about morals, government, and our own constitution, is sound, practical, and free from commonplace. He has got many of your notions about punishment, which I always thought the most important of your discoveries; and I could almost suspect, if it were possible, that he had read your introduction: and I very much fear, that, if you ever do publish on those subjects, you may be charged with stealing from him what you have honestly invented with the sweat of your own brow.<sup>36</sup>

Paley's work was not only based on the same principle, it included information on punishment, which is a central topic of Bentham's introduction. This would not be important per se, but Wilson sees so much similarity between Bentham's and Paley's views on the subject that he suggests Paley might be guilty of plagiarism, if it were possible. Moreover, a word of caution is added: if Bentham ever publishes his treatise on punishment, it is possible that he, Bentham, might be charged with plagiarism, even though all his friends and supporters knew he was writing on the topic years before Paley was.

Bentham did not respond to Wilson's fear with any note of concern. In response to Wilson he wrote, in a light vein:

Great comfort to get a letter from you at last; but some chagrin to find I have been destroying the better part of my life, as you pretend to do your vacations. I had ordered horses for England, to take triumphant possession of the throne of Legislation, but finding it full of Mr. Paley, I ordered them back into the stable. Since then, I have been tormenting myself to no purpose, to find out some blind alley in the career of fame, which Mr. Paley's magnanimity may have disdained.<sup>37</sup>

Bentham did return to England the next year. However, two more years passed before he published IPML. His procrastination led his friend Wilson to urge him in 1788 to publish his long delayed introduction. Wilson wrote:

I am led to these reflections by having accidentally looked this morning into your Introduction to your Penal Code. It grieves me to think that so much excellent matter should be either lost or forestalled - you are not likely at present to complete that Code; but is it impossible to publish the Introduction by itself? It is not unusual to publish part of a book; and why not this part, which though called an Introduction, contains a system of morals and general jurisprudence infinitely superior to any extant?<sup>38</sup>

Even with his acknowledged disdain for his Introduction to a Penal Code, Bentham published it as An Introduction to the Principles of Morals and Legislation in 1789. It "seems to have received little or no notice in periodical publications at the time."<sup>39</sup> Only 128 copies went on sale, for the remainder had either been "devoured by the rats" or

"damp rot."<sup>40</sup> No second edition was needed; no critical acclaim was given, and Bentham had to wait over twenty years for England to take note of "the only part of the major work of Bentham's early years as a writer which was published in his lifetime in the form he gave it."<sup>41</sup> He waited some forty years until he brought out another edition of it.

When Bentham did publish IPML in 1789, he did allay Wilson's fear that Bentham would be accused of plagiarizing Paley's work. In the first sentence of the preface he wrote, "The following sheets were,...., printed as long ago as the year 1780," i.e., before Paley printed his work.<sup>42</sup> Bentham's work was thus established as being prior to Paley's, and no plagiarism on Bentham's part was thus possible. That plagiarism on Paley's part was a possibility had already been mentioned by Wilson.

Given the popularity of Paley's book, is it not possible that a work with a similar title, with supposedly comparable contents, and written by an author who was not "hampered by his (Paley's) profession and his past conduct"<sup>43</sup> and, yet, who was known for his works on government - is it not possible - that a title similar to Paley's might bring attention and readers to the work? An Introduction to the Principles of Morals and Legislation is by Bentham's own admission somewhat misnamed. Had it retained its original title, Introduction to a Penal Code, it would have been

more aptly named. So why did Bentham change it? It is not too far fetched to think that he did it to call attention to a work, IPML, which was supposedly very similar to a widely accepted and highly regarded work, Principles of Morals and Political Philosophy, and yet, was different enough to be considered a competitor.<sup>44</sup>

One final point: the phrase "An Introduction to" is often suppressed or disregarded when the title of IPML is given. The work is often called Principles of Morals and Legislation. This shortened version of the name is so obviously similar to Paley's title, that the titles could be confused, or, at least, compared. This shortening may not have taken place in Bentham's time and/or it may not have been done knowingly. However, it may have been that Bentham and his friends attempted to profit from Paley's popularity. If so, the ploy failed.

In the intervening years the change in the title has taken on a greater significance. Students turn to IPML expecting a treatise on morals or ethics, and legislation. These expectations are not met, because the work contains very little on morals and does not obviously contain much more on legislation. It was and is an Introduction to a Penal Code. That title is not misleading vis-a-vis its contents. It is appropos. One is not surprised to find in a work with that name a utilitarian theory of punishment, especially if the author is an acknowledged utilitarian.



### The Outline of IPML

Possibly one might claim that too much has been made of a brief preface and a few lines from Bentham's correspondence. Another obvious source of information about the content of IPML has not been considered yet and that is the outline of IPML itself. If the foregoing analysis is correct, then one should find in this outline chapter titles concerning legislation and punishment.

A seventeen line listing of the table of contents of IPML could be presented forthwith. Some of the chapter titles are uninformative, since they tend to be too general and bland, and are not very analytical in nature. A more instructive method will actually take its cue from Bentham: list the chapter titles and some of the sub-headings along with them. These sub-headings will be selected to demonstrate - where the chapter titles apparently do not - that government, legislation, and punishment are discussed throughout IPML.

The chapter titles are:

- I      Of the Principle of Utility  
          Mankind governed by pain and pleasure  
          A measure of government conformable to  
          the principle of utility, what  
          Laws or dictates of utility, what
- II     Of Principles Adverse to that of Utility
- III    Of the Four Sanctions or Sources of Pain  
          and Pleasure
- IV     Value of a Lot of Pleasure or Pain How  
          to be Measured

- V Pleasures and Pains, Their Kinds  
In what way the law is concerned  
with the above pains and pleasures
- VI Of Circumstances Influencing Sensibility
- VII Of Human Actions in General  
The demand for punishment depends in  
part upon the tendency of the act
- VIII Of Intentionality
- IX Of Consciousness
- X Of Motives
- XI Of Human Dispositions in General  
Indications afforded by this and other  
circumstances respecting the depravity  
of an offender's disposition
- XII Of the Consequences of a Mischievous Act
- XIII Cases Unmeet for Punishment  
The end of law is, to augment happiness  
But punishment is an evil
- XIV Of the Proportion Between Punishments and  
Offences  
Rules of proportion between punishments  
and offences
- XV Of the Properties to be Given to a Lot of  
Punishment  
Punishments which are apt to be deficient  
in this respect  
How two lots of punishment may be rendered  
perfectly commensurable
- XVI Division of Offences  
No act ought to be an offence but what is  
detrimental to the community
- XVII Of the Limits of the Penal Branch of Juris-  
prudence  
Ethics in general, what  
Private ethics  
The art of government: that is, of legis-  
lation and administration  
The limits between the provinces of pri-  
uate ethics and legislation<sup>45</sup>

Some of the chapters, namely XIII-XVI, are obviously about punishment and offences. Even though they comprise only approximately one-fourth of the chapters, they do constitute over two-fifths of the book.

Other chapters have some portion of them which discuss government, law, or punishment, e.g., I, VII, XI. This is not overwhelming, so even the kindest critic may argue that this table of contents does little to bolster the thesis of this work. This point has some merit. In order to diffuse it, and add to the weight of favorable evidence, some sentences and/or themes from some of the chapters which do not apparently support the general thesis will be mentioned. This is not the place for a full discussion of these statements, but they will show there is more information relating to law and punishment in IPML than even the chapter titles might indicate.

Chapter II begins with, "If the principle of utility be a right principle to be governed by, and that in all cases..." and leaves no doubt of Bentham's affirmation of this.<sup>46</sup> In Chapters III and IV he continues this theme, but he changes the focus to the legislator:

...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.<sup>47</sup>



Pleasures then, and the avoidance of pains, are the ends which the legislator has in view: it behoooves him therefore to understand their value.<sup>48</sup>

Moreover, there is a lengthy catalog of pleasures and pains of Chapter V. The final section of this chapter begins with this observation:

Of all these several sorts of pleasures and pains, there is scarce any one which is not liable, on more accounts than one, to come under the consideration of law.<sup>49</sup>

In the next chapter, "Of Circumstances Influencing Sensibility," Bentham considers how the legislator, executive magistrate, and the judge may take circumstances into account. Bentham asks and then answers two questions which show how one might use one's understanding of circumstances.

Has any person sustained an injury? they {circumstances} will need to be considered in estimating the mischief of the offence.... Is the injurer to be punished? they {circumstances} will need to be attended to in estimating the force of the impression that will be made on him by any given punishment.<sup>50</sup>

Nor is this the first use of "punishment." As early as Chapter II mistakes in applying punishment are discussed. Men usually punish as they hate, and this is questionable according to utilitarian principles. "Punishment" is mentioned again in Chapter III, and a brief characterization of it is given.

The subject of punishment per se is not considered again until Chapter XIII. But Chapters VII-XII prepare the way for what is written in XIII-XVI. Chapter VII is a

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pivotal chapter between the earlier chapters and the latter for it begins "The business of government is to promote the happiness of society, by punishing and rewarding."<sup>51</sup> The "promoting happiness via government" theme refers to prior chapters. Sometimes citizens and/or others violate the government's dictates. What happens then? The government must step in and administer some sanction, which is usually in the form of punishment. So early on in Chapter VII Bentham states that this chapter will discuss "acts" and "circumstances" in order to ascertain their relationship to punishment. The next two chapters on "intention" and "consciousness" continue the same theme.

This leaves three chapters, X-XII, with nothing written about them with respect to punishment and/or government. These three chapters continue the discussion of the prior three. Bentham boldly states the importance of the chapter on motives - Chapter X - in the following terms:

What is here said about the goodness and badness of motives, is far from being a mere matter of words. There will be occasion to make use of it hereafter for various important purposes. I shall have need of it for the sake of dissipating various prejudices, which are of disservice to the community, sometimes by cherishing the flame of civil dissensions, at other times by obstructing the course of justice. It will be shown, that in the case of many offences, the consideration of the motive is a most material one: for that in the first place it makes a very material difference in the magnitude of the mischief: in the next place, that it is easy to be ascertained; and thence may be a ground for a difference in the

demand for punishment.<sup>52</sup>

Dispositions, for Bentham, are recurring, fixed, or habitual motives. In any case "disposition" is a "kind of fictitious entity," so very little will be said of "it" since what has been said about motive applies to dispositions as well. However, the importance of dispositions is underscored by Bentham's statement that "All that penal law is concerned to do, is to measure the depravity of the dispositions where the act is mischievous."<sup>53</sup> Again, dispositions are discussed in IPML because an understanding of them is necessary for understanding of penal law and punishment.

The chapter on the "consequences of a mischievous act" precedes the discussion of punishments and offences in Chapters XIII-XVI. Since, according to Bentham's system there must be some mischief or mischievous act before punishment is considered, this chapter leads into a discussion of punishment. Mischief does not create a sufficient condition for punishment, but it certainly is necessary. It is also necessary to know what a mischievous act is, before anyone is punished.

The last chapter, entitled "Of the Limits of the Penal Branch of Jurisprudence," contains only two sections. The first discusses the difference or distinction between private ethics and legislation. The other, which ends rather abruptly, is concerned with an explanation of jurisprudence

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and its branches.

This brief overview of the text may be altogether too brief and one-sided, but it does supply some necessary evidence for the preliminary thesis: An Introduction to the Principles of Morals and Legislation was written as an introduction to a penal code. The early chapters establish the utilitarian base; the middle chapters introduce the key terms used in law and punishment; the final chapters focus on punishment and offences per se.

Having this preliminary analysis of the contents of IPML, two further steps can be taken. The contents can be compared and/or contrasted to Paley's Principles of Morals and Political Philosophy<sup>54</sup> in addition to some other texts of that time, and with some current texts on criminal law - especially the introductory part of those texts. Given what has been written on prior pages about IPML, it should differ with Paley's Principles and the other ethical treatises, and show some favorable comparisons to works on criminal law. Such will be shown to be the case.

Paley's work is divided into six books and only the last of these discusses political knowledge. One chapter of some twenty-four pages in length, is devoted to the topic of crimes and punishments.<sup>55</sup> Some passages from this chapter do sound remarkably like Bentham, e.g., "The proper end of human punishment is not the satisfaction of justice, but the prevention of crimes,"<sup>56</sup> or "The certainty of punishment is

of more consequence than the severity."<sup>57</sup> However, the minuteness of classification and the far-reaching analysis are missing. Legal punishment was not Paley's main theme, as is evidenced by the chapter on punishment, and the further contents of his Principles.

Two other sections of his book contain legal/political discussions. Part I of Book III contains a discussion of property, contract and oaths. Book IV, which is very brief, considers drunkenness, suicide, and the right of self-defense under the general title of "Duties to Ourselves, and the Crimes Opposite to These." The rest of the book discusses preliminary matters, moral obligation, duties to God, and such diverse topics as slander, anger, charity, incest, fornication, and marriage. Some of these are topics which are discussed in IPML, but in IPML the discussion of marriage, for example, is related to possible legal violations. Anger, slander, virtue, and duties to God are not considered by Bentham since they lack legislative force or application. The tone, direction, and tenor of IPML differs from that of Paley's Principles. Any similarities are minuscule; the differences are macroscopic.

The major difference between the two is the discussion of punishment. This is a central and recurring topic of IPML, while in Paley's Principles it has a neat, brief section to itself. It permeates the whole of Bentham's work, while it is an unimportant part of Paley's. Thus, Paley is

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able to examine other topics for their relationship to morals, and Bentham does not.

British Moralists, edited by Selby-Bigge, contains selections from works on morality, by certain eighteenth century authors. Two well-known, prominent authors included are Shaftesbury and Francis Hutcheson. The selection from Shaftesbury is entitled, "An Inquiry Concerning Virtue." Virtue is defined as "...a certain, just Disposition, or proportionable Affection of a rational Creature towards the moral Objects of Right and Wrong;..."<sup>58</sup> If a person were completely immoral then that person would be lacking in "...all Candour, Equity, Trust, Sociableness, or Friendship..."<sup>59</sup> In another place Shaftesbury discusses conscience, shame, self-reproach, immorality and villany.<sup>60</sup>

From this all too brief citing of topics from one author, an eighteenth century classification of morals begins to emerge. Morals are related to character, or to what sort of person one is. Morality is also concerned with relations between people in important, but non-legal, ways. Morality, as law, does indicate that certain acts ought to be done or ought not to be done. However, according to Paley and Shaftesbury, morality considers individual character traits and, one finds very little of this in Bentham.

A more telling comparison may be made between Bentham and Hutcheson. In "An Inquiry Concerning the Original of

our Ideas of Virtue or Moral Good" Hutcheson concludes "...that Action is best, which procures the greatest Happiness for the greatest Numbers; and that, worst, which, in like manner, occasions Misery."<sup>61</sup> A few pages later he introduces a moral arithmetic "...to compute the Morality of any Actions, with all their Circumstances, when we judge of the Actions done by ourselves, or by others,..."<sup>62</sup> A series of formulas follow in which one is asked to multiply benevolence by ability, or self-love by ability. In order to determine the moment of evil by an agent one multiplies hatred times ability.<sup>63</sup> All this sounds so much like Bentham one begins to wonder whether Bentham "borrowed" ideas much more freely than even he admits.

However, there are two glaring differences between this work and IPML. Hutcheson continues his discussion by considering topics such as "gratitude" and "honor." These are individual virtues which seemed so important to Shaftesbury. However, one could respond to this difference by citing different interests of the respective authors. No author, when discussing the same topic as another author, must include the same material. Each discussion may proceed along lines determined by the author.

The difference between Bentham and Shaftesbury and Hutcheson is the inclusion of "punishment" in IPML. A moral system may make recommendations for dealing with immoral behavior. The recommendations may involve sanctions,

but these sanctions are not written codes and administered in a formal way by society. A parent may "punish" a lying son or daughter, but this punishment will vary from parent to parent. The punishment is also regulated by society, for example, as to its severity. A parent may spank a child, but not unduly beat him/her. Morality and legal theory may be in large measure concerned about similar topics, but the clearest indication that one is considering legal theory, as opposed to morality, is the inclusion of legal punishment as a topic for systematic, in-depth discussion.

Since it has been claimed that IPML was an introduction to a penal code a further comparison may be made, viz., the contents of IPML to criminal law texts. This procedure may be dubious, but a point made earlier is important here: this is only a part of the evidence. If, however, one found similarities between the contents of IPML and criminal law texts, this would be prima facie evidence of some common purpose.

Three widely used and well known criminal law books were selected at random.<sup>64</sup> In each book, the same general topics were discussed in some early chapter or chapters: actus rea, mens rea, circumstances, consequences, and intention. Motive was explicitly discussed in one in the beginning chapters, but not in the other two. In each case, the division of offences followed these preliminaries.

The comparisons to IPML are fairly obvious. Chapters VII-XII discuss acts, circumstances, motives, intentions, and consequences. The longest chapter of IPML is XVI, which contains the Division of Offences. Not only that, Bentham's order of presentation of topics is very nearly the same as the three criminal law texts. These similarities may be coincidences; but as the pertinent chapters of this work will show, such was not the case. Bentham was writing about legislation, the necessary conditions of breaking a law, and punishment. This is the theme in Chapters VII through XVI, of IPML, but it begins much earlier than that: the first paragraph of the preface.

## END NOTES

- <sup>1</sup> Jeremy Bentham, The Limits of Jurisprudence Defined, introduction by Charles Warren Everett (New York: Columbia University Press, 1945) and Jeremy Bentham, The Collected Works of Jeremy Bentham, J. H. Burns, gen. ed. Of Laws in General, ed. H.L.A. Hart (University of London: The Athlone Press, 1970).
- <sup>2</sup> Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, introduction by Laurence J. Lafleur, The Hafner Library of Classics (New York: Hafner Publishing Company, 1948), p. xxiii.
- <sup>3</sup> Ibid., p. xxvi.
- <sup>4</sup> Ibid., p. xxv.
- <sup>5</sup> Ibid.
- <sup>6</sup> Ibid., pp. xxviii-xxix.
- <sup>7</sup> This work will be discussed in due course.
- <sup>8</sup> Bentham, Introduction to the Principles, p. xxxi.
- <sup>9</sup> Ibid., see p. xxiii, "the present title," p. xxiv "this new title," and p. xxv "its original title."
- <sup>10</sup> Ibid., p. xiii, and p. xxvi.
- <sup>11</sup> Ibid., p. xxv.
- <sup>12</sup> Ibid.
- <sup>13</sup> Ibid., p. xxiv.
- <sup>14</sup> Jeremy Bentham, The Collected Works of Jeremy Bentham, J. H. Burns, gen. ed., An Introduction to the Principles of Morals and Legislation, eds. J. H. Burns and H.L.A. Hart (The University of London: The Athlone Press, 1970).
- <sup>15</sup> Ibid., p. xxxviii.
- <sup>16</sup> Ibid.

- 17 Jeremy Bentham, The Collected Works of Jeremy Bentham, J. H. Burns, gen. ed., The Correspondence of Jeremy Bentham, ed. Ian. R. Christie, vol. 3 (University of London: The Athlone Press, 1971), P. 514.
- 18 Elie Halévy, The Growth of Philosophical Radicalism, trans. Mary Morris, with preface by A. D. Lindsay (New York: August V. Kelley, 1949), p. 21, makes the same point.
- 19 Bentham, Introduction to the Principles, p. 18.
- 20 Jeremy Bentham, The Collected Works of Jeremy Bentham, J. H. Burns, gen. ed., The Correspondence of Jeremy Bentham, ed. Timothy L. S. Sprigge, vol. 1 (University of London: The Athlone Press, 1968), pp. 358-359.
- 21 William Blackstone, whom Bentham attacked in his Fragment on Government.
- 22 Correspondence, Vol. 1, p. 367.
- 23 Jeremy Bentham, The Collected Works of Jeremy Bentham, J. H. Burns, gen. ed., The Correspondence of Jeremy Bentham, ed. Timothy L. S. Sprigge, Vol. 1 (University of London: The Athlone Press, 1968), p. 23.
- 24 Ibid., pp. 42 and 57.
- 25 Ibid., p. 100.
- 26 Ibid., p. 319.
- 27 Ibid., p. 345.
- 28 Ibid., p. 409.
- 29 Ibid., p. 411.
- 30 Ibid., p. 417.
- 31 Ibid.
- 32 Ibid., p. 488.
- 33 Ibid.
- 34 Correspondence, Vol. 3, p. 124.
- 35 Ibid., pp. 490-491.

- <sup>36</sup> Ibid.
- <sup>37</sup> Ibid., p. 513.
- <sup>38</sup> The Works of Jeremy Bentham (1838), x, 195-95, quoted in The Limits of Jurisprudence Defined, p. 13.
- <sup>39</sup> Introduction to the Principles, ed. Burns and Hart, p. xli, n. 3.
- <sup>40</sup> Correspondence, Vol. 2, pp. 522-523, n. 1, and The Works of Jeremy Bentham (1838), x 197, quoted in The Limits of Jurisprudence Defined, p. 14.
- <sup>41</sup> Introduction to the Principles, ed. Burns and Hart, p. xlii.
- <sup>42</sup> Bentham, Introduction to the Principles, p. xxiii.
- <sup>43</sup> Correspondence, Vol. 3, p. 490.
- <sup>44</sup> This is called "Chapman's Conjecture" since it lacks firm evidence. Halévy, Philosophical Radicalism, p. 21, claims Bentham "finally adopted a title which was obviously borrowed from Helvetius." Note Wilson's phrase "which though called an Introduction, contains a system of morals and general jurisprudence" in The Limits of Jurisprudence Defined, p. 13.
- <sup>45</sup> Bentham, Introduction to the Principles, pp. xxxiii-iii.
- <sup>46</sup> Ibid., p. 8.
- <sup>47</sup> Ibid., p. 24.
- <sup>48</sup> Ibid., p. 29.
- <sup>49</sup> Ibid., p. 41.
- <sup>50</sup> Ibid., pp. 64-65.
- <sup>51</sup> Ibid., p. 70.
- <sup>52</sup> Ibid., pp. 129-130.
- <sup>53</sup> Ibid., p. 142.
- <sup>54</sup> William Paley, The Principles of Moral and Political Philosophy, new edition (London: C. and J. Rivington and others, 1829).

- <sup>55</sup> Ibid., pp. 425-449.
- <sup>56</sup> Ibid., p. 425.
- <sup>57</sup> Ibid., p. 445.
- <sup>58</sup> British Moralists, ed. L. A. Selby-Bigge, new introduction by Bernard H. Baumrin, Library of Liberal Arts, 2 vols. (Indianapolis: The Bobbs-Merrill Company, Inc., 1964), p. 18.
- <sup>59</sup> Ibid., p. 27.
- <sup>60</sup> Ibid., p. 49.
- <sup>61</sup> Ibid., p. 107.
- <sup>62</sup> Ibid., p. 110.
- <sup>63</sup> Ibid., p. 113.
- <sup>64</sup> Anthony Hooper, ed., Harris' Criminal Law, 21st ed., (London: Sweet and Maxwell, 1968), J. C. Smith and Brian Hogan, Criminal Law (London: Butterworths, 1965), and Glanville Williams, Textbook of Criminal Law (London: Stevens and Sons, 1978).

### CHAPTER III

#### THE PRINCIPLE OF UTILITY AND ITS COMPETITORS

##### Introduction

The first five chapters of IPML have been called the strictly ethical chapters of the work.<sup>1</sup> That this view is mistaken will be shown in the next three chapters, by citing evidence which shows the chapters discuss government or legislation from a utilitarian point of view. This is especially the case in Chapters I and II, in which Bentham is establishing the principle of utility as the basic principle of IPML.

##### Chapter I

The prime topic of discussion in Chapter I is the principle of utility. However, the chapter does not open with a statement of the principle, but with a statement about "government."

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure ...They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while.<sup>2</sup>

One might respond that Bentham is not writing about "government" in this paragraph in any ordinary, straightforward sense of that term, and if this is the quality of

one's evidence one should cease before even the average reader is insulted. This comment would be justified except it takes Bentham too seriously, for Bentham quickly acknowledges that this passage is only "metaphor and declamation" which does not improve moral science.<sup>3</sup>

Having granted the prior point, this does not mean one relinquishes the "government" emphasis or interpretation altogether. The first paragraph of Chapter I of IPML is oft-quoted, and discussed, but seldom for its mention of government. It does consider government by pleasure and pain and considers this inevitable. Pleasure and pain have an empire, and people may try to revolt against it, but to no avail. We are governed by them whether we acknowledge it or not. This is a basic principle for Bentham, and it is a principle of "government" in the broadest sense of that term. He does immediately consider government in its more usual sense, as a societal institution. Since government may use the principle of utility that is a prior consideration, and the first topic for consideration.

Bentham begins his discussion of the principle of utility by giving his definition of the principle.

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.<sup>4</sup>

This definition does not obviously apply to government. However, to make the definition explicit, Bentham adds, "I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government."<sup>5</sup> So government is obviously included in the broadest considerations of the principle.

After this definition Bentham explains in detail certain important terms in it, or related to it. "Utility" is explained first; "the interest of the community" is next. Then he devotes two paragraphs to the principle and its manifestation in government.<sup>6</sup>

A measure of government...may be said to be conformable to or dictated by the principle of utility, when in like manner the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it.<sup>7</sup>

When an action, or in particular a measure of government, is supposed by a man to be conformable to the principle of utility, it may be convenient, for the purposes of discourse, to imagine a kind of law or dictate, called a law or dictate of utility: and to speak of the action in question as being conformable to such law or dictate.<sup>8</sup>

As these paragraphs, and the sentence immediately following the definition of the principle of utility, show, Bentham thought the principle of utility applied to government. He states his position clearly and emphatically. If IPML were primarily an ethical treatise, then no mention of government would be necessary or appropriate. This first chapter indicates that IPML is concerned with government.

It would not be accurate to say it is not concerned with morals at all, because morals are action related, but morality is not the primary concern. IPML is based on the principle of utility, and as that is a moral principle, one could say it has a moral basis.

One final point: Bentham claims that one cannot prove or disprove the principle of utility.<sup>9</sup> Suppose, however, one simply wants to disregard it. Bentham's advice to such a person is:

Let him settle with himself, whether he would wish to discard this principle altogether; if so, let him consider what it is that all his reasoning (in matters of politics especially) can amount to?<sup>10</sup>

One cannot reason accurately or cogently in matters of politics especially apart from the principle of utility. Whether or not this is true is irrelevant for the moment. Bentham believed it to be true and took this opportunity to underscore the political nature of the principle. He was not forced to do this; he made a point which seemed very reasonable and appropriate to him.

Bentham further emphasized the relationship between the principle of utility and government in a footnote added to Chapter I in 1822. A Mr. Alexander Wedderburn had complained that the greatest happiness of the greatest number was a dangerous principle of government. Bentham agreed. Any principle of government which has the greatest happiness of the greatest number "...as the only right and justifiable

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end of government..." is dangerous to any government "which has for its actual end or object, the greatest happiness of a certain one,..." and to "...all those functionaries..., whose interest it was, to maximize delay, vexation, and expense, in judicial and other modes of procedure,..."<sup>11</sup>

While training to become a lawyer Bentham had many opportunities to observe English law in operation. He was sickened by what he saw: the law did not serve the interests of the people, but rather inordinately benefited lawyers and judges. People were charged for three visits to court when they had actually only made one. Copies of papers were difficult and costly to obtain, and if obtained, could be voided because of the slightest imperfection. Justice came at a high price, and most of this price was paid to the lawyers, clerks and judges. In IPML Bentham is expressing his opposition to such practices.<sup>12</sup>

Chapter I states the basic principle of IPML: the principle of utility. That the principle has direct implications for government is also established. In Chapter II punishment as a function of government is first considered, and that function is the central theme of IPML. That chapter is the next consideration.

## Chapter II

This chapter also begins with a statement about government based on the principle of utility, and then discusses two principles which might oppose the former or "correct"



view. In discussing the two "incorrect" principles Bentham turns the argument to a consideration of government and punishment very quickly, and these topics are his major focus in these chapters.

If the principle of utility be a right principle to be governed by, and that in all cases, it follows from what has been just observed, that whatever principle differs from it in any case must necessarily be a wrong one.<sup>13</sup>

In this very confident manner, Bentham opens Chapter II. He assumes he has shown that the principle of utility is the right one to be governed by. Some would question whether or not this has been done. In a certain way it was argued for in the first chapter, but it was not demonstrated in any incorrigible manner.

Bentham then offers two putative challengers to the principle of utility. Given his confidence in the superiority of the principle of utility, he assumes both of these positions will be shown to be ludicrous.

Asceticism is attacked for being in principle opposed to utility at all times. It does approve and disapprove of acts which "augment or diminish the happiness of the party whose interest is in question; but in an inverse manner:..."<sup>14</sup> It approves of acts which tend to diminish happiness and disapproves of acts which augment it.

Asceticism may be tried as a moral principle, but it is seldom a principle of government, for as Bentham observes:

Whatever merit a man may have thought there would be in making himself miserable, no such notion seems ever to have occurred to any of them, that it may be a merit, much less a duty, to make others miserable....<sup>15</sup>

However, the principle of asceticism could be a principle of punishment, even though it fails as a general principle of government. For example, consider the case of a rape. One would disapprove of the rapist's pleasure and approve his punishment, and this is consistent with the principle of asceticism. Surprisingly, Bentham agrees with this assessment, but denies this is an adequate assessment of the act and its circumstances. The view of asceticism believes the pleasure which one receives from such an act stands alone, or is pure pleasure. Bentham denies this, and counters with,

The case is, that it never does stand alone; but is necessarily followed by such a quantity of pain...that the pleasure in comparison to it, is as nothing:...<sup>16</sup>

This is a questionable assumption on Bentham's part, but that is not the prime concern here. This passage and the prior one illustrate that the argument of IPML revolves around government and punishment. Morals are mentioned and discussed briefly, but the first point of discussion is punishment, and the last is government.

Next Bentham discusses a principle which is at times consistent with the principle of utility, but at other times is not: the principle of sympathy and antipathy. It, too,

approves and disapproves of actions, but the approval and disapproval occurs "merely because a man finds himself disposed to approve or disapprove of them:..."<sup>17</sup> The approval or disapproval is based on one's feeling or feelings, with no consideration of the consequences.

This principle also applies to morals, but again the primary focus is government and punishment. Bentham introduces this principle with the comment that it "at this day seems to have (the) most influence in matters of government,..."<sup>18</sup>

Moreover, the principle is often adopted as a principle of punishment, but with rather odd or bizarre results. One punishes as one feels: "if you hate much, punish much: if you hate little, punish little: punish as you hate. If you hate not at all, punish not at all:..."<sup>19</sup> No consideration is given to the utility of punishment, nor to whether feelings or sentiments are a reliable guide for punishing. If feelings are fallible, they usually "err on the side of severity."<sup>20</sup> They may be too lenient, but this is seldom the case. Far too often two parties differ with each other, and this difference is magnified unduly. The parties become angry with each other and "each becomes in the other's eyes an enemy, and if law permit, a criminal."<sup>21</sup>

More could be said about Bentham's discussion, but what has been said shows Bentham's reasons for discussing these principles. In both cases he contrasts them with the

principle of utility and its relationship to morals, but he uses more space and time discussing government and punishment.

### Conclusion

To this point Bentham has explained the principle of utility and shown its superiority to other principles. There is ample evidence that the principle of utility is applied to considerations of government. Moreover, in Chapter II the discussion of the two opposing positions is primarily in terms of government and punishment.

This leads to a crucial point. A writer may "pick and choose" topics, but this selection indicates the writer's purpose and the relative importance he/she attaches to a subject. Bentham includes the material about government and punishment in these two chapters because he intended to; he wanted to; it fit his purposes. Since there is more about government and punishment in these two chapters than there is about morals, one may justifiably conclude these are the important topics for Bentham. These two chapters introduce the whole work: the principle of utility applies to laws both through their enactment and enforcement. The former will lead to good laws; the latter to correct punishment.

## END NOTES

- <sup>1</sup> Anthony Quinton, Utilitarian Ethics (New York: St. Martin's Press, 1973), p. 27.
- <sup>2</sup> Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, introduction by Laurence J. Lafleur, The Hafner Library of Classics (New York: Hafner Publishing Company, 1948), p. 1.
- <sup>3</sup> Ibid., p. 2.
- <sup>4</sup> Ibid.
- <sup>5</sup> Ibid.
- <sup>6</sup> Ibid., pp. 2-3.
- <sup>7</sup> Ibid., p. 3.
- <sup>8</sup> Ibid.
- <sup>9</sup> Ibid., p. 4.
- <sup>10</sup> Ibid., p. 6.
- <sup>11</sup> Ibid., p. 5, n. 1.
- <sup>12</sup> For example, see James Steintrager, Bentham (Ithaca, New York: Cornell University Press, 1977), pp. 20-23.
- <sup>13</sup> Ibid., p. 8.
- <sup>14</sup> Ibid., p. 9.
- <sup>15</sup> Ibid., p. 11.
- <sup>16</sup> Ibid., p. 9.
- <sup>17</sup> Ibid., p. 16.
- <sup>18</sup> Ibid., p. 14.
- <sup>19</sup> Ibid., pp. 16-17.

<sup>20</sup> Ibid., p. 20

<sup>21</sup> Ibid.

## CHAPTER IV

### THE SANCTIONS AND THE CALCULUS

#### Introduction

The preface and the first two chapters of IPML indicate that government and punishment were prime topics of Bentham in the work. One may well wonder, "Can this approach be sustained?" The answer to that question is an unqualified "Yes." This will be shown to be the case in the very chapter which is generally only considered for its evaluation of ethical acts. However, before considering the so-called "hedonist calculus," the chapter on sanctions will be examined briefly.

#### Chapter III

Chapter III begins with a quote which is a purported conclusion from the first two chapters of IPML and which points ahead to the topic of this chapter. Bentham begins the chapter:

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 it depends upon the legislator, to be made to fashion his behaviour.<sup>1</sup>

The legislator has the happiness of the community in view,

one would suppose, when he enacts any law. If one breaks the law then that person can be made to change his/her behavior only insofar as the behavior reduces the pleasure and the security of the members of the community.

Pleasure and pain are also the means by which one can be made to alter his/her behavior, therefore it is important to know their sources. These sources, which are called sanctions, are four: the physical, political, moral, or religious sanction.

The physical is the basis of the political and moral, and is fundamental for punishment. If a suffering is inflicted by law, then it will be physical in nature and will be called a punishment. That which happens to a man by the sentence of the political magistrate is that which "is commonly called a punishment."<sup>2</sup>

The capable legislator uses the political sanction carefully for by it he/she exerts "an influence over the conduct of mankind." The legislator cannot, however, completely ignore the moral and religious sanctions, even though they cannot be used by him/her. They must enter into the legislator's calculations or else "he will be sure almost to find himself mistaken in the result" of his calculations.<sup>3</sup>

#### Chapter IV

This is the key chapter of IPML. It has been discussed repeatedly as a technique for making a moral or

ethical decision. There is some merit in that explanation for Bentham acknowledges at the conclusion of the procedure that it applies to moral judgments.<sup>4</sup> Given this, and the history of the interpretation of this chapter, one could concede that it applies only to morals and accept defeat gracefully.

There are at least two reasons for not acquiescing on the interpretation of this crucial chapter. First, if the interpreters have been incorrect here they may have been incorrect at other points. So the stakes are higher and, in a sense, much more exciting than usual. If the so-called hedonistic calculus could be shown to apply to government and punishment, and not only to ethics, this would lend some credibility to the general thesis of this work.

A more important reason for continuing this re-examination pertains to the available evidence. There is ample historical and contextual evidence to support the view that even in the hedonistic calculus Bentham was thinking about its application to legislation and punishment.

The little book, On Crimes and Punishments, by Ceasare Beccaria,<sup>5</sup> had a profound influence on Bentham. As has been shown recently, Beccaria's work was the source for the phrase which is identified with hedonistic utilitarianism: "the greatest happiness for the greatest number."<sup>6</sup> Even though this phrase is not found in the body of IPML, it occurs twice in the same footnote in that work and is a

part of the "Benthamite idiom." Of greater importance from the perspective of this work is the context in which Beccaria introduces the phrase. After noting, with a tone of despair, the manner in which laws are generally enacted Beccaria does offer some hope if only laws could be

...dictated by a dispassionate student of human nature who might, by bringing the actions of a multitude of men into focus, consider them from this single point of view: the greatest happiness shared by the greatest number.<sup>7</sup>

Thus, even this slogan of the radical British reformers of the 18th and 19th centuries was primarily - in one basic source - concerned with the enactment of laws.

This is not all with respect to the relationship between Bentham and Beccaria. Bentham acknowledges his reliance on Beccaria for a major portion of the calculus. As he writes:

The idea of estimating the value of each sensation by analyzing it into these four ingredients, I took from M. Beccaria: gleaming up those several articles from different places in which I saw them made use of in estimating the force and utility of punishment.<sup>8</sup>

Even the most cursory perusal of On Crimes and Punishments confirms Bentham's admission. Intensity and duration are discussed in connection with the death penalty, while "promptness" and "certainty" are the topics of separate chapters. These basic four ingredients are all there, and are discussed in the context of punishment.<sup>9</sup>

In order to be fair and complete one must also cite

the passage which immediately follows the last quote. In it Bentham does say "punishment is but pain applied to a certain purpose" and then adds "the value of a pleasure is susceptible to the same analysis,..." and finally concludes this dual analysis was all one needed "as the foundation for a compleat system of moral science."<sup>10</sup> The point of fairness and completeness relates to Bentham's vision: this is a foundation for moral science. This is possibly contrary to the thesis of this work; however, a more telling point may be made. Bentham "discovered" the first four elements of the calculus in a work on punishment, and then applies them to pleasure. These elements of the calculus were adapted to the latter use after they had been accepted as applicable in the former manner. Pain and punishment were conceived of prior to pleasure and reward. The elements of intensity, duration, certainty, and promptness formed the nucleus of a chastening calculus, before they were adapted to a hedonistic calculus. Historically, the evidence is very clear: the first part of the calculus considered pain and punishment basic, before pleasure became a portion of the calculation. Subsequent sections of IPML use the calculus in this manner for the calculus is first mentioned again when assessing the consequences of a mischievous act. So the elements of the calculus were initially conceived by Beccaria as an assessment of punishment. Bentham thought they were useful for that purpose

and demonstrates this in the closing chapters of IPML.

As has already been indicated, Chapter IV of IPML is directed, at least indirectly, to the legislator. It begins:

Pleasures then, and the avoidance of pains, are the ends which the legislator has in view: it behooves him therefore to understand their value. Pleasures and pains are the instruments he has to work with: it behooves him therefore to understand their force, which is again, in other words, their value."<sup>1</sup>

If this chapter was principally to be used by the moralist, why is it addressed to the legislator? To ignore this question is somewhat intellectually irresponsible. The most obvious answer is, Bentham was writing in Chapter III of IPML of the source of pleasure and pains, and of the physical/political sanctions. He considers the pain and suffering side more than the pleasurable one, and ends the chapter explaining to the legislator how to use the information presented. Chapter IV of IPML continues the prior chapter for Bentham assumes he has established that pleasures and pains are both final causes and efficient causes, and the legislator must be taught how to calculate the force of these two physical/political forces. Chapter III introduces the legislator to the materials by which he can motivate people; Chapter IV presents him with a technique for estimating how much of the material to use. These two chapters form a unit and any division of them may lead

to misinterpretation.

The technique of the calculus does not obviously render it applicable only to morals or legislation. Bentham concludes the procedure by observing:

It is not to be expected that this process should be strictly pursued previously to every moral judgment, or to every legislative or judicial operation.<sup>12</sup>

This summary is obvious evidence for a moral/political interpretation. In other words, Bentham thought the calculus applied in both those areas. While not denying this position, this work is arguing: a) the calculus applies in both politics/punishment and morals, and the former is primary in IPML, and b) IPML was written as an introduction to a penal code and the calculus provides directions for the application of punishment to illegal acts.

In a subsequent chapter Bentham illustrates his theory by citing as an example one man who refuses to pay his share of public taxes. This one act would not cause any great harm, but suppose others followed his example until none paid their taxes. Bentham evaluates the results in this manner:

This mischief, in point of intensity and duration, is indeed unknown: it is uncertain: it is remote. But in point of extent it is immense; and in point of fecundity, pregnant to a degree that baffles calculation.<sup>13</sup>

One person's illegal act seems rather insignificant, but when the possibilities of a total community following suit are considered, then the act creates a demand for punishment. In addition, Bentham is claiming his method is

rational, for it is only by applying it - or something like it - that one can provide a justification for punishing the person who breaks the law.

As an argument for his calculus Bentham produces an argument from common practice: this is what people, in fact, do. They calculate pleasures and pains before they act. If the calculus was primarily to be used in evaluating ethical acts, one would expect an illustration from that area. However, Bentham is consistent, since he cites as an example two matters which are generally evaluated on a legal basis. He asks,

An article of property, an estate in land, for instance, is valuable, on what account? On account of the pleasures of all kinds which it enables a man to produce, and what comes to the same thing the pains of all kinds which it enables him to avert.<sup>14</sup>

Bentham could have used any number of illustrations such as keeping a promise, or telling a lie. However, he asks about property and an estate. In both these cases a person's relation to them may be moral - in the broadest sense of that term - but it is, more often than not, governed by legal perimeters. How does one inherit an estate, hold it, and pass it on, except by the cooperation of the society at large? This cooperation usually comes through legal agencies and their operations. This is another instance of Bentham's focus on matters legal and/or political rather than on personal and/or moral.

## Conclusion

In summary, the calculus is a continuation of the discussion of the sanctions of the prior chapter. The sanctions are the province of the legislator, and since they are produced by pleasure and pain, the calculus provides the legislator with a "rough" means for approximating the amount of pleasure and/or pain which might be produced by an action. Since Bentham borrowed the basic constituents of the calculus from Beccaria's On Crimes and Punishment, these elements were applied to punishment in the original case, and only adapted by Bentham to evaluate pleasures. He may not have succeeded in this venture, but he closed the chapter with an illustration about the value of an estate or an article of property. This is a further indication of his concern with applying the calculus to legal matters.

Given the historical and exegetical evidence adduced, the traditional interpretation of the hedonistic calculus must be altered. The calculus does not apply to morals only: adapted from a classic on punishment, Bentham addressed it to the legislator; applied it to punishment in a latter portion of IPML, and applied it to a legal/political area in the only illustration given in this chapter. This broader interpretation is consistent with the context, with the history of this section, and the broader context of IPML. Since it is a more extensive, yet consistent,

explanation, it should be accepted.

## END NOTES

- <sup>1</sup> Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, introduction by Laurence J. Lafleur, The Hafner Library of Classics (New York: Hafner Publishing Company, 1948), p. 24.
- <sup>2</sup> Ibid., p. 26.
- <sup>3</sup> Ibid., pp. 27-28.
- <sup>4</sup> Ibid., p. 31.
- <sup>5</sup> Cesare Beccaria, On Crimes and Punishments, translated and with an introduction, by Henry Paolucci, The Library of Liberal Arts (Indianapolis: The Bobbs-Merrill Co., Inc., 1963).
- <sup>6</sup> Robert Shackleton, "The Greatest happiness of the greatest number: the history of Bentham's phrase," Studies on Voltaire and the Eighteenth Century 90 (1972): pp. 1461-1482.
- <sup>7</sup> Beccaria, On Crimes and Punishments, p. 8.
- <sup>8</sup> David Baumgardt, Bentham and the Ethics of Today (Princeton, New Jersey: Princeton University Press, 1952), p. 557.
- <sup>9</sup> Beccaria, On Crimes and Punishments, pp. 46-48 and 55-59.
- <sup>10</sup> Baumgardt, Bentham, p. 557.
- <sup>11</sup> Bentham, Introduction to the Principles, p. 29.
- <sup>12</sup> Ibid., p. 31.
- <sup>13</sup> Ibid., p. 162.
- <sup>14</sup> Ibid., p. 32.

CHAPTER V  
PLEASURES, PAINS, AND CIRCUMSTANCES

Introduction

Chapters V and VI of IPML may appear to contain little information in support of the thesis of this work, or none which contradicts it either. They are both brief chapters which contain lists of terms and very little by way of sustained explanation. However, at the end of both these chapters Bentham indicates their "use," and without exception they are applied to "punishment." Thus it will be demonstrated that even these two innocuous appearing chapters which contain lengthy lists of pleasures, pains, and circumstances do support the general thesis of this work.

Chapter V

This chapter contains a list of pleasures and pains. Pleasures and pains are called interesting perceptions and these perceptions may be simple or complex. Some fourteen simple pleasures are listed, along with twelve simple pains.<sup>1</sup>

Of what use are these lists? If IPML were a work on ethics only, one would expect some sort of application with respect to the way one person may produce pain or pleasure in another person or set of persons. This is not what

Bentham does, for he applies this knowledge of pain and pleasure to law. As he writes:

Of all these several sorts of pleasures and pains, there is scarce any one which is not liable, on more accounts than one, to come under the consideration of the law.<sup>2</sup>

This is not all. He then explains the relationship between offence, motive, and profit of offence, and pleasure and pain. An offence is committed when one person either destroys another's pleasure or produces pain. This tendency which the offence has could be called the mischief of the act and this mischief establishes the grounds for punishing the offence.

A person is moved or motivated to perform a mischievous act because he/she hopes to gain some pleasure or avoid some pain. If either of these are achieved via an offence, then there is a profit to the offence.<sup>3</sup> This is the language of penal theory and not morals.

Suppose an offender is apprehended, tried, found guilty, and sentenced. The sentence, or punishment, according to Bentham, can only be carried out "by the production of one or more of these pains."<sup>4</sup>

If Bentham had planned to write a treatise on ethics, it seems this would have been the opportune moment to instruct the reader in ethical hedonism. Since all the pleasures and pains in Bentham's schema, except benevolence and malevolence, are self-regarding,<sup>5</sup> then one might profit

from directions on increasing one's pleasure. Possibly Bentham passes on this point because of his belief about the strength of the hold which pleasure and pain have on us. That it did not suit his purposes is a more plausible explanation. Bentham is attempting to develop a penal code, and so he discusses pleasure and pain vis-a-vis penal theory and not ethical theory. He could have done the latter; he chose to do the former.

## Chapter VI

"Pain and pleasure are produced in men's minds by the action of certain cause."<sup>6</sup> This is Bentham's opening sentence in the chapter entitled, "Of Circumstances Influencing Sensibility." Even though the causes of pleasures and pains are fairly easy to determine, everyone is not affected in the same way by a given cause. Some people receive a greater pleasure from food or wealth than some other persons; others will be immune to the pains of smell, but very aware of those of desire.

A variable which needs to be considered when calculating the force of a particular pleasure or pain is this variation in being susceptible to a particular pain or pleasure. Many things may be part of these circumstances influencing sensibility, but Bentham enumerates and describes some thirty-two of them. They range from the very personal, e.g., sex, age, health, and hardiness, to the very social, e.g., education, government, and religious profession. Any of

them may influence a person's response to a pleasure or pain, and so, Bentham concludes they need to be discussed.

The discussion, however, will not be beneficial or useful to everyone. It will prove very useful to the legislator, executive magistrate, or the judge in enacting laws and determining punishment. Bentham writes:

The circumstances, all or many of them, will need to be attended to as often as upon any occasion any account is taken of any quantity of pain or pleasure, as resulting from any cause. Has any person sustained an injury? They will need to be considered in estimating the mischief of the offence. Is satisfaction to be made to him? They will need to be attended to in adjusting the quantum of that satisfaction. Is the injurer to be punished? They will need to be attended to in estimating the force of the impression that will be made on him by any given punishment.<sup>7</sup>

Thus, again, at the point of application Bentham opts for relating the matter under discussion, i.e., circumstances, to offences and punishment. Other options were available; he concentrates on the one which fits his purpose.

The chapter continues with some further observations on applying these circumstances in law. Some of the circumstances may in general apply to a whole class of citizens. Where this is the case, the legislator can allow for this in the laws. A prime example would be insanity, and the rules with respect to it.<sup>8</sup>

Other circumstances may apply to classes of people

but "in their application to different individuals (they) are susceptible of perhaps an indefinite variety of degrees."<sup>9</sup> The legislator is thus, unable to enact laws which will cover all these cases, so "provision may be made for them by the judge, or other executive magistrate, to whom the several individuals that happen to be concerned may be made known."<sup>10</sup>

This will be the case most often with habitual occupations, pecuniary circumstances, health, and strength. Other circumstances may apply at times, but in other instances hardly at all.<sup>11</sup>

Some of the circumstances are so unique their "existence cannot be ascertained" or their degree cannot be measured. Neither the legislator nor the executive magistrate can take these into consideration for obvious reasons.<sup>12</sup>

Bentham makes one final point with respect to the circumstances which influence one's senses. He has noted "that different articles in this list of circumstances apply to different exciting causes:..." and he now needs to consider "what the exciting causes are with which the legislator has to do."<sup>13</sup> The legislator has very little chance to use pleasure as an exciting cause. He generally will consider mischievous acts and punishments. He will attempt to prevent the former, by using the latter, "by the terror of which it is his endeavor to prevent them."<sup>14</sup> The legislator does not produce mischievous acts, but punishments are a

part of his production, and therefore are included in the exciting causes with which he works. Bentham then adds an admonition to both the legislator and the judge: "If they would know what it is they are doing when they are appointing punishment" they would have "an eye to all these circumstances."<sup>15</sup>

Bentham does not stop with this general recommendation. He gives the following specific directions:

They ought each of them, therefore, to have before him, on the one hand, a list of the several circumstances by which sensibility may be influenced; on the other hand, a list of the several species and degrees of punishment which they purpose to make use of: and then, by making a comparison between the two, to form a detailed estimate of the influence of each of the circumstances in question, upon the effect of each species and degree of punishment.<sup>16</sup>

This could be accomplished in either of two ways. The circumstance could be listed and then note "the different influences it exerts over the effects of the several modes of punishment:..."<sup>17</sup> The other alternative simply reverses the procedure. Bentham recommends the second approach since the legislator is responsible for this, as opposed to the circumstances, and the legislator and the judge can, in a sense, only consider mitigating circumstances after the punishment has been established.

### Conclusion

The two chapters which have been discussed as a unit are very similar in format: an introduction, body, and then

application. The introductions lead into the topic of the chapter, the body of the chapters present the various words or terms being discussed, and in each case the major point of application concerns legislation and punishment.

IF IPML were primarily a treatise on ethics Bentham had ample opportunity to demonstrate this after the discussion of the various pleasures and pains. Any one of the pleasures of skill, piety, and benevolence - to name a few - may determine what one does in a particular situation, and the same can be said for the various pains. Bentham chooses to indicate the usefulness of this chapter vis-a-vis offences and punishment.

The same pattern is followed in the next chapter. Bentham could have focused on the positive circumstances, but he considers the legislator and his use of the circumstances which influence sensibility. Any and all of these circumstances may come under the purview of the legislator or magistrate, and Bentham shows the necessity of their knowledge of them. Do they not apply to ethics or morals, as well? One could argue this point, but it seems they do or can. For instance, an insane person is not held to the same moral standard as a person who is sane. These circumstances do apply to morals, but Bentham considers legislation and punishment as their prime place of application. Since he was writing an introduction to a penal code, this is what one would expect.

There is another reason why Bentham could not use the last chapter with respect to morals. Two of the circumstances which he explains are moral sensibility and moral bias. To use one's moral sensibility to explain one's reaction - or lack thereof - to a moral act would be either trivial or circular. However, in explaining moral bias he claims "It admits of as many varieties, therefore, as there are dictates which the moral sanction may be conceived to issue forth."<sup>18</sup> This language is reminiscent of the discussion of the four sanctions in Chapter III of IPML. Bentham is only being consistent with his instructions to the political magistrate not to leave the moral sanction out of his calculations.<sup>19</sup> He includes them at this very point, but note they are included for the legislator or political magistrate. That is the point which this work is arguing: IPML was written primarily for the legislator and possibly incidentally for the ethical theorist. The reverse does not hold, as has been shown, and as will be shown even more clearly in the subsequent chapters of this work.

## END NOTES

- <sup>1</sup> Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, introduction by Laurence J. Lafleur, The Hafner Library of Classics (New York: Hafner Publishing Company, 1948), p. 33.
- <sup>2</sup> Ibid., p. 41.
- <sup>3</sup> Ibid.
- <sup>4</sup> Ibid.
- <sup>5</sup> Ibid. Self-regarding pains do not suppose the existence of some pain or pleasure of some other person, or persons.
- <sup>6</sup> Ibid., p. 43.
- <sup>7</sup> Ibid., pp. 64-65.
- <sup>8</sup> Ibid., p. 65.
- <sup>9</sup> Ibid.
- <sup>10</sup> Ibid.
- <sup>11</sup> Ibid., pp. 65-66.
- <sup>12</sup> Ibid., p. 66.
- <sup>13</sup> Ibid.
- <sup>14</sup> Ibid.
- <sup>15</sup> Ibid., p. 67.
- <sup>16</sup> Ibid.
- <sup>17</sup> Ibid.
- <sup>18</sup> Ibid., p. 50.
- <sup>19</sup> Ibid., p. 28.

## CHAPTER VI

### PHILOSOPHY OF MIND

#### Introduction

The section of IPML which consists of Chapters VII-XII, could be called the philosophy of mind section because in it Bentham discusses terms which would fall under that broad general heading: acts, intention, consciousness, motives, and disposition. It also forms an explanatory link or conceptual bridge between the chapters on the principle of utility, pleasure and pain, and those on offences and punishment.

One could say this is another exhibit of Bentham's intention to write an ethical treatise. It discusses the proper ethical terms - "acts," "motives," and "intentions" - and clearly establishes the motive of benevolence as the purest form of utility. Benevolence consists of one person considering the good or positive consequences of an act for another person or persons, and seems to have little connection with legislation and punishment.

That this view is mistaken will be clearly demonstrated. Bentham makes it obvious from the beginning of Chapter VII that the terms are being discussed because of their relationship to punishment. Moreover, as has been

indicated earlier in this work, this series of terms are still discussed in books on criminal law. Having a mens rea, or evil intention, is a necessary condition for breaking most criminal laws. One breaks a law by performing an act, and this act usually comes from a particular motive or disposition. Bentham is striving for conceptual clarity in order to indicate the consequences of a mischievous or illegal act, before he states his theory of punishment.

Usually, but not without exception, in this section the last paragraph of a chapter explains the "use" of that chapter. In these "use" paragraphs, Bentham indicates the practical application of the chapter, and either "offences" or "punishment," or both, are discussed. This will add to the evidence already adduced, and will continue to demonstrate Bentham's purpose in writing IPML: to write an introduction to a penal code.

Each chapter will be discussed in turn, and the methodology will be very similar to that applied to Chapters V and VI of IPML. The topic, or key word of the chapter, will be examined and so will the "use" paragraph. Passages between these two will be discussed on a limited basis and only where they are pertinent to the broader question under consideration.

### Actions

Bentham begins Chapter VII with an observation about the business of government. Its business

...is to promote the happiness of the society, by punishing and rewarding. That part of its business which consists in punishing, is more particularly the subject of penal law. In proportion as an act tends to disturb that happiness, in proportion as the tendency of it is pernicious, will be the demand it creates for punishment...

The general tendency of an act is more or less pernicious, according to the sum total of its consequences: that is, according to the difference between the sum of such as are good, and the sum of such as are evil.<sup>1</sup>

A brief explanation of "consequences" is followed by some general information on "intention" and "consciousness."

In what seems to be a rather abrupt shift in content, Bentham writes

In every transaction, therefore, 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 intentionality that may have accompanied it. 4) The consciousness, unconsciousness, or false consciousness, that may have accompanied it.<sup>2</sup>

. . . . .

There are also two other articles on which the general tendency of an act depends: and on that, as well as on other accounts, the demand which it creates for punishment. These are, 1) the particular motive or motives which gave birth to it, 2) the general disposition which it indicates.<sup>3</sup>

These two paragraphs outline this section. The six underlined words, plus "consequences of a mischievous act"

focus the discussion. These terms are interrelated because they need to be considered "in every transaction,...which is examined with a view to punishment,..."<sup>4</sup> The emphasis which was obscure and subtle in the first six chapters of IPML now becomes obvious and dominant in this section. Bentham's purpose and intention in writing IPML is now made explicit: he is writing an introduction to a penal code. This section is a necessary preliminary unit before Bentham explains his theory of punishment per se.

Bentham's discussion of "act" or "acts" is basically unenlightening, but it is helpful. He classifies acts, using dichotomous division, but he never really analyzes the meaning, or a meaning of the word itself.

Acts may be classified as being positive or negative, and the negative category may be divided further into absolutely or relatively negative acts. Other classifications include external, internal, transitive, intransitive, simple and complex.<sup>5</sup>

Bentham does try to make two useful distinctions. He explains the difference between the repetition of an act and a habit or practice. The repetition of an act may take place quickly, over a short period of time. For example, one may, in a fit of anger, throw six glasses, one at a time, against a brick building. This would be repeating the act of throwing a glass at a wall. However, this would not be a habit unless one did this with some regularity in

similar situations. Thus, stealing six cars on one day does not necessarily mean one is a habitual criminal. Stealing six cars over six months or a year may indicate a habit.

As Bentham says

Every habit is a repetition of acts;...  
but every repetition of acts is not a  
habit.<sup>6</sup>

Bentham also attempts to answer the question, "What is it that constitutes one act?" or "Where does one act end and another begin?" Since questions of this sort frequently are asked in the course of procedure, they may seem crucial and worth some effort to answer. Such is not the case, according to Bentham, for he terminates the discussion with the observation, which is in effect a squelch.

In any of these cases it may be one, perhaps, as to some purposes, and several as to others. These examples are given, that men may be aware of the ambiguity of language: and neither harass themselves with unsolvable doubts, nor one another with interminable disputes.<sup>7</sup>

### Circumstances

Circumstances, according to Bentham, are any objects or entities whatsoever. This certainly is too broad, too general, and lacks in specificity. Bentham's explanatory sentences do not fare much better, for he writes

Take any act whatsoever, there is nothing in the nature of things that excludes any imaginable object from being a circumstance to it. Any given object may be a circumstance to any other.<sup>8</sup>

In one sense, this will not do either. For example, there

are some students outside my door at the present time. They are talking. I am sitting at my desk and I am writing. These students are tangentially related to my writing, but they are not actually any part of my writing. They possibly could be, but it is difficult to ascertain how one would establish such relevance.

Bentham improves his position by dividing circumstances into material and immaterial. Materiality

applied to the circumstances,...bears relation to the consequences. A circumstance may be said to be material, when it bears a visible relation in point of causality to the consequences:....<sup>9</sup>

Causality thus becomes the key to understanding circumstances. There are four different ways in which an event or act and a circumstance may be causally related: 1) production, 2) derivation, 3) collateral connection, and/or 4) conjunct influence. These four ways are explained and an example is given of each.

What Bentham is saying is something like this: consider any act A. "A" will have circumstances or prior conditions which produce it; it will also have conditions or events which it produces. Other circumstances may be directly related to each other, or related to some common event or object which is then directly connected to the event "A". Any act is surrounded by a sea of circumstances, and the astute legislator or judge will remember this.

This information about acts and circumstances will be

useful to and used by the legislator, magistrates, and the judge. An understanding of "act" is necessary in order to stipulate an offence, for "an act of some sort or other is necessarily included in the notion of every offence."<sup>10</sup>

Some circumstances are so intimately connected with the very nature of a particular offence that no separation is generally made between the offence and circumstance. These are called criminative circumstances for they "are connected with the consequences of the original offence, in the way of production,..."<sup>11</sup> Other circumstances may be combined with this initial set in a beneficial or mischievous manner. If they are beneficial they will be called exculpative or extenuative circumstances; if they are mischievous in nature, aggravative circumstances.

Circumstances may also be related to the consequences of an offence and as such "may become of use, by being held forth upon occasion as so many proofs, indications, or evidence of its having been committed."<sup>12</sup>

In brief, an understanding of acts and their concomitant circumstances is necessary for designating X or Y as an offence. Further, insight into circumstances and acts will lead to a clearer understanding of the total framework in which an act takes place. Knowing this structure, one may exonerate or implicate, depending upon the circumstances.

## Intentions

Intentions for Bentham are particular circumstances which are caused by motives. Even though people may call "intentions" good or bad, this is technically not correct and only a figurative way of speaking.

The consequences of intentions may be either direct or indirect. Given that an action or an incident is directly intentional, it may be either ultimately intentional or mediately intentional. The categories of exclusively or inexclusively also apply to that which is directly intentional. The inclusive category may be further divided into the conjunctive, disjunctive or indiscriminate branches.

As Bentham correctly observes, people often speak of the goodness or badness of a person's intention. In two places Bentham discusses this issue and in both instances he attempts to carefully explain the various words which are used, e.g., "intention," "motive," and "circumstance." He also maintains his hedonistic utilitarian position, which is,

Strictly speaking, nothing can be said to be good or bad, but either in itself; which is the case only with pain or pleasure: or on account of its effects; which is the case only with things that are the causes or preventives of pain and pleasure.<sup>13</sup>

An intention is not a pleasure or pain and, as such, the prior disjunct does not apply to it. The latter is a

possibility since intentions produce acts which have consequences or effects. However, this possibility is also rejected for reasons which will be given subsequently.

Bentham countenances another possibility. Something may be called good or bad on the basis of its cause. Motives cause intentions and, thus, an intention could be called good or bad because it was produced by a good or bad motive, respectively. However, as will be seen after the discussion of consciousness or understanding, Bentham also rejects this possibility.

Bentham then returns to a consideration of the possibility that an intention may have consequences which are either good or bad, and then the words good or bad could be applied to intentions as the cause of the consequences. This appears hopeful, but Bentham dashes any hope on this point in three brief sentences:

But the goodness or badness of the consequences depend upon the circumstances. Now the circumstances are no objects of the intentions. A man intends the act: and by his intention produces the act: but as to the circumstances, he does not intend them: he does not, inasmuch as they are circumstances of it, produce them.<sup>14</sup>

However, consider Bentham's own illustration. In the year 1628, Villiers, Duke of Buckingham, was stabbed and killed by one Felton. The causative circumstances were Felton's trip to the place where Villiers was living, entering Villiers' apartment, and drawing his knife. On Bentham's rendering in the passage quoted, Felton did not

intend to produce these circumstances. Felton could have been conscious of them, or unaware of them, but they were not intended. Certainly Felton's trip was intentional, for how else would one explain it? Or again, drawing the knife was a circumstance and would also be considered intentional. Not all circumstances would be intentional, but some are. Bentham seems to have forgotten this point, when he wrote that one does not intend circumstances.<sup>15</sup>

Bentham was intent upon showing the relationship between intention, consciousness, and motive. This is the next topic for discussion, and so the latter two words will be discussed in turn.

### Consciousness

If intention is Bentham's word for the will, then consciousness is his word for one's intellect. Bentham calls it both the perceptive faculty and the understanding, and the context indicates these words should be interpreted in their broadest sense. A synonym might be awareness, for when Bentham writes of the relationship between circumstances and the understanding he uses the root word, i.e., aware.

As was stated in the prior unit on intentions, Bentham thought one does not intend the circumstances of a given act; one is only aware or not aware of them. This awareness is what Bentham means by "consciousness." "Was he aware of the circumstances" would be another way - for

Bentham - of saying "Was he conscious of the circumstances?" In a further refinement of his position, Bentham states the circumstance may "...have been present to his mind, or not present."<sup>16</sup> Given this addition, it seems Bentham does not mean by aware or consciousness, being minimally aware or conscious, but a focal awareness in which one is thinking about the circumstance or circumstances at hand.

This view is supported by the division of the acts into advised and unadvised. The former are acts of which a person is aware of the circumstances, while the latter are the opposite; i.e., the person is not aware of the circumstances. Unadvised actions are divided into heedless and not heedless categories. "Heedless" applies if

a person of ordinary prudence, if prompted by ordinary share of benevolence, would have been likely to have bestowed such and so much attention and reflection upon the material circumstances, as would have effectually disposed him to prevent the mischievous incident from taking place:....<sup>17</sup>

A case which is not heedless is simply the negative of the above.

"Advised" and "unadvised" does not exhaust the possibilities with respect to categories of acts and their circumstances. Acts may be also mis-advised. Suppose a person did think or believe that a particular circumstance was part of an act by way of "collateral connexion" - which is one of Bentham's own phrases. This act would be mis-advised with respect to this circumstance if the

circumstance did not exist, or if it existed and failed to produce any pleasure or pain. Thus the act is mis-advised and there is mis-supposal in this case. Given this mis-advised act it may be classified further as either rash or not rash.<sup>18</sup>

Having this information on consciousness Bentham then explains the relationship between consciousness and intentionality.

When the act itself is intentional, and with respect to the existence of all the circumstances advised, as also with respect to the materiality of those circumstances, in relation to a given consequence, and there is no mis-supposal with regard to any preventive circumstance, that consequence must also be intentional; in other words; advisedness, with respect to the circumstances, if clear from the mis-supposal of any preventive circumstances, extends the intentionality from the act to the consequences.<sup>19</sup>

This shows Bentham's reliance upon the intellect as the guide for intention. If a person is aware of or thinking about the circumstances, and this awareness is correct with respect to obnoxious consequences, then the whole action is intentional. Even though Bentham intended to write a logic of the will - which he did in large measure - the will, or intention, depends upon consciousness for direction.

There is a unique relationship between consciousness, intention, motive and consequences. Some instances create some surprises as in the case in which "Out of malice a man prosecutes you for a crime of which he believes you to be

guilty but of which in fact you are not guilty." In this case the intention is good, but both the motive and consequences are bad. According to Bentham this fits his earlier statement on intentions, for if the consequences of his act had proved

such as he believed them likely to be {they} would have been good: for in them would have been included the punishment of a criminal, which is a benefit to all who are exposed to suffer by a crime of the like nature.<sup>20</sup>

In this instance and in the prior definition Bentham evaluates intentions on the basis of expected consequences, or consequences which one believes will take place. Given this assumption Bentham could say, or would be forced to say, that Hitler's intentions with respect to the Jews were good. Hitler thought the extermination of the Jews would be beneficial to all the living, and yet, can genocide be good? This is the absurdity to which Bentham's position points.

The practical import of these two chapters on intention and consciousness is united into a single paragraph. Two words which are "capable of the most extensive and constant application, as well to moral discourse as to legislative practice" have been discussed.<sup>21</sup> This being the case, one might expect an application or illustration from both these areas. Bentham, however, is consistent and turns his attention to one word only: punishment.

One's intention and consciousness determine in large

measure whether an act has good or bad consequences. If it has bad consequences, or creates mischief, this creates, or brings about, the demand for punishment in many instances. Given a particular intention and an awareness of the circumstances of the act, one has the formation of many of the criminative circumstances. However, in almost all cases where there is an absence of intention and consciousness, one has grounds for extenuation with respect to punishment.

Legal punishment takes both the will and the understanding into consideration. Either one or both may be used as a basis for condemnation or acquittal. Since intent is so closely associated with act, it is probably considered the more important of the two. Consciousness, however, welds intention, to act, to consequences. It forms the logical bond, such that, if an act is intentional and the perpetrator of the act is aware of what he/she is doing, then the consequences are also intentional. To use Bentham's words, "at any rate they cannot but be intentional."<sup>22</sup>

### Motives

An understanding of "motive" is necessary for any systematic overview of IPML. Both directly, and by implication, it reaches back to Chapters I, IV, and V, and forward to Chapters XVI and XVII. It immediately helps explain "intention" and "disposition." The former are caused by motives and the latter are also intimately related to motives. Motives mold the character of acts, and therefore offences,

and thereby produce different effects. Understanding motives is integral to dealing correctly with offences.

Bentham defines "motives" in two different ways:

By a motive, in the most extensive sense in which the word is ever used with reference to a thinking being, is meant anything that can contribute to, give birth to, or even prevent, any kind of action.<sup>23</sup>

. . . . .

By a motive then, in this sense of the word, is to be understood anything whatsoever, which, by influencing the will of a sensitive being, is supposed to serve as a means of determining him to act, or voluntarily to forbear to act, upon any occasion.<sup>24</sup>

The first of these is much too broad. For instance, during an examination, a doctor might tap my loosely hanging leg with a rubber mallet. The lower portion of the leg will swing up, if my reflexes are normal. This reflex is clearly an act, yet one done without any motive. The only candidate for the name "motive" in Bentham's scheme of things is the rubber mallet, but this clearly will not do. Mallets basically do not have motives. Yet it contributed to an action on my part. Of course, Bentham could respond that neither the mallet nor my leg was a thinking being.

In the prior example the prevention of an action fares no better than the production of an action. Jones restrains me from running back into a burning building to save my child: Jones' holding me is not a motive.

The second definition fares much better primarily

because it includes the phrase, "by influencing the will of a sensitive being." That which influences the will causing "it" to act or not to act in a certain manner is a motive. This explains the failure of the prior definition: no reference was made to "influencing the will," or internalizing the cause of the action. Thus that definition was readily defeated by illustrations which focused on external causes or restraints.

In another place Bentham states, "A motive is substantially nothing more than pleasure or pain, operating in a certain manner."<sup>25</sup> This agrees with a prior explanation of motive, in which Bentham said,

Motive refers necessarily to action. It is a pleasure, pain, or other event that prompts to action. Motive then, in one sense of the word, must be previous to such event. But, for a man to be governed by any motive, he must in every case look beyond that event which is called his action; he must look to the consequences of it: and it is only in this way that the idea of pleasure, of pain, or of any other event, can give birth to it.<sup>26</sup>

To call motives, *qua* motives, "nothing more than pleasure or pain" seems basically wrongheaded. Consider greed, for example. Greed is a motive, but it is debatable that greed, qua greed, is a pleasure. Greed may produce pleasure, and be related to pleasure, and yet not be a pleasure. Pleasure seems to be that for which one seeks, or a goal for which one strives. It is considered the result of an act or series of actions, not the cause. It

is a present fulfillment of a past expectation. It is not that expectation.

To go one step further and relate the question to Bentham's main concern in IPML, consider the question, "What was the motive for the crime?" To answer "pleasure" would probably be legally ludicrous, if one were offering that as the cause for the crime. As Alston points out, given this question "...we are dealing with a sort of action for which there are no socially acceptable reasons."<sup>27</sup> Pleasure, in a proper context, is socially acceptable, but not as a cause for a crime.

Motives, as Bentham correctly points out, are action-related. For instance, one may correctly ask, "What was his motive for doing A?" As an answer, one may cite lust, ill-will, or fear of the unknown. These are explanations or reasons for his action, and are offered as motives which existed prior to his action. "Pleasure" would not, and does not, function in the same way. It would be odd to answer the foregoing question by citing "pleasure," where by "pleasure" one intends a motive which was before the act and the cause of the act.

Bentham, as has been shown, does not agree with this last comment. He takes great pains to explain motives - almost to the point of praising them. He writes:

Now pleasure is in itself a good:...,  
the only good: pain is in itself an evil...,  
the only evil; ...It follows, therefore,

immediately and incontestibly, that there is no such thing as any sort of motive that is in itself a bad one.<sup>28</sup>

It is not obvious how this follows or if it follows. Bentham assumes that a person will always perform that act which brings pleasure, or at least avoids a greater quantity of pain, unless there is some mis-supposal involved. Given that pleasure is the motive that prompts one to action, and that pleasure is the only thing good in itself, then no motive "is in itself a bad one." To emphasize this point, Bentham adds as a footnote:

Let a man's motive be ill-will; call it even malice, envy, cruelty; it is still a kind of pleasure that is his motive: the pleasure he takes at the thought of the pain which he sees, or expects to see, his adversary undergo. Now even this wretched pleasure, taken by itself, is good: it may be faint; it may be short: it must be at any rate impure: yet while it lasts, and before any bad consequences arrive, it is as good as any other that is not more intense. See ch. iv. {Value}.<sup>29</sup>

This certainly is strange. To call the pleasure which one receives from the suffering of another "good" is a misapplication of the term. Suppose I received pleasure from the success of another; that would be a "good" pleasure. If another person receives pleasure from the suffering of another person, that also is a "good" pleasure. However, consider these two points: 1) According to Bentham, the phrase "good pleasure" is redundant, and that does not seem to be the case. 2) In ordinary language, receiving

pleasure from the suffering of another is called "sadistic pleasure." By Bentham's standard, "sadistic pleasure" is a "good pleasure." Moreover, by Bentham's account, one is unable to distinguish between the pleasure afforded by benevolence and those of malevolence.

Bentham classifies motives according to their effects, but he is not satisfied with the results. He then opts for a method which would

...distribute them according to the influence which they appear to have on the interests of the other members of the community, laying those of the party himself out of the question: to wit, according to the tendency which they appear to have to unite, or disunite, his interests and theirs. On this plan they may be distinguished into social, dissocial, and self-regarding.<sup>30</sup>

The social class is further divided into the purely-social and semi-social.

The purely social class has one member and one member only: good-will. Love of reputation, desire of amity, and religion are called semi-social motives. The dissocial class has one and only one member: displeasure. The self-regarding class is the largest, and includes physical desire, pecuniary interest, love of power, and self-preservation.

This tripartite division is useful in understanding some prior passages and some material which follows. For instance, good-will is praised in terms which prior to this point have been reserved for the principle of utility and

pleasure. Moreover, motives are considered again in the next two chapters, and are prominently mentioned in the analysis of the distinction between private ethics and legislation.

Good will is the highest motive, and if one considers each motive as creating a law or dictate which urges or enjoins one to engage in it, or not to engage in it, then the dictates of good will

...are surest of coinciding with those of utility. For the dictates of utility are neither more nor less than the dictates of the most extensive and enlightened (that is well-advised) benevolence.<sup>31</sup>

Thus if one is motivated by benevolence which is without mis-supposal and extends to as many people as possible, then one is operating on the basis of utility. One could infer on the basis of what Bentham has written that utility and benevolence are the same, but that would be an unwarranted inference. Benevolence is a motivation to act; utility is a result of the action. Being motivated by benevolence will result in the same consequences as acting in accordance with the principle of utility: the greatest amount of good possible will be produced.

There is one way in which benevolence or good-will may not be consistent with utility. A person may be enjoined by benevolence, but may fail to understand that performing Act A would not be benevolent as performing Act B. Then, according to Bentham,

...the case is, that a partial benevolence may govern the action, without entering into any direct competition with the more extensive benevolence, which would forbid it; because the interests of the less numerous assemblage of persons may be present to a man's mind, at a time when those of the more numerous are either not present, or, if present, make no impression. It is in this way that the dictates of this motive may be repugnant to utility, yet still be the dictates of benevolence.<sup>32</sup>

In this case the person was benevolent, but failed in applying benevolence as extensively as possible, i.e., goodwill extended to a lesser number, rather than a greater number, of people. Benevolence remained the motives, but utility was not served because extent was omitted from the calculation.

Motives move a person to act. Diverse motives may be acting on a person at the same time and thus create a conflict among motives. When this happens, a dissocial or self-regarding motive may be opposed by the motive of goodwill or benevolence. This is generally the case where the tendency of the act is bad, for as the chapter on the hedonistic calculus showed, this means more pain or evil is produced than pleasure or good. Since the dissocial or self-regarding motives do not tend to coincide with the dictates of utility, they are more susceptible of producing a bad tendency.

The chapter on motives has its practical application with respect to legislation and punishment. When

considering an offence, differences in motives allow for a "...difference in the magnitude of the mischief..." and thus possibly may be "...a ground for a difference in the demand for punishment..." Moreover, an understanding of motives is necessary "...in order to pass a judgment on any means that may be proposed for combating offences in their source."<sup>33</sup> More will be said by way of application at the conclusion of the discussion of dispositions.

### Dispositions

Since both intentions and motives are neither good nor bad in Bentham's scheme of things, one might wonder if there is nothing which may be called good or bad about a man who acts on the basis of a certain motive. Surprisingly, Bentham answers this query with, "Yes, certainly: his disposition." Having granted the term Bentham almost retracts it by his definition of it.

Now disposition is a kind of fictitious entity, feigned for the convenience of discourse, in order to express what there is supposed to be permanent in a man's frame of mind, where, on such or such an occasion, he has been influenced by such or such a motive, to engage in an act, which, as it appeared to him, was of such or such a tendency.<sup>34</sup>

Not only is disposition a fictitious entity which helps conversation along, but it considers what is supposed to be permanent in a man's mind. Thus disposition is a useful fictitious entity about whose existence one is not sure.

One's disposition will be good or bad according to

its effects, but especially the effects which increase or decrease the happiness of the community. In the calculating the value of the happiness one will consider one's own happiness and/or the happiness of others. If one's actions increase happiness then the disposition will be called good; the name for the opposite sort of disposition is bad or depraved.

Since this section is considering various topics in order to explain the nature of a mischievous act as it relates to law and punishment, Bentham is not concerned with disposition with respect to the person's own happiness. Nor is he concerned with a beneficent or meritorious disposition, even though examples are given of both the aforementioned sorts of dispositions. Since a disposition which is of a mischievous nature is the immediate concern of the penal law, this is the sort of disposition which Bentham wants to explain. A person would be of a mischievous disposition if, regardless of his/her motives, he/she

...is presumed to be more apt to engage, or form intentions of engaging, in acts which are apparently of a pernicious tendency than in such as are apparently of a beneficial tendency:....<sup>35</sup>

In support of this statement and others Bentham puts forth two very reasonable and practical observations which relate intentions to consequences and dispositions.

...in the ordinary course of things the consequences of actions commonly turn out conformable to intentions.<sup>36</sup>

. . . . .

The other is, that a man who entertains intentions of doing mischief at one time is apt to entertain the like intentions at another.<sup>37</sup>

The first means that a person usually does what he/she intends, and the second says that intentions are habit-forming. To support the second observation, Bentham adds in a footnote,

To suppose a man to be of a good disposition, and at the same time likely, in virtue of that disposition, to engage in an habitual train of mischievous actions, is a contradiction in terms:....<sup>38</sup>

Can one determine the disposition of a person by an action which he/she performs? According to Bentham, this may be done if two circumstances are known: 1) the apparent tendency of the act, and 2) the sort of motive which prompted the act.

The tendency will be good or bad depending on calculations which one would make by the method indicated in Chapter IV of IPML. The motives used are those listed in the Chapter X of IPML. One may list any of those motives, assume a good tendency, or a bad tendency, and then reflect on what, if anything, would be indicated about the disposition of the person performing an act under these circumstances.

Suppose, for instance, a self-regarding motive, and the tendency of the act is bad. The disposition in this

case is a mischievous one. For example, if a man steals a loaf of bread simply to keep from paying for it, this indicates a "thievish disposition," which is bad.<sup>39</sup>

If the motive is good-will and the tendency of the act is good, then the person who performed that act would have a beneficent disposition. If a baker gave a starving man a loaf of bread, his disposition would be accounted good.<sup>40</sup>

Many other examples are given, and all of them could be discussed. Yet in the interest of time and space two of the more difficult ones end this portion of the discussion.

Is it possible to have an act which has a bad tendency, and yet the motive which moved the person to act was good will? Yes, it is. This could happen if a man acted from confined, as opposed to enlarged benevolence. Nothing certain is known about the disposition in this case, but it is probably good on the whole.<sup>41</sup>

Or again, suppose a man acts from a dissocial motive of ill-will, and yet the tendency of the act is good. What, if anything, is known about his disposition?

Consider this example: You prosecute a baker for selling short weight and he is guilty as charged. The tendency of this act is good, and yet, your motive was ill-will. You disliked the baker for some reason, possibly a quarrel between the two of you. Nothing seems to be indicated with respect to your disposition. In all likelihood you would not react in such a way again. You failed to act from

enlarged benevolence, and had this happened one would say the purely social motive restrained the dissocial motive, and thus both the tendency and the motive would have been good.<sup>42</sup>

Since the "penal law is concerned...to measure the depravity of the disposition where the act is mischievous"<sup>43</sup> Bentham desired to be more exact about measuring the mischievousness of a person's disposition, so he adopts a different tack. This approach leads him back to motives, but then forward to temptation, and the laying down of some rules based on the relationship of the disposition, the temptation, and the mischievousness of the undertaking or act. All this maneuvering is related to determining the seriousness of an offence, and the amount of punishment required.

One's disposition is, "...as it were, the sum of his intentions:..."<sup>44</sup> Intentions are caused by motives, and so, in order to understand one's disposition a further explanation of motives is necessary.

A motive which would prompt a person to perform a mischievous act is called a seducing or corrupting motive. In contrast to those motives, some restrain a person from engaging in mischievous acts and these are called tutelary, preservatory, or preserving motives. Tutelary motives may be divided into standing or constant motives, and occasional motives. The former tend to restrain a person from "...any

mischievous acts he may be prompted to engage in;..." while the latter depend upon the accidental circumstances which surround an act and tend to operate on an irregular basis.<sup>45</sup>

After again reciting the caveat that no motive is exempt from leading one to engage in a mischievous act, Bentham presents his list of standing tutelary motives. As might be expected, benevolence or good-will leads the list, and love of reputation and the desire of amity are not far behind. The motive of religion finally makes this list, but only after several disclaimers have been issued.

The force of the love of reputation and the desire of amity depends upon the possibility of detection of the mischief one does. (Detection will be explained later.) The greater the chance of detection the stronger these motives become: as the possibility of detection decreases so does the force of these motives. Benevolence and religion do not depend on the danger of detection, since they do not take it into consideration.

Any motive may also operate as an occasional tutelary motive, but these are not as important as the artificial tutelary motives which the law has created. These are two of these motives, according to Bentham; the love of ease and self-preservation. The former considers the trouble which would be necessary in order to do any mischievous act, and the latter the dangers one would undergo in performing an illegal or mischievous act. One sort of danger is called

physical, and would include danger to life and limb. The other danger "results from moral agency," in which certain people would look with disapprobation on the action if they knew one had done it. Another name for this danger is the danger of detection.<sup>46</sup>

Detection may occur while the act is being carried out, or at some distance from it. Legal punishment is a paradigm case of the latter type of detection.

With all this as background, one is now in a position to understand the phrase, "the strength of temptation," and what, if anything, it indicates about "the degree of mischievousness in a man's disposition in the case of any offence." Suppose a man is tempted to do a mischievous act. The strength of this temptation depends upon the seducing motives and the occasional tutelary motives. If the putative pleasure which will be gained from the crime is great in the eyes of the offender compared to the possible trouble and danger, the temptation will be said to be strong. Given that the pleasure is small in the foregoing formula, the temptation will be weak. The "strength of the temptation" does not depend upon the seducing motives only, but it comes from a calculation of the force of the seducing or impelling motives, and the occasional tutelary motives, and calculating the ratio between them. How this is done, Bentham never explains. Simply making some personal comparison between the two motives is possibly a more plausible position.<sup>47</sup>

Bentham has not forgotten the standing tutelary motives. Since all these motives are social motives, one deducts their force and then calculates the strength of the temptation using the method mentioned in the preceding paragraph.

One inference may be made from this about the depravity of a man's disposition. If a man is overcome by a very weak temptation, that indicates a depraved and mischievous disposition. Moreover, if a man engages in a highly mischievous offence without any regard for restraining effect of the social motives, then that tends to show that his disposition is "proportionally depraved."<sup>48</sup>

This section concludes with four rules about the relationship between the depravity of one's disposition, strength of the temptation, and the mischievousness of the act. The last two rules are worthy of mention:

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.<sup>49</sup>

. . . . .

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.<sup>50</sup>

The first of these rules is illustrated by the following: If a rich man steals a loaf of bread it is more explicitly a sign of the depravity of his disposition, than

if a poor man, who was at the point of death from hunger, committed the same act.

The latter rule depends upon Bentham's assumption that the social motives are the predominant motives in one's life, and thus, "regulate and determine the general tenor of his life."<sup>51</sup> Since everyone's nature, according to Bentham, is oriented toward good-will, love of reputation, the desire of amity, and religion, the dissocial motives operate only on occasion and are usually suppressed and supplanted by the social ones. Thus if a man is continually motivated by dissocial motives, that shows an insensibility to the social motives. Moreover, if one man beats another in a fight which happened spontaneously, that does not indicate as depraved a disposition as does the case where one person beats another by some premeditated plan.

This discussion of dispositions concludes with some observations about punishment. 1) Any indication of extraordinary depravity of the disposition adds to the demand for punishment. 2) If a judge is governed by the principle of sympathy and antipathy in giving out punishment, he/she will tend to evaluate the disposition only. If an offender has a good disposition, this judge would probably forego punishment, but if the disposition of the offender is found to be odious, more punishment than is necessary may be administered. Such obviously would not be the case if the judged were a partisan of the principle of utility.<sup>52</sup>

Playing "what if" games, or making hypothetical conjectures is at best highly suspect, but it needs to be done at this point. For, if Bentham had been writing a treatise on morals or ethical theory he may have discussed the terms from "act" to "disposition," but with differences in emphasis and application. For instance, "acts" and "dispositions" can be either positive or negative, but Bentham basically chose to discuss the latter. Even his illustrations are related to legislation, law, and punishment. There was ample place for an illustration or two about lying, cheating, or breaking a promise, but Bentham foregoes the opportunity, and instead writes of robbery, non-payment of taxes, and Tyrell shooting William II, King of England. The possibility for an ethical discussion was present, but Bentham chose to discuss law and punishment.

This bent intensified as the unit progressed. Under the heading of "dispositions," motives which guide and direct behavior were discussed at length. An understanding of these motives is necessary in order to understand "temptation." Not any temptation is meant, however, for Bentham is considering the temptation to perform an illegal or mischievous act. An act of this type then calls for a physical sanction in the form of legal punishment. This section may have application to ethics, but this is not its use in IPML.

The chapter on motives ended with a discussion of offences and punishment. The one on consciousness reflected

on criminative circumstances and extenuation; offences and the circumstances which surround them concluded the section on actions and circumstances. All the parts of this unit have been pointing toward a discussion of legal punishment. Bentham is one step away from that for he must first discuss the consequences of a very specific act: a mischievous one.

#### Consequences of a Mischievous Act

The opening paragraph of Chapter XII of IPML includes a review of the topics which have been discussed in this chapter: act, circumstances, consciousness, intentions, motives, and disposition. In order to form "the concluding link in all this chain of causes and effects"<sup>53</sup> Bentham turns to the topic of consequences, or tendency. Since the main topic of IPML has been shown to be legislation and punishment, Bentham actually did not need to add the restricting comment,

Now, such part of this tendency as is of a mischievous nature, is all that we have any direct concern with; to that, therefore, we shall here confine ourselves.<sup>54</sup>

Indeed, when considering consequences, there are many candidates. Certainly consequences could be divided into beneficial and mischievous. This, however, did not serve Bentham's purpose, and so, he chose to discuss "the consequences of a mischievous act" only. This topic forms the logical bridge between this section and the next, on punishment.

Acts with their circumstances are produced by people with certain intentions, motives, and dispositions. These acts also have "consequences or tendency." This phrase is used twice in the two opening paragraphs of Chapter XII and gives the impression that the words are synonymous. More support for this view is given when Bentham writes, "the tendency of an act is mischievous when the consequences of it are mischievous;...: However, consequences and tendency are shown not to be identical by the statement.

The consequences, how many and whatsoever they may be, of an act, of which the tendency is mischievous, may, such of them as are mischievous, be conceived to constitute one aggregate body, which may be termed the mischief of the act.<sup>55</sup>

The consequences may be, in part, mischievous and, in part, non-mischievous. The mischievous parts are called the mischief of the act, and one would assume that the mischievous part of the consequences would have to outweigh or be greater than the non-mischievous part in order for the tendency of the act to be called mischievous. Tendency is consequence dependent, though not the same as the consequences.

The aforementioned mischief may be divided into primary and secondary portions. Both of these categories may also be divided into two different groups, but that will come in due course. Primary mischief is that mischief which is sustained by assignable individuals, or an assignable individual. These individuals, or this individual,

may be the direct subjects of the mischief, in which case it is called the original primary mischief. Being the person robbed or persons swindled would be an example of this. Other assignable individuals may be connected with original sufferer by way of sympathy or interest. These people would be subject to the derivative primary mischief of the act.<sup>56</sup>

Secondary mischief does not fall upon assignable individuals, but upon a portion of the whole community or the whole community. In neither case are any individuals singled out as assignable individuals.<sup>57</sup>

Secondary mischief is divided into pain and danger. Another word for "pain" is alarm, and seems to be the word which Bentham prefers in this connection. The alarm is grounded in the apprehension at suffering similar mischief as the individual or individuals did in the original instance. This apprehension can produce a pain, which Bentham appropriately calls the pain of apprehension.<sup>58</sup>

Danger is associated with alarm, but can be separated from it. The primary mischief produces danger since if one has been robbed, there is a chance that another may suffer the same fate. This exposure to a similar fate is called danger.

As Bentham points out, there may be danger where there is no alarm and alarm where there is no danger. There may be a rash of burglaries in a neighborhood without any prior alarm or apprehension. Stories about burglaries and

robberies may circulate in a neighborhood even when such have not taken place. The first example illustrates danger without alarm; the second alarm without danger.<sup>59</sup>

Secondary mischief can produce alarm only if the mischief is extra-regarding and has specific people for its object. If the people whom it affects are undesignated - or "uncertain," to use Bentham's term - no alarm is produced. Thus, no alarm is produced by the non-payment of taxes.<sup>60</sup>

Bentham addresses himself to a question which many have pondered: how can one robbery cause another, if it can? A plausible answer based on the discussion of motives is rejected immediately. The prior robbery cannot cause a person to commit another robbery by "any direct motive." Since a motive causes a person to look forward to some pleasure, a person commits a robbery because of some anticipated pleasure. This anticipated pleasure exists irrespective of the prior robbery, so that prior robbery does not produce a motive to commit another robbery.<sup>61</sup>

The answer to the question, according to Bentham, is two-fold: 1) if a person is tempted to commit a robbery, the prior robbery might make this person think he/she can commit a robbery. The first robbery gives them the idea, one might say. 2) Moreover, the prior robbery may weaken the tutelary or restraining motives. This is accomplished by weakening the force of either the political or moral

sanction. The prior sanction prevents crimes by "denouncing some particular kind of punishment against any who shall be guilty of it." This penalty will act as some sort of restraining motive.<sup>62</sup> The threat of punishment depends in part on detection since

...the real value of which punishment will of course be diminished by the real uncertainty: as also, if there be any difference, the apparent value by the apparent uncertainty. Now this uncertainty is proportionally increased by every instance in which a man is known to commit the offence, without undergoing the punishment.<sup>63</sup>

This refers back to the calculus. The value of a pleasure or pain depends upon the elements of value from intensity to extent. Certainty of pain increases the value, uncertainty lowers it. Bentham is claiming the political sanction loses force or strength where punishment is uncertain. This in turn encourages people to commit an offence.

The moral sanction may prevent a robbery by indicating the indignation of the society against any and all who commit a particular offence. The more members of a community who disapprove of an act and who do not engage in an act, the less likely is that act to be done. Members of a society discern what is permissible and not permissible by both what the society says and does.

In both the cases where the past offence does tend to make it plausible to commit an offence in the future, one may say the cases "operate by the force or influence of

example."<sup>64</sup>

The simplest cases of producing mischief, i.e., immediate positive pain, have now been discussed. The whole topic of mischief needs further discussion, and so, Bentham turns to that topic, plus two illustrations in order to complete this unit.

Mischief may be divided according to 1) its nature, 2) its cause, and 3) the person or persons who is/are the object of it. In its nature, it will be simple or complex. If it is simple, it may be further divided into positive and negative. Regardless of any of these classifications it may be either certain or contingent. If it is negative it may avert pain or danger, and thus produce security.<sup>65</sup>

Mischief may be produced or caused by one single action or "not without the concurrence of other actions."<sup>66</sup> These actions may be by one person, or many people, and the acts may be the same kind or other kinds.

The person, or persons, who is/are the object of the mischief may be an assignable individual or group of individuals, or a group of unassignable individuals. As Bentham points out later "assignable" means that the person or persons is/are identified either "by name, or at least by description, in such manner as to be sufficiently distinguished from all others."<sup>67</sup> This latter qualification could be achieved, for example, by using words such as home owners, gas station attendants, or persons over eighteen

years of age.

The assignable individual who is the object of the mischief may be the person who caused it, or some other person or persons. Given that the object of the mischief is unassignable, then these persons may be the entire community or state, or some sub-set of it. If the assignable individual who is the object of the mischief also caused it, the mischief is called self-regarding. In all other instances it is extra-regarding. Moreover, if the mischief affects either the person who caused it or some other individual then it is private. If it affects the whole community it is called public, and if it affects a sub-set of the community it is named semi-public.

Two examples show how the classifications are used. Suppose a man drinks too much liquor and becomes intoxicated. Since this one instance may lead the person to repeat the act, it has a chance of producing mischief. The mischief, though, is self-regarding and private. It produces no alarm, but possible produces danger "by the influence of example."<sup>68</sup>

Suppose a person does not pay his/her public tax. Some benefit is withheld by this act, and so, the act is mischievous. If the tax is small the government would probably render the same services without this person's share of taxes. One could argue that the act was therefore not mischievous. Bentham would say this shows the consequences are not certain. In addition, the consequences certainly do

become mischievous if applied to the whole community, i.e., no one paid taxes. Police protection would cease, and the military would become non-existent. These would be highly undesirable consequences.

If no one paid taxes, the mischief would be evaluated by the calculus as follows: intensity and duration, unknown; uncertain, remote. "But in point of extent it is immense; and in point of fecundity, pregnant to a degree that baffles calculation."<sup>69</sup>

This application of the calculus underscores the point which has been made in several prior instances: legislation and punishment are Bentham's main concerns in IPML. Many examples have been given of using the calculus to evaluate pleasure, and that, primarily with respect to private ethics. For example, should this man have sexual intercourse with this woman, is a question of ethics which one could calculate. To Bentham, this question belongs to the same genre as the example on intoxication, except that it is private and extra-regarding. Of more importance is the attempt to apply the calculus to the consequences of a mischievous act, and this Bentham does in this instance and in the chapters which follow.

Bentham completes the chapter with a discussion of intentionality, consciousness, motive, and disposition, since they are "circumstances upon which the production of ...secondary mischief depends."<sup>70</sup> A good motive does not

eliminate secondary mischief if the primary consequences of an act are pernicious. However, given pernicious primary consequences, a bad motive, and beneficial secondary consequences, the whole act is not called bad because of the motive.

The motives which must be the most carefully checked with respect to secondary mischief are the self-regarding sort: physical desire, the love of wealth, the love of ease, the fear of pain, and the love of life. They are the most powerful and most extensive, and thus, they are capable of producing acts with a bad tendency. Or, as Bentham writes:

The aggravation which the secondary mischief of an act, in as far as it respects the future behavior of the same person,..., is as the tendency of the motive to produce, on the part of the same person, acts of the like bad tendency with that of the act in question.<sup>71</sup>

Insofar as secondary mischief concerns the future behavior of the same person, it "is aggravated or lessened by the apparent depravity or beneficence of his disposition."<sup>72</sup>

The consequences of an act may be either primary or secondary, natural or artificial, and these are distinctions which are important to IPML. Both sets of these consequences are related to punishment. The primary consequences of an act may be mischievous, and yet, the secondary may be beneficial.

This is the case, for instance, with all acts of punishment. When properly applied...., the primary mischief being never intended to fall but upon such persons as may happen to have committed some act which it is expedient to prevent, the secondary mischief, that is the alarm and danger, extends no farther than to such persons as are under temptation to commit it: in which cases, in as far as it tends to restrain them from committing such acts, it is of a beneficial nature.<sup>73</sup>

This view will be discussed at the appropriate place in the discussion of punishment per se.

Punishment is also an artificial consequence, annexed by political authority to an offensive act. It is used by the political authority in order to put "a stop to the production of events similar to the obnoxious part of its natural consequences." Bentham's view of punishment is, therefore, the next topic. In one sense, all which has been discussed to this point is prolegomenous; that which follows is substantive.

## END NOTES

- <sup>1</sup> Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, introduction by Laurence J. Lafleur, The Hafner Library of Classics (New York: Hafner Publishing Co., 1948), p. 70.
- <sup>2</sup> Ibid., p. 71.
- <sup>3</sup> Ibid., pp. 71-72.
- <sup>4</sup> Ibid., p. 71.
- <sup>5</sup> Ibid., pp. 71-73.
- <sup>6</sup> Ibid., p. 75.
- <sup>7</sup> Ibid., p. 76.
- <sup>8</sup> Ibid., pp. 76-77.
- <sup>9</sup> Ibid., p. 77.
- <sup>10</sup> Ibid., p. 80.
- <sup>11</sup> Ibid.
- <sup>12</sup> Ibid., p. 81.
- <sup>13</sup> Ibid., p. 87.
- <sup>14</sup> Ibid., p. 88.
- <sup>15</sup> Ibid., p. 78.
- <sup>16</sup> Ibid., p. 89.
- <sup>17</sup> Ibid., pp. 89-90.
- <sup>18</sup> Ibid., p. 90.
- <sup>19</sup> Ibid., p. 91.
- <sup>20</sup> Ibid., p. 94.

- 21 Ibid., p. 95.
- 22 Ibid., p. 92.
- 23 Ibid., p. 97.
- 24 Ibid., p. 98.
- 25 Ibid., p. 102.
- 26 Ibid., p. 99.
- 27 The Encyclopedia of Philosophy, reprint edition (1972), s.v. "Motives and Motivation," by William P. Alston, but see also, IPML, p. 155 for another view.
- 28 Bentham, An Introduction to the Principles, p. 102.
- 29 Ibid., n. 1.
- 30 Ibid., p. 120.
- 31 Ibid., p. 121.
- 32 Ibid., p. 122.
- 33 Ibid., p. 130.
- 34 Ibid., p. 131.
- 35 Ibid., p. 132.
- 36 Ibid., p. 133.
- 37 Ibid.
- 38 Ibid., n. 3.
- 39 Ibid., p. 134.
- 40 Ibid.
- 41 Ibid., p. 135.
- 42 Ibid., pp. 140-141.
- 43 Ibid., p. 142.
- 44 Ibid.
- 45 Ibid.

- <sup>46</sup> Ibid., p. 146.
- <sup>47</sup> Ibid., p. 147.
- <sup>48</sup> Ibid., p. 148.
- <sup>49</sup> Ibid., p. 149.
- <sup>50</sup> Ibid., p. 150.
- <sup>51</sup> Ibid., p. 151.
- <sup>52</sup> Ibid.
- <sup>53</sup> Ibid., p. 152.
- <sup>54</sup> Ibid.
- <sup>55</sup> Ibid.
- <sup>56</sup> Ibid., pp. 152-153.
- <sup>57</sup> Ibid., p. 153.
- <sup>58</sup> Ibid., p. 153.
- <sup>59</sup> Ibid., p. 151.
- <sup>60</sup> Ibid., p. 158-160.
- <sup>61</sup> Ibid., p. 155.
- <sup>62</sup> Ibid., pp. 155-156.
- <sup>63</sup> Ibid., p. 156.
- <sup>64</sup> Ibid., p. 157.
- <sup>65</sup> Ibid., p. 158.
- <sup>66</sup> Ibid.
- <sup>67</sup> Ibid., p. 205, n. 2.
- <sup>68</sup> Ibid., p. 160.
- <sup>69</sup> Ibid., p. 162.
- <sup>70</sup> Ibid., p. 164.
- <sup>71</sup> Ibid., p. 167.

<sup>72</sup> Ibid., p. 168.

<sup>73</sup> Ibid., pp. 157-158.

## CHAPTER VII

### ON PUNISHMENT

#### Introduction

The next three chapters of IPML, XIII-XV, may be considered as a section on punishment if for no other reason than the title of each of these chapters contains the word "punishment." One might argue for the inclusion of the lengthy chapter entitled, "Division of Offences," but that chapter explains the nature of an act which renders it liable to punishment, and explains nothing about punishment per se. A discussion of this latter chapter might precede the unit on punishment, as Bentham has suggested in the preface of IPML.<sup>1</sup> An understanding of "offence" is essential before one can meaningfully discuss punishment, for "offence" establishes some minimal or prima facie reason for punishment. "The man was punished because he broke the law" makes good sense; but "He was punished legally even though there was no law for him to break" seems absurd. Offences will be considered, however, in the next chapter and under their own special heading.

Moreover, since Bentham himself forged the link between the consequences of a mischievous act (Chapter XII) and punishment, the discussion will now turn to the latter

topic.

### Utilitarianism and Punishment

Chapter XIII begins in a manner which is reminiscent of the first sentence or sentences of two prior chapters: III and VI. The subject matter in each case is the same, while the emphasis or direction of a particular chapter shifts to suit Bentham's topic for the chapter. These chapters - III, VI, XIII - respectively, begin:

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...<sup>2</sup>

. . . . .

The business of government is to promote the happiness of the society, by punishing and rewarding. That part of its business which consists in punishing, is more particularly the subject of penal law. In proportion as an act tends to disturb the happiness, in proportion as the tendency of it is pernicious, will be the demand it creates for punishment.<sup>3</sup>

. . . . .

The general object which all laws have, or ought to have, in common, is to augment the happiness of the community; and therefore, in the first place, to exclude, as far as may be, everything that tends to subtract from that happiness: in other words, to exclude mischief.<sup>4</sup>

The good legislator will consider the happiness and security of the community which he/she represents. To be more direct, this will be the only end which the legislator has in view. In order to accomplish this unitary goal, the

legislator will enact proper laws. These laws, if followed, will promote the good as indicated by the calculus of Chapter IV. Where they are not obeyed, they will create a demand for punishment via some political sanction, but also as determined by the calculus. Bentham assumes "...that the criminal law sets up, in its rules, standards of behaviour to encourage certain types of conduct and discourage others...."<sup>5</sup>

However, Bentham is faced with a problem about punishment which he acknowledges early on in Chapter XIV and attempts to answer. According to his own analysis, any person who breaks the law performs a mischievous act. This act will tend to subtract from the happiness of the community and not augment it. If such a person is then punished this will subtract from the happiness of the community even more, for "all punishment is mischief: all punishment in itself is evil."<sup>6</sup> However, as a partisan of the principle of utility, it seems that Bentham is in a dilemma. He evaluates acts according to the tendency which they have to augment or diminish the happiness of the community. He approves of any act which augments the happiness; he disapproves of those which reduce happiness. Punishment has an immediate consequence of diminishing the happiness of any offending member of the community. It seems that Bentham cannot be in favor of punishment.

Bentham answers this counter-intuitive notion

forthwith. Given the principle of utility, and his views on laws and community happiness, he justifies punishment because it will prohibit or prevent some greater evil. As Bentham writes:

Upon the principle of utility, if it (punishment) ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.<sup>7</sup>

Bentham turns immediately to consider four cases where punishment ought not be admitted or used. However, before those are discussed, something more remains to be said about Bentham's justification of punishment.

Bentham does not attempt to justify or explain his view on punishment in the body of IPML. He has offered several insights about punishment in the prior chapters, and includes more information on it in a lengthy footnote to the passage which was quoted in the preceding paragraph. This footnote and one paragraph from Chapter XII will be discussed to determine, at least in part, Bentham's justification for punishment.

The distinction between the primary and secondary consequences of an act is essential to understanding Bentham's justification of punishment. This distinction was not made until the last chapter and loomed large in Bentham's discussion of the consequences of a mischievous act. Where mischief happens to an assignable individual or individuals, it is termed primary. If the mischief is

secondary, it extends to the whole community or some sub-set of unassignable individuals of the community.<sup>8</sup>

According to Bentham the primary and secondary consequences of an act need not possess the same quality. The primary consequences may be mischievous, while the secondary may be beneficial, and "this is the case, for instance, with all acts of punishment, when properly applied." The primary mischief or evil falls "upon such persons as may happen to have committed some act which it is expedient to prevent...." Since this is mischief it tends to subtract from the happiness of the community, but this is only half the account. The secondary mischief, i.e., alarm and danger, "extends no farther than to such persons as are under temptation to commit it (some act which it is expedient to prevent)." These persons are thus restrained from committing a mischievous act or acts by the alarm and danger, and thus the secondary mischief "is of a beneficial nature."<sup>9</sup>

This paragraph is interesting for several reasons, and calls for comment. Bentham begins with the neutral phrase "primary and secondary consequences of an act"<sup>10</sup> even though the discussion to this point in the chapter has been about primary and secondary mischief. He then ostensibly argues for a combination of mischievous primary consequences, and beneficial secondary consequences. Moreover, these secondary consequences could be beneficial "to such a degree as even greatly to outweigh the mischief of

the primary."<sup>11</sup> Legal punishment is cited as the paradigm of this case, but in order to reach this conclusion there is a shift in Bentham's terminology. He writes of primary mischief and then rather than beneficial consequences, he writes of secondary mischief, i.e., alarm and danger, as beneficial since they tend to restrain a person or persons who are under temptation to commit a mischievous act. Earlier, Bentham has argued that alarm is a pain of apprehension, and danger "nothing but the chance of pain." So it seems that pain and the chance of pain may produce that which is beneficial, or that secondary mischief may prove beneficial.<sup>12</sup>

Bentham seems to be inconsistent with his own calculus. According to that method of calculating, one adds the values of pleasures on one side, and the values of pains on another. If the balance is on the side of pain, then the act has a bad tendency on the whole. Punishment produces pain, and this would then mean that punishment has a bad tendency. Punishment also produces alarm and danger, i.e., pain, to people under temptation to commit acts of a similar sort and this secondary mischief also has a bad tendency according to the calculus. If this is not the case, then why call it mischief?

Bentham, however, thinks that the law may produce artificial tutelary motives via an awareness of danger. People are disposed to self-presentation and because of

that motive may refrain from a mischievous act. They do not want to get caught in the act of committing an offence, or face a criminal trial for an offence. The danger of detection operates as a positive force with both the love of reputation and the desire of amity.

Bentham can then reason as follows: punishment is mischief, and it does produce a secondary mischief of alarm and danger, i.e., pain, to those under temptation to commit acts such as the one for which this person was punished. The pain of secondary mischief is not followed by further pains, if the tempted person uses it as an artificial tutelary motive. This person is restrained by this motive, and from an experience which was initially painful, he reaps a benefit. Pleasure may follow pain, according to the calculus. In this instance the initial pain was not fecund at all and very impure. Thus it is that the tendency of a mischievous act may be beneficial. Moreover, this is consistent with Bentham's explanation of the tendency of the act throughout the text.

This paragraph (XII, 14)<sup>13</sup> presents the preliminary rationale for punishment. IPML began with an explanation of the principle of utility, applied it in the calculus, analyzed an "act" and its surrounding circumstances, and as an introduction to a penal code now faces the question of the justification of punishment. Punishment produces pain, and little or no pleasure. If pleasure and pain

determine good and evil respectively, then punishment appears to be an evil. Bentham must show that it is beneficial and this is the case he claims because of its deterrent effect. It deters only those under temptation to commit an offence, and in this capacity as an artificial tutelary motive it benefits the whole society.

This deterrent effect is, in part, what Professor Hart calls the general deterrent effect. It consists of "the threat of punishment to all who are tempted to commit offences."<sup>14</sup> In order to ascertain Bentham's views on the individual deterrent effect the footnote at the beginning of Chapter XIII will now be examined.

#### The Ends of Punishment

Apart from this footnote there is very little theoretical or analytical discussion of Bentham's view of punishment. There are rather complete descriptions of cases unmeet for punishment, but very little which is positive, i.e., when to punish, and nothing in the body of the text on the theory of punishment. By examining the first footnote in the chapter, an embryonic view begins to emerge.

Bentham says nothing about the general justifying aim of punishment. In one sense he assumes it: according to the principle of utility punishment is justified because of its beneficial consequences. This point was made in the last chapter of IPML. In this chapter, however, he is concerned with justifying specific or individual punishment.

His assumption remains the same as in the case of the general justifying aim. The justification for inflicting punishment in any instance must be the beneficial consequences of the act.

"The immediate principal end of punishment is to control action."<sup>15</sup> This is accomplished via one or both of two different means in the respect to any offender. If the offender is physically restrained or detained, punishment operates by disablement. If on the other hand the offender in a sense is made to modify his/her will, then punishment has a reforming effect. The former mode is immediate in its effects, while the latter considers the long term effects of any punishment. One could infer that Bentham considers punishment as a means of changing the character of the offender. Thus, once the offender is released or has been punished, he/she would choose to act in a constructive, as opposed to a mischievous, manner.

Punishment may influence the will of a non-offender, who is a potential offender, by way of example. This is consistent with the paragraph from the last chapter of IPML which has already been discussed. The alarm and danger, or secondary mischief, will extend only to those persons who are tempted to commit like mischievous acts and deter them from acting in a similar manner. This "danger," or sense of possible danger to themselves, forms an artificial tutelary motive which actually weakens the temptation

to commit the offence. Since the strength of the temptation is a ratio between the seducing motives and the tutelary motives, providing a strong tutelary motive reduces the strength of the temptation.<sup>16</sup>

Bentham emphasizes the foregoing point with the observation that "example is the most important end of all, in proportion as the number of the persons under temptation to offend is to one."<sup>17</sup> This is an instance of further reliance on the calculus with respect to punishment, and shows Bentham's predilection for counting and calculation. In effect, he thinks punishment provides a deterrent since it acts as a tutelary motive. This deterrent is all the more useful, i.e., good, where large numbers of people are tempted to commit offences of the sort for which a given offender is punished. If offenders are not punished, crimes will be committed frequently and without any sense of guilt. When this happens another person, or persons, may consider committing an offence. Without the restraint of possible punishment, the temptation becomes much stronger, and thus the absence of punishment of "a past offence tends to pave the way for the commission of a future offence."<sup>18</sup> This "invitation" to commit an offence operates "by the force or influence of example." Thus the example of a lack of punishment tends to increase the number of offences committed, while punishment of offenders tends to serve as an example, and reduce the number of offences.

Where many are tempted, there punishment of one offender may have its greatest benefit. This happens because punishment may weaken the temptation or negate the idea of performing the offence.

Whether the foregoing is too rationalistic or not will be discussed in a more appropriate place. Professor Hart seems to suggest that it is; whereas Bentham will demur. The answer, in part, depends upon whether or not the passions calculate.<sup>19</sup>

Bentham does discuss reformation, disablement, and example further in a later chapter. He also includes "compensation" which is also called vindictive satisfaction. Bentham also discusses that end of punishment in the footnote which begins Chapter XIII. He rejects compensation only as sufficient for punishment, since any pleasure which one would receive from the punishment of another will never be equivalent to the pain of punishment. Bentham is arbitrary on this point, for he states his position as if it was self-evident and/or obvious. Moreover, he has acknowledged earlier that a person who has a motive of ill-will, such as malice, envy, or cruelty, may receive pleasure from the suffering of an adversary.<sup>20</sup> He called this pleasure good, but warned of possible bad consequences associated with it. These bad consequences, then, must be the suffering of the offender, and these consequences or pains will always be greater than the pleasures of ill-will. At least

Bentham is convinced of this.

Punishment which disables or reforms, or provides an example, may compensate as an ancillary end. Bentham makes a stronger statement than this, for he writes, "the punishment, however, which is allotted to the other purposes, ought, as far as it can be done without expense, be accommodated to this."<sup>21</sup> The other ends are paramount, but vindictive satisfaction ought to be included where it can be naturally included with those three. Bentham's rule seems to be: Don't punish for this reason alone, but insofar as possible include it when you can.

The ends of punishment are four: reformation, disablement, compensation, and example. Bentham has very little to say about these, but says much more about "cases unmeet for punishment." This topic comprises the major portion of Chapter XIII and the discussion will now turn to these cases.

#### Cases Unmeet for Punishment

The cases unmeet for punishment are also four: where it is groundless, inefficacious, unprofitable, or needless. Each of these cases will be discussed in turn. In each instance the case will be explained, and as is needed, problems with the case will be explored.

Punishment is groundless where no mischief has been done by the act under consideration, or if the act is not mischievous on the whole. Suppose an act is generally

considered mischievous. For example, one person attacking another would fall into this category. If, however, the attack was mutual no mischief would have been done. This would be the case, for example, in a boxing match. Even if only one of the people gave his/her consent - provided it was free, and fairly obtained - no mischief would be done according to Bentham. Thus if a sadist joined forces with a masochist and by beating him/her produced pain, no mischief would have been done if the masochist fairly and freely agreed to the act. Such consent would remove such an act from consideration for legal punishment. This conclusion may seem odd and even debatable, but it is consistent with what Bentham has written.<sup>22</sup>

There is another conclusion which is consistent with another reason Bentham gives for a punishment being groundless, but which Bentham would not want to draw. If mischief was produced by an act, but this mischief led to a benefit which was greater than the mischief, then any proposed punishment of any alleged offender would be groundless. Examples of such acts would be "precaution against instant calamity" and "anything that is done in the exercise of the several sorts of powers necessary to be established in every community, to wit, domestic, judicial, military, and supreme." The second of these could lead to the punishment of the innocent.<sup>23</sup>

Bentham attempted to avoid this by indicating in the

chapter of IPML immediately preceding this one that the mischief of properly applied acts of punishment is intended to fall only on "such persons as may happen to have committed some act which it is expedient to prevent."<sup>24</sup> These acts would be mischievous acts, or acts which produce more pain than pleasure, and are prohibited legally. So one would never punish the innocent since he/she never would have done some act "which it is expedient to prevent," i.e., any mischief.

This is a noble attempt, but it is not consistent with the view that one may perform an act which is mischievous, and yet not be punished because some benefit of a greater value is realized. Consider the case which John Hope Franklin cites in his history text, From Slavery to Freedom, with respect to New York City.

The winter of 1740-41 was very severe and, as is often the case, the poorest class, i.e., the Negro slaves, suffered the most from it. Some of the slaves and poor whites began setting houses of whites on fire, and looting the houses before they were set on fire. Panic gripped New York, and the city council knew it must act. This was made more urgent since a rumor began circulating that the "Negroes and poor whites were conspiring to destroy law and order in the city and seize control." The council approved two very interesting measures: 1) a pardon for any informer who might be involved in the conspiracy, plus

2) rewards of varying amounts for information about the conspiracy. Any white person who informed would receive 100 pounds sterling; a free Negro, Indian, or mulatto would receive forty-five pounds. A slave would only receive twenty pounds, but in addition would gain his or her freedom.<sup>25</sup>

An indentured servant named Mary Burton made the most of the situation for she made a series of revelations which were "as sensational as they were inaccurate." Other testimony was given and "the public, the jury, and the judges were so completely caught up in the excitement of the moment that convictions were not to be denied." Before the ordeal was over eighteen Negroes were hanged, thirteen burned alive, and seventy were banished. Four white people were also hanged.<sup>26</sup>

The purported uprising was squelched, and so were any future ones. "There were no more serious outbursts in the colonial period. The citizens, perhaps, had outdone themselves and realized it."<sup>27</sup>

The citizens of New York acted unjustly, in some of the hangings, burnings, and banishments. Some, if not most, of those convicted and punished were innocent. Their acts, however, had legal approval, and were beneficial on the whole. The arson and looting were stopped and further uprisings suppressed. This benefit does not render any punishment of the citizens who participated in these

atrocities groundless. It is doubtful that the benefit should be considered a mitigating circumstance.

In this case innocent people were punished and a benefit of great value was produced. Whether the benefit outweighed the questionable acts of the citizens and the loss of lives, remains an open question. Bentham would want to contend two different but related points about the aforementioned incident. 1) The people who were tortured, banished and executed were not "legally punished." Since they were innocent and known to be innocent they could not have been legally punished. However, Bentham cannot claim this for what was done was in accord with the laws enacted by the council. These may have been ad hoc laws, but they served their purpose: they united the colony and eliminated any threat of insurrection. One could argue that it was better that twenty-two should die, rather than hundreds die and a society be destroyed. 2) Bentham could claim that any proposed punishment for those who enacted the laws and had the punishments meted out would be groundless since any mischief produced was outweighed by the benefits produced. In this case, one could argue, he was correct. However, some innocent people were unjustly killed. Regardless of the benefits, this is one of the worst commentaries one can make about a society. Should a society sacrifice justice in order to ensure its own serenity and cohesiveness? Without justice one may have a collection of individuals,

but no community or society.

However, consider the Holmes case. Holmes either threw, or had thrown, into the North Atlantic fourteen male and two female passengers and allowed twenty-five to remain in the long boat. They were rescued: the others drowned. Was Holmes guilty of murder? Should Holmes have been prosecuted? On Bentham's view punishment is rendered groundless if the mischief is outweighed by benefit, and thus Holmes should not be punished. There are no grounds for punishment in this case, according to Bentham, and yet one wonders. The judge and jury thought there were grounds for punishment and acted accordingly.<sup>28</sup>

Punishment is also groundless in cases where there is certainty of adequate compensation for the offence; yet this must apply "in all cases where the offence can be committed." In some cases this will be no grounds for "absolute impunity," but it can serve as a reason for a lesser punishment. This may be the reason why embezzlement is punished on a different basis than armed robbery. In the former case restitution may be made, and this could mitigate the sentence.<sup>29</sup>

#### Inefficacious Punishment

If punishment cannot act so as to prevent mischief it is called inefficacious. Punishment is inefficacious in the cases where it was not enacted until after the mischievous act was done. The threat of punishment is "forward looking" and cannot serve as a deterrent where there

is nothing illegal to deter.

If the law was enacted but not promulgated to the people "on whom it seems intended that it should operate" it is also considered inefficacious. It cannot prevent mischief in this instance because the mischief or evil has not been identified. Pointing out the mischief, or making the law known is a necessary condition for legal punishment. The law cannot prevent mischief X in the case where the only constituted authorities have not made the public aware that X is not to be done.

Suppose the law is properly enacted and made known to the citizens of the community. The penal provision "could produce no effect on him" in infancy, insanity, and intoxication.<sup>31</sup> One could grant the first and second of these, but the case of intoxication presents problems. Punishment cannot act so as to prevent mischief by one who is intoxicated, since this person is not in control of his/her behavior. This, however, would not excuse such a one from punishment, as infancy would, for example. Suppose a ten year old is playing with matches and sets a house on fire. In this case age would be/could be an extenuating circumstance. Intoxication would not be so considered. An adult would not be excused for starting a fire which destroyed a house solely on the grounds of intoxication. If this is not convincing, consider the case of an intoxicated adult who causes an automobile accident. Intoxication

is not an extenuating circumstance, and would even call for a more severe punishment in our society.

Bentham is aware of the limitations of his methodology. In a footnote he explains that infancy and intoxication "cannot be looked upon in practice as affording sufficient grounds for absolute impunity."<sup>32</sup> The will in these cases cannot be deterred, and therefore, the prohibitions of the law could have no effect on the person. However, offenders would not be granted complete immunity from prosecution or punishment for infancy or intoxication.

Infancy and intoxication are non-comparable cases. The law assumes one chooses to be intoxicated, or at least could have prevented becoming intoxicated to the point of being dangerous to others. One is an infant or one is not an infant: no choice is involved. Intoxication is usually a temporary state of being, which a person may be in one day and not the next. It is episodic, whereas infancy is a continuous state which hopefully ends at some point of minimal maturity. Infancy and intoxication seem to be an odd couple under the same general heading. Punishment may be ineffective with both but for different reasons. Infants, in general, lack judgment and understanding. People who become intoxicated may, in general, demonstrate good judgment, but under the influence of alcohol lose this judgment. Infants have the potential for good judgment, but not always the capability. Adults who become intoxicated may possess

good judgment prior to becoming intoxicated, but actually cannot make a good judgment after being intoxicated. The law could have produced an effect on them if they had remained sober. They potentially could have been influenced; with infants the potentiality is dormant as long as they remain infants.

A law may be properly enacted, promulgated, and able to produce an effect on a person; but in an individual case it may not. This may happen if the act is done unintentionally, if the person is not aware that the act has a tendency to produce mischief, or in any case of missupposal.

Punishment is also inefficacious

Where, though the penal clause might exercise a full and prevailing influence, were it to act alone, yet by the predominant influence of some opposite cause upon the will, it must necessarily be ineffectual; because the evil which he sets himself about to undergo, in the case of his not engaging in the act, is so great, that the evil denounced by the penal clause, in case of his engaging in it, cannot appear greater.<sup>33</sup>

Two examples are given: 1) physical danger and 2) threatened mischief. In both these cases apparently "some opposite superior force" is in operation.<sup>34</sup>

The last instance in which punishment is inefficacious is akin to the immediately preceding one. Punishment, or the threat of punishment, cannot prevent mischief where a person is either physically compelled to perform an act or is physically restrained from an action.

### Unprofitable Punishment

In the ordinary course of events it is impossible to establish all the cases in which punishment is unprofitable. In order to establish this the evil of the offence must be compared to the evils of punishment and since the former vary from particular offence to particular offence, each case will be different. It is possible to analyze the evils of punishment, and thus gain some insight into possible cases in which the mischief of punishment might be greater than that which it prevented.

There are four different evils of punishment. These are distinguished from each other by the persons affected. People who obey the law and are thereby deterred from performing an act know of the evil of coercion or restraint. The law does prohibit and inhibit certain actions, and this is an evil. This would be a beneficial evil where it is effective, as has been indicated earlier. This evil "will be greater or less, according to the nature of the act from which the party is restrained."<sup>35</sup>

The law breaker is aware of the evil of apprehension. He/she is open to punishment if detected, apprehended, and found guilty. One who is punished undergoes the evil of sufferance. Anyone who has sympathy for a sufferer of any of these classes of evil feels the pains of a derivative evil. This is an indirect evil by association.

There may be extraordinary circumstances which render

punishment unprofitable, even though "in the ordinary state of things, the evil resulting from the punishment is not greater than the benefit."<sup>36</sup> These circumstances include a dramatic increase in the number of delinquents, and the punishment of a delinquent who renders some highly valued service to the community. Also punishment may become unprofitable if the people in general believe some offence ought not be prohibited at all, or if offenders "ought not be punished in the way in question."<sup>37</sup> Moreover, the displeasure of some foreign power which a country wishes to please, or retain as an ally, may render punishment too expensive. The common thread in all these cases is one ought not to punish "where the mischief it would produce would be greater than what it prevented."<sup>38</sup>

#### Needless Punishment

The last class in which punishment ought not be inflicted is where punishment is needless. It is not needed because "the mischief may be prevented...without it" or "at a cheaper rate." The mischief in this case is somewhat difficult to identify with precision for Bentham calls them "all those offences which consist in the disseminating pernicious principles in matters of duty; of whatever kind the duty be; whether political, or moral or religious."<sup>39</sup> Those who teach pernicious principles should not be punished, but exposed by some other individual. If the state wants to enter the discussion, it should do so by using the pen rather

than the sword.

Bentham also notes that terror might be cheaper than punishment in certain cases. He does not elaborate on or illustrate this point.<sup>40</sup> Terror does render punishment needless, but if it is does so at a cheaper rate, one might ask "Why not use it all the time?" If terror is only used sporadically and is authorized by the government, it could be argued that the mischief of it is outweighed by the good it does. However, in this case no punishment would be needed because any punishment would be groundless. To say that terror by the government renders punishment needless may be true and this government may be augmenting the total happiness of the country, but what a commentary on that society and its legal system. One could only hope that one was not a part of the terrorized minority. Governments do terrorize, but "ought" governments to terrorize? Bentham answers this question in the affirmative, but the justice of any such acts could be, and should be questioned.

#### The Rules of Punishment

So there are four cases in which punishment is not worthwhile or ought not, according to the utilitarian standard, to be done. However, if punishment is to be used there are four subordinate goals which the legislator who is governed by the principle of utility will be guided by. These are: 1) to prevent, where possible any offence from being committed; 2) if an offence is committed, to induce the

offencer "to commit an offence less mischievous, rather than more mischievous"; 3) if an offence is committed, to dispose the offender "to do no more mischief than is necessary to his purpose"; and 4) to prevent mischief "at as cheap a rate as possible."<sup>41</sup>

Bentham states thirteen rules or canons "by which the proportion of punishments to offences is to be governed." These are not stated consecutively nor are they all commented on to the same degree. There is something to be said for presenting them as a unit, offering some general comments, and then commenting on individual rules as it seems appropriate. By doing this Bentham's plan may receive a unity which it seems to lack in the original. At least, one can hope for some over-all unity in the discussion.

Bentham's rules are:

Rule 1. 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.

. . . . .

Rule 2. The greater the mischief of the offence, the greater is the expense, which it may be worth while to be at, in the way of punishment.

. . . . .

Rule 3. Where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.

. . . . .

Rule 4. The punishment should be adjusted in such a manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving

birth to it.

. . . . .

Rule 5. The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.

. . . . .

Rule 6. 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.

. . . . .

Rule 7. To enable the value of the 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.

. . . . .

Rule 8. Punishment must be further increased in point of magnitude, in proportion as it falls short in point of proximity.

. . . . .

Rule 9. 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.

. . . . .

Rule 10. When a punishment, which in point of quality is particularly well calculated to answer its intention, cannot exist in less than a certain quantity, it may sometimes be of use, for the sake of employing it to stretch a little beyond that quantity which on other accounts would be strictly necessary.

Rule 11. In particular, this may sometimes be the case, where the punishment proposed is of such a nature as to be particularly well calculated to answer the purpose of a moral lesson.

. . . . .

Rule 12. In adjusting the quantity of punishment, the circumstances, by which all punishment may be rendered unprofitable, ought to be attended to.

. . . . .

Rule 13. Among provisions designed to perfect the proportion between punishments and offences, if any occur, which, by their own particular good effects, would not make up for the harm they would do by adding to the intricacy of the Code, they should be omitted.<sup>43</sup>

Rules 1. through 4. state the minimum limits of punishment, whereas 5. indicates the maximum limit. Thus the pain of the punishment must outweigh the pleasure of the offence; it must cause a lesser rather than a greater offence to be committed; a major offence against society deserves major punishment; and every discrete part of the offence should have some punishment connected with it. These rules should be used by the legislator in determining the acceptable minimum punishment. The adroit legislator also will not legislate more punishment than is necessary. The laws then provide their own motives for abiding by them. Any law breaker should know that the law, via the political sanction, will require more of him/her than was received in the act of breaking the law. This applies to any offence or to any increase in the mischievous consequences of any offence.

Rule 6. is also to serve as a guide to the legislator, but it should be used "principally for guiding the judge in

his endeavours to conform, on both sides, to the intentions of the legislator."<sup>43</sup>

Rule 1. is singled out by Bentham for special discussion for several reasons. First, this rule is based on Bentham's view of what is meant by "strength of a temptation." In the chapter on "Dispositions" Bentham defined the strength of temptation as depending

...upon the ratio between the force of the seducing motives on the one hand, and such of the occasional tutelary ones, as the circumstances of the case call forth into action, on the other. The temptation, then, may be said to be strong, when the pleasure or advantage to be got from the crime is such as in the eyes of the offender must appear great in comparison of the trouble and danger that appear to him to accompany the enterprise: slight or weak, when that pleasure or advantage is such as must appear small in comparison of such trouble and such danger."<sup>44</sup>

In the current chapter Bentham observes

The strength of the temptation,..., is as the profit of the offence: the quantum of the punishment must rise with the profit of the offence:..., it must therefore rise with the strength of the temptation."<sup>45</sup>

Punishment, or the threat of punishment, serves as an artificial tutelary motive, as has been shown earlier. This artificial motive not only teaches, it "constitutes the restraining motive"<sup>46</sup> which keeps a person from committing an offence. If a possible offender is not restrained by the threat of punishment, then in any such instance, punishment is inefficacious. In order to insure the efficacy of punishment it must be of sufficient quantity to outweigh the

profit of the offence.

To those who think that "the quantum of the punishment must rise with the profit of the offence" is a cruel or harsh rule, Bentham replies in two ways. They either fail to understand the rule, or they fail to see the cruelty of their own position. Those who lack understanding would make punishment inefficacious, and this is answered by making them aware of the relationship between the profit of the offence or the impelling motive, and the restraining motive of punishment.

If punishment is reduced below the level necessary for it to act as a restraining motive, then anyone who so reduced it would be acting in partial benevolence and not with the most extensive benevolence which utility requires.<sup>47</sup> This partial benevolence would be cruel to the public since they would be exposed to diverse mischief, but it would also be cruel to the offender for he would be punished for no purpose "...and without the chance of compassing that beneficial end, by which alone the introduction of the evil of punishment is to be justified."<sup>48</sup> In this latter case punishment would have no purpose since it would be inefficacious, and it would lose the force of alarm and danger and, therefore, lose its beneficialness.

Rule 1. also is directly related to the calculus. It includes "value," which is a key concept in the calculus. He observes, however, that "value" is "less perspicuous"

than "quantity."<sup>49</sup> However, quantity does not "properly include the circumstances either of certainty or proximity" and these circumstances are necessary when estimating the value or force of pleasure or pain. If a putative punishment for an offence is compared to the apparent - to the offender - profit of the offence, punishment is lacking in both certainty and proximity. Any profit from an offence is more certain and more immediate, according to Bentham's estimate - at least that is what the offender believes. This deficiency can only be eliminated by adding to the value in point of magnitude, for according to Bentham "...there is no other way in which it can receive any addition to its value, but by increasing the magnitude."<sup>50</sup> "Magnitude" has not been defined in IPML, but the context and a later characterization indicate that it includes intensity and duration only. Bentham's strong statement about the increase in the value of punishment coming from an increase in no other way than via magnitude, emphasizes a point which he made earlier in discussing the calculus: the value of a pain or pleasure may be calculated by itself by considering intensity, duration, certainty, and propinquity, and these alone.<sup>52</sup> These variables may be used to calculate the value of a specific pain for an individual person, especially one who has broken the law.

In order to remedy any deficiency in certainty and proximity, Bentham instituted Rules 7. and 8. to augment

Rule 1. Rule 1. is also augmented by Rule 9. which asks the question whether or not a particular offence might indicate a habit on the part of the offender. If a habit is indicated, punishing for the specific offence in question might render the punishment inefficacious. So, if a habitual practice is indicated, the value of the punishment should be increased in order to restrain the person from the habit, and in order to insure that the offence, or possible series of offences, is unprofitable.<sup>53</sup> Thus, Rules 7., 8. and 9. act so as to augment Rule 1.

Two more rules also allow for increasing the punishment: 10. and 11. Rule 11. is a particularization of the more general Rule 10. but adds an interesting insight to it. Rule 10. allows for punishment to be increased in quantity, i.e., intensity and duration, if a punishment which is well suited for the purpose cannot be administered in an amount less than might be absolutely necessary. This is especially true, if the punishment serves "the purpose of a moral lesson." Bentham cites as a specific illustration "...the infamy of a public exhibition....for him who lifts up his hand against a woman, or against his father."<sup>54</sup>

Rule 12. simply calls for a consideration of the circumstances which render punishment unprofitable when one is adjusting the quantity of punishment. In other words, there is no need to punish if more mischief is produced than is

prevented.

In Rule 13. Bentham applies the principle of utility to the twelve rules. The system may be worse than useless if minute distinctions which really do not make a difference are allowed a major role. Forget the minor points, especially where they create more harm than good with respect to the rules. Do that, even with respect to these rules, which augments the total happiness of the community.

There are two other paragraphs which contain material which need comment. One of them is well-known and often quoted; the other has been overlooked. The best known will be saved for last.

Punishment belongs under the aegis of the political sanction. This sanction is only one of four: the physical, moral, and religious are the other three.<sup>55</sup> Since all four of these may be used to produce the same effect, one might expect quantities of punishment to be adjusted - downward - because of the influence of the other three sanctions. They do help, but no downward adjustment is made because the other sanctions cannot be counted on with any degree of certainty or regularity. The moral sanction on occasion may be "adopted into and modified by the political," but apart from that it suffers the same defects as the physical and religious sanctions. According to Bentham "the legislator is therefore obliged to provide the full complement of punishment,..." because the force of other sanctions "...can never

be reduced, like political punishment, into exact lots, nor meted out in number, quantity, and value.<sup>56</sup>

The view expressed by Bentham here should not be overrated, nor undervalued. His position seems quite clear: the physical, moral, and religious sanctions are unlike the political sanction in that they fail to fit the calculus. These sanctions cannot be specified with respect to number, quantity, and value. If the moral sanction qua moral sanction is "never determinate enough to be depended upon,"<sup>57</sup> except where it has been subsumed under the political sanction, then this casts further doubt about the applicability of the calculus to the area of morals. At least the calculus fails in application to the negative aspect of morals, i.e., the calculation of pain. Moreover, the calculus is accepted as being the instrument which establishes the correct ratio of punishment to offences, and thus shows this application to be the paradigm case, at least in Bentham's thinking.

Bentham's view of the threat of punishment as restraining one from committing a crime may be, and has been questioned. Professor Hart considers it as presenting a "rationalistic picture of 'criminal deliberation'" and rejects Bentham's approach.<sup>58</sup> Bentham was aware of the possibility of such potential criticism and addresses it in paragraphs of which portions are often repeated.

There are some, perhaps, who at first

sight, may look upon the nicety employed in the adjustment of such rules, as so much labour lost: for gross ignorance, they will say, never troubles itself about laws, and passion does not calculate,...when matters of such importance as pain and pleasure are at stake, and these in the highest degree (...) who is there that does not calculate? Men calculate, some with less exactness, indeed, some with more: but all men calculate...Passion calculates, more or less, in every man:...<sup>59</sup>

What can it mean for the passions to calculate? Passions, sentiments, feelings seem to be ways in which people react to situations. They may be influenced by reason, or reasons, and in turn, may influence how a person reasons or fails to reason. One can understand the Humean notion of reason being the slave of passions, but Bentham seems to be giving the passions "a mind of their own."

Bentham is attempting to answer a potential problem. His list of rules are based on restraining a person from breaking the law or inducing a person to do less mischief than more. He does not appeal to consciousness for aid, but assumes that certain motives will be in operation. He has earlier rejected motives which influence the mind only, in favor of those which move one to action - motives of the will. Having made the division, he is able to explain actions via motives, but motives do not seem to be amenable to rules for guidance. He needs a blending of intellect and motive at this point, but only has the latter. Given the emphasis of the chapter, one understands Professor Hart's criticism with respect to its "rationalistic picture of

criminal deliberation." Bentham counters with a rationalism of the passions, which while delivered with some feeling, or passion, leaves the reader unconvinced. He had no other course open, however.

#### Properties of Punishment

Having stated these rules, Bentham finishes the unit on punishment by listing and explaining the properties to be given to a lot of punishment. These properties will be applied in conformity with the rules, and in certain instances, the properties are discussed on the basis of the contribution which they make to the rules. In each case, though, the quality, or the property, will be regulated by the quantity, or the proportion.<sup>60</sup>

The eleven properties or qualities of punishment are: variability, equilability, commensurability, characteristicalness, exemplarity, frugality, subserviency to reformation, efficacy in disabling, subserviency to compensation, popularity, and remissibility. Each of these will be discussed in turn, albeit somewhat briefly.

The first rule of proportion attempted to insure that punishment was efficacious. The fourth rule allowed for and called for minute adjustments to correspond to parts of the mischief of offence, while the fifth rule aimed at making sure that punishment was not needless. There is a common thread in all these rules: punishment should vary depending upon certain factors.<sup>61</sup> Therefore, punishment should

be variable or demonstrate variability.<sup>62</sup>

Equalibilty tends to function, or ought to function in tandem, with variability. It also is related to, or comes from, the sixth rule. Even if a punishment is variable, it may in some circumstances produce too much pain or none at all. For instance, consider banishment. Suppose an offender wanted to come to the United States, and received as a sentence banishment to the United States. Would that sentence produce any pain? Obviously not. An equable punishment will take this sort of circumstance into consideration. It will insure that "the pain which is produced by any mode of punishment, will be the joint effect of the punishment which is applied to him, and the circumstances in which he is exposed to it."<sup>63</sup>

The third rule of proportion spoke of inducing a man to prefer a lesser offence by having a sufficiently greater punishment for the greater offence. This is fine rhetoric, but how can it be done? According to Bentham this can be done by insuring commensurability between offences. How can one be sure of some common measure between two different punishments? This is difficult since "...punishments of different kinds are in few instances uniformly commensurable."<sup>65</sup> This can be done by adding to the quantity of the lesser punishment, either some punishment of the same kind or a different kind.

It is desirable that punishment resemble or be like

the offence. "When this is the case with a punishment and an offence, the punishment is said to bear an analogy to, or to be characteristic of the offence." In this case the punishment possesses characteristicalness or the fourth property to be given to a lot of punishment. Retaliation is the prime example of this type of property.<sup>66</sup>

It has been shown that example is the most important end of punishment. Suppose one could make an example of an offender without any real or actual punishment. That particular technique should be used since one would apparently be punished, without actually being punished, and yet the beneficial results would accrue to the community at large. Since the apparent punishment does all the service and the real does the mischief, any unnecessary addition to the real punishment would make that punishment needless. So where the same results may be achieved at a cheaper rate, choose that approach. Any punishment which does this is called exemplary.<sup>67</sup>

The fifth rule of proportion required no more punishment than was necessary in order to bring compliance with the rules. Any more punishment would be unnecessary and render the rules unfrugal. Frugality is desirable and is the sixth property.<sup>68</sup>

Exemplarity has been shown to be one of the properties which punishment should have. This property represents one of the four distinct ends of punishment: reformation,

disablement, compensation, and example.

In order to reform an offender one needs to know what motive caused him to commit the offence. Suppose the motive for an offence was ill-will. This indicates irascible affections on the part of the offender, and Bentham recommends a spare diet. If indolence and pecuniary interest move a person to robbery, for example, Bentham thinks penal labor may have a reforming tendency.<sup>69</sup>

The surest way of disabling an offender is by putting him/her to death. This punishment is also unfrugal, and so, other means should be sought. Imprisonment works very well, and in other instances, all one needs to do is remove the offender from the opportunity of taking advantage of a situation.

Punishments can be compensatory. If this compensation is vindictive in nature, it will be based on the quantity of punishment. Monetary compensation is nearly the same as pecuniary punishment.<sup>70</sup>

The absence of unpopularity is very much to be desired of any punishment. An unpopular punishment leads people to withhold their assistance to the execution of the law, which leads to the uncertainty of punishment.<sup>71</sup> This then may cause more people to commit the offence. Any punishment which is both unpopular and based on the principle of utility "ought not to be employed."<sup>71</sup> If it is only the former, then it is the task of the legislator to instruct

and correct the people, for they have failed to understand that they are taking issue with that which is for their own interest.

Insofar as possible punishment should be remissable. Suppose a person who was actually innocent was found guilty. If that person has received all of his/her punishment, then remissability is out of the question. This is then a point to be made for chronical punishments, such as imprisonment, banishment, and penal labor. Acute punishments are not remissable. These include, but are not limited to, whipping, branding, mutilation, and capital punishment. The latter is obviously irremissible, and should be carefully scrutinized for this reason.<sup>72</sup>

No one punishment is perfect, and none possesses all these properties: One must carefully mix and match these properties, carefully observing the rules of punishment, and the ends of punishment, in order to attain the most apt punishment possible. The offender, the judge, the legislator, and the community at large must all be well served by such a compromise.

### Conclusion

This chapter may be too long and includes what may seem to be needless detail. However, if as has been argued, Bentham was writing an introduction to a penal code, then his view of punishment is of prime concern. Since this work is dedicated to the proposition that IPML is precisely that,

then this becomes, in part, the justification for this rather lengthy chapter.

The unity and order of IPML are now fairly obvious. As the preface states it was written as an introduction to a penal code. In order to establish this code Bentham explained the principle of utility and showed its relation to government. The calculus applied the principle to acts, but its primary function is the evaluation of acts of legislation and/or punishment. Acts, motives, intentions, along with their consequences had to be explained in order to clarify the central concepts of breaking the law. Having all that Bentham then turned to "punishment," and gave a rationale for it, in addition to rules which govern its usage.

These chapters, along with the next, provide the capstone for IPML. They were Bentham's reason for writing in the first place. The principle of utility, the calculus, acts, intentions, and motives are all support pieces: they support Bentham's view of punishment. They have only instrumental value, for they point to the apex of the work which is the theory of punishment.

The thesis of this work has been established. The next two chapters will be useful, additional support. They are not absolutely necessary, but they are needed to complete the investigation.

## END NOTES

- <sup>1</sup> Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, introduction by Laurence J. Lafleur, The Hafner Library of Classics (New York: Hafner Publishing Co., 1948), p. xxvi.
- <sup>2</sup> Ibid., p. 24.
- <sup>3</sup> Ibid., p. 70.
- <sup>4</sup> Ibid., p. 171.
- <sup>5</sup> H.L.A. Hart, Punishment and Responsibility (Oxford: Oxford University Press, 1972), p. 6.
- <sup>6</sup> Bentham, Introduction to the Principles, p. 170.
- <sup>7</sup> Ibid., p. 170.
- <sup>8</sup> Ibid., p. 153.
- <sup>9</sup> Ibid., p. 157.
- <sup>10</sup> Ibid.
- <sup>11</sup> Ibid.
- <sup>12</sup> Ibid., p. 153.
- <sup>13</sup> Ibid., pp. 157-158.
- <sup>14</sup> Hart, Punishment and Responsibility, p. 128.
- <sup>15</sup> Bentham, Introduction to the Principles, p. 170, n.1.
- <sup>16</sup> Ibid., p. 147.
- <sup>17</sup> Ibid., pp. 170-171, n.1.
- <sup>18</sup> Ibid., p. 156.
- <sup>19</sup> See the discussion at the end of the "Rules of Punishment" section of this chapter.

- <sup>20</sup> Bentham, Introduction to the Principles, p. 102.
- <sup>21</sup> Ibid., pp. 170-171, n.1.
- <sup>22</sup> Ibid., pp. 171-172.
- <sup>23</sup> Ibid., p. 172.
- <sup>24</sup> Ibid., p. 157.
- <sup>25</sup> John Hope Franklin, From Slavery to Freedom, 3d. ed. (New York: Alfred A. Knopf, 1967), p. 93.
- <sup>26</sup> Ibid.
- <sup>27</sup> Ibid., p. 94.
- <sup>28</sup> United States v. Holmes, 1 Wall. Jr. 1, 26 Fed. Cas. 360, No. 15, 383, quoted in Philip E. Davis, ed., Moral Duty and Legal Responsibility, The Century Philosophy Series, (New York: Appleton-Century-Crofts, 1966), pp. 102-118.
- <sup>29</sup> Bentham, Introduction to the Principles, p. 172.
- <sup>30</sup> Ibid., p. 173.
- <sup>31</sup> Ibid.
- <sup>32</sup> Ibid., pp. 173, n.1.
- <sup>33</sup> Ibid., pp. 174-175.
- <sup>34</sup> Ibid., p. 174.
- <sup>35</sup> Ibid., p. 176.
- <sup>36</sup> Ibid.
- <sup>37</sup> Ibid., p. 177.
- <sup>38</sup> Ibid., p. 171.
- <sup>39</sup> Ibid.
- <sup>40</sup> Ibid.
- <sup>41</sup> Ibid., p. 178.
- <sup>42</sup> Ibid., pp. 179-185.
- <sup>43</sup> Ibid., p. 182.

- <sup>44</sup> Ibid., p. 147.
- <sup>45</sup> Ibid., p. 180.
- <sup>46</sup> Ibid., p. 179, n.2.
- <sup>47</sup> Ibid., pp. 121-122.
- <sup>48</sup> Ibid., p. 181.
- <sup>49</sup> Ibid., p. 183.
- <sup>50</sup> Ibid.
- <sup>51</sup> Ibid., p. 187.
- <sup>52</sup> Ibid., p. 29.
- <sup>53</sup> Ibid., p. 184.
- <sup>54</sup> Ibid., p. 184 and pp. 184-185, n.1.
- <sup>55</sup> Ibid., Chapter III, pp. 24-28.
- <sup>56</sup> Ibid., p. 186.
- <sup>57</sup> Ibid.
- <sup>58</sup> Hart, Punishment and Responsibility, p. 133.
- <sup>59</sup> Bentham, Introduction to the Principles, pp. 187-188.
- <sup>60</sup> Ibid., p. 189.
- <sup>61</sup> Ibid., pp. 179-182.
- <sup>62</sup> Ibid., p. 190.
- <sup>63</sup> Ibid.
- <sup>64</sup> Ibid., p. 192.
- <sup>65</sup> Ibid.
- <sup>66</sup> Ibid.
- <sup>67</sup> Ibid., p. 193.
- <sup>68</sup> Ibid., p. 194.
- <sup>69</sup> Ibid., p. 296.

<sup>70</sup> Ibid., pp. 197-198.

<sup>71</sup> Ibid., pp. 198-199.

<sup>72</sup> Ibid., pp. 199-200.

## CHAPTER VIII

### THE DIVISION OF OFFENCES

#### Introduction

The contribution of the lengthy chapter entitled "Division of Offences" to IPML is inversely proportionate to its length. It is roughly equal in length to the first nine chapters combined, or to the unit on philosophy of mind - Chapters VII-XII. It is half as long as the total length of all the chapters which precede it. It actually adds very little of a theoretical nature to IPML as a treatise on punishment. It is very fecund in practical matters, however.

In large measure the chapter consists of lists of offences. Approximately 200 offences are classified in the body of the text, with many others relegated to the footnotes. As the title of the chapter indicates, there is a division of offences, first via classes, then by genera. The method used in all these classifications is the method of definition or division by genus and difference.

The discussion of this chapter will focus on Bentham's definition of an offence, his method of division, an explanation of the various classes, and Bentham's view of the value of his method. All of these topics are

directly related to offences, and an offence is a necessary condition for punishment according to Bentham. It may not be necessary to say it, but all these topics, in general, and offences, in particular, are directly related to punishment. In this chapter it is obvious that Bentham is writing about punishment, and this further substantiates the thesis that IMPL was written as an introduction to a penal code.

#### Definition and Methodology

An offence, according to Bentham, is any act or acts which the legislator thinks have a tendency to produce mischief.<sup>1</sup> The decision does not depend solely on the legislator for the community should be considered. However, any act "which they whom the community are in the habit of obeying" declare as offence is an offence. This does not mean that it ought to be an offence, for the good of the community - according to the principle of utility - should make the sole determination of that question. For not every act which the legislators are willing to prohibit or punish ought to be an offence, but only ones which "in some way or other...{are} detrimental to the community."<sup>2</sup>

Acts can only be detrimental to the community "by being detrimental to some one or more of the individuals that compose it." These individuals must either be assignable or unassignable, and this division is the basis for forming the five classes or divisions of offences.<sup>3</sup>

However, before these are formed and explained, Bentham's method of arriving at these classifications will be considered.

In a long footnote at the beginning of Chapter XVI, Bentham explains his methodology with respect to the division of offences. His method is aimed at enabling people "to understand the things that are the subject of it."<sup>4</sup> This understanding comes from knowing about the "qualities or properties" of the things in question. Some properties are unique to a certain thing, while it shares some properties with other things. The former properties are rarer than the latter, and yet to understand a thing perfectly, one must be informed about both sorts of properties vis-a-vis all other things. In order to understand a logical whole, one must divide it on the basis of agreement and difference. Each member or group of members of such a whole will share in the common property, but can be distinguished by some quality via which it disagrees with the other members. There is a method for doing this, but

This can only be done in the way of bipartition, dividing each superior branch in two, and but two, immediately subordinate ones; beginning with the logical whole, dividing that into two parts, then each of those parts into two others; and so on. These first-distinguished parts agree in respect of those properties which belong to the whole; they differ in respect of those properties which are peculiar to each. To divide the whole into more than two parcels at once, for example into three, would not answer the purpose; for, in fact, it is but

two objects that the mind can compare together exactly at the same time. Thus then, let us endeavor to deal with offences; or rather, strictly speaking, with acts which possess such properties as seem to indicate them fit to be constituted offences.<sup>5</sup>

One wonders about the laudatory and/or dogmatic claims made for this method. It was and is a commonly accepted method of definition. Is it the only way of "giving a perfect knowledge" of the nature of things?<sup>6</sup> One could explain a car without any reference to a farm tractor, yet they both share common properties. Also, one could explain armed robbery, without indicating any difference between it and stealing.

Moreover, one could understand without classifying, but one could not classify (correctly) without understanding. Correct classification is a sufficient condition of understanding, while understanding is a necessary condition of correct classification. Classification is "understanding dependent," but the reverse is not true.

So Bentham's method is helpful as a means of arranging and categorizing; it is not a means of discovery. In order to apply it accurately one must possess a great deal of information before beginning the process. It is the procedure, however, which Bentham uses, and it is applied to offences.

In a telling footnote, however, Bentham acknowledges the weakness of the method of division. He even

"found it necessary to deviate" from it to some degree in classifying public offences. The benefit to the reader was weighed against the burden of its tediousness and found wanting. Being a utilitarian or pragmatist even in his writing Bentham decided readability and interest should take the precedence over methodology. He forewent the methodology rather reluctantly because the method was "doubtless...eminently instructive." In addition, the methodology was not at fault; indeed it was the basis for any originality in IPML. In Bentham's words: "If there be anything new and original in this work, it is to the exhaustive method so often aimed at that I am indebted for it."<sup>7</sup>

#### Classes of Offences

As has been indicated earlier, an act which is detrimental to one or more of the members of a state or community shall be said to be detrimental to the state. These individuals will be assignable or unassignable. In order to be consistent with the earlier chapter on the consequences of a mischievous act, any offence which is assignable will have primary mischief, and any offence which is unassignable will contain secondary mischief. Some offences will produce both. One class produces neither, and on the basis of Bentham's definition of "offence" one wonders about the reliability of including it. Part of the problem comes from Bentham's reliance on the method of dichotomous

division.

Suppose an offence is committed against an assignable individual. That person, according to Bentham "may either be a person other than the offender, or the offender himself." Offences against a person other than the offender are called offences against individuals and compose the first class of offences. The more complete name of this class is private extra-regarding offences.<sup>8</sup>

There are persons who may have an offence or offences committed against them and yet they are unassignable, i.e., not differentiated either by name or description from other members of the society. They will not comprise the whole of society, but a sub-set, class, or neighborhood. Offences against this group are called semi-public offences.<sup>9</sup>

On the basis of the first division which was made acts would be detrimental to assignable individuals or unassignable individuals. One class of assignable individuals was a person other than the offender; another class was the offender himself/herself. Any offence which is detrimental in the first instance to the offender himself is a self-regarding offence, and this is considered by Bentham to be the third class.<sup>10</sup>

The fourth class of offences are public offences or offences against the state. Their distinguishing property is

...the distant mischief which they threaten to bring upon an assignable indefinite multitude of the whole number of individuals, of which the community is composed.<sup>11</sup>

The final class is one for any offences which have been left unclassified. Bentham calls these multiform or heterogeneous offences, and they are identified "particularly according to the purposes to which they are applied" since they are acts which "may be detrimental in any one of the ways in which the act of one man can be detrimental to another." There are only two types of these offences: 1) "offences by falsehood," and 2) "offences against trust."<sup>12</sup>

The class of private offences is Bentham's paradigm class. Offences of this sort produce both primary and secondary mischief. Since some assignable individual is affected, some person will generally have a natural interest in the prosecution of them. That person may be the one who was attacked, for example, in an assault, or near relatives, in a homicide. The mischief which was produced is obvious, according to Bentham, but it is necessary in order to have grounds for punishment.<sup>13</sup>

This class differs from all others since it admits both compensation and retaliation. This means either or both may be used, not that either or both ought to be used. If compensation is given, this may be adequate reason for remitting punishment.

These offences are generally recognized as such throughout the world, and would be universally "obnoxious to the censure of the world" were it not for two "false" principles - asceticism and antipathy.<sup>14</sup> Both of these have been discussed earlier in this work, and Bentham's reference to them here substantiates the earlier view; in IPML they are discussed for their application to punishment, as opposed to morals.

The self-regarding class of offences presents Bentham with the most problems. It is an anomaly in his system, as surely as the fifth class is. However, this one is questionable because it does not produce any obvious mischief, and thus, one may question whether there is any adequate basis for punishment with respect to it.

The preceding may be an overstatement with respect to mischief. However, Bentham does say offences of this class produce no secondary mischief, and it is often questionable "...whether they are productive of any primary mischief at all:..."<sup>15</sup> The reason for this is easy to ascertain for "...the person whom it most affects, shows by his conduct that he is not sensible of it."<sup>16</sup> Given this lack of any acknowledged mischief, except in some derivative sense, on what basis is punishment justified?<sup>17</sup>

Bentham is very coy in his answer to the foregoing question. He reasons thusly:

The best plea for punishing them is

founded on a faint probability there may be of their being productive of a mischief, which, if real, will place them in the class of public ones:...<sup>18</sup>

This is reminiscent of the earlier chapter in which Bentham argued for an exception because of "...the production of a benefit which was of greater value than the mischief."<sup>19</sup> One punishes offences of this class because there is a "faint probability" they may produce a mischief. Faint probability clearly does not justify punishment, however, for no offence would have been committed. Since there is no secondary mischief, and no one to claim primary mischief, there is no adequate basis for punishment.

Bentham claims they may become public offences. If this is the justification for punishment, then why not wait until any such offence becomes a public offence, and then punish it on that basis? However, if that is done then the self-regarding class of offences would become empty or useless. It seems the class should be eliminated, or Bentham should acknowledge there is no adequate ground for punishment of offences of this class.

To be fair to Bentham, he did indicate some reservations with respect to offences in this category. Before citing some examples of these offences, e.g., fasting, self-mutilation, gluttony, drunkenness, and suicide, he asserted he was including them "...to exhibit the mischief, if any, which it is of the nature of them...to produce..."<sup>20</sup>

He was not sure any mischief was produced, and moreover, if any was he also refused to pass any judgment as to whether these "offences" should be punished.<sup>21</sup> Bentham failed to grasp the "no harm - no foul," or "no harm to someone else - no punishment" precept, which Mill later stated so clearly.

The semi-public and the public class of offences share so many features in common one must look carefully for their differences. In neither case are assignable persons affected; they admit no compensation or retaliation; no one person has an interest in prosecuting the offender(s) and there is reason to punish offences of both types even though they have neither "occasioned" or are "...about to occasion, any particular mischief to any particular individual."<sup>22</sup>

The semi-public offences affect less than the whole community, but a public offence reaches the whole community or state. The former produce danger or alarm, or both, whereas the latter produces only danger. Semi-public offences are classified into two broad categories: calamity and delinquency. Pestilence, tempest, and blight are examples of calamities. An offence will be created if a person's act causes any of these, or if a person failed to act to prevent them.<sup>23</sup>

Pestilence, famine, and blight are clearly undesirable. However, it is not at all clear what one person

could do with respect to famine and blight. Suppose one could prevent a famine? Should it be made an offence for his failure to do so? He might be censured morally, but legally it is another matter. The same could be said with respect to pestilence.

Offences which are public, or apply to the whole population, have better examples than the semi-public ones. Offences against external security, the police, justice, the sovereign, or national interest in general are all included in the public category. These do not produce any primary mischief, and the secondary mischief produced is only danger, and not alarm.

Bentham's own words provide an apt evaluation of the fifth class of offences which includes only offences by falsehood and against trust. Of this class Bentham writes: "This class will appear, but too plainly, as a kind of botch in comparison of the rest."<sup>24</sup> The two divisions of the class spread themselves "over all the preceding classes"<sup>25</sup> and, hence, one species may be found in one preceding class, and another species in yet another.

In either case it would seem that any offence of falsehood or trust would be private in nature. Legal falsehood would be a statement to someone and/or about someone. Perjury, uttering and publishing, or a false statement in order to obtain funds are examples which come to mind. Those would all be private offences, and yet

Bentham hesitated to characterize his legal falsehoods in this manner.

A legal misuse of trust could be similarly analyzed. One could misuse a trust, abscond with its funds, or fail to represent the interests of a trust. Insofar as these are legal offences, some specific individual would have been wronged. This individual may not have been wronged directly, but he/she would have been indirectly harmed. Thus, it seems, if some violation of trust does occur it could be classified as a private offence.

According to Bentham's own words he has been "striving to cut a new road through the wilds of jurisprudence,..."<sup>26</sup> One could ask, "How has he done?" and Bentham has a ready answer.

In this division of offences based on the principle of utility the language could serve all nations "...as a glossary by which all systems of positive law might be explained, while the matter serves as a standard by which they might be tried." In other words, it has universal application.<sup>27</sup>

The methodology or analyses "...is as applicable to the legal concerns of one country as of another:..."<sup>28</sup> This is because of the reasonableness, or the logical nature of the system of classification.

The logical whole, constituted by the sum total of possible offences, has been bisected in as many different directions as

were necessary, and the process in each direction carried down to that stage at which the particular ideas thus divided found names in current use in readiness to receive them.<sup>29</sup>

This in turn has led to "assistance to the apprehension and to the memory" in this very technical area. This arrangement has pedagogical value for it helps one remember the place which any given offence has in the system. Since the division of offences is based on a common characteristic of the classes, then additional offences may be classified accordingly. Moreover, general propositions may be formed with respect to the offences of a given division "...in such a manner as to exhibit a variety of other properties that may belong to them in common."<sup>30</sup>

This classification of offences not only describes offences, "but why they ought to be" so called. In doing this "...it accounts for, and in some measure vindicates, the treatment which it may be thought proper to bestow upon the act in the way of punishment." It is a "perpetual apology" to every citizen in that it explains the necessity of having laws, punishments, and restrictions on his/her liberty. The legislator will be the one best served by it for

To the legislator it is a kind of perpetual lesson: serving at once as a corrective to his prejudices, and as a check upon his passions. Is there a mischief which has escaped him? In a natural arrangement, if at the same time an exhaustive one, he cannot fail to find it. So he tempted ever to force

innocence within the pale of guilt? The difficulty of finding a place for it advertises him of his error. Such are the uses of a map of universal delinquency, laid down upon the principle of utility: such the advantages, which the legislator as well as the subject may derive from it: Abide by it, and every thing that is arbitrary in legislation vanishes.<sup>31</sup>

### Conclusion

This chapter is obviously about legal punishment. Offences are classified according to the person or persons affected. An offence, which is a mischievous act, creates a demand for punishment. This demand is then satisfied according to the theory and rules which were laid down in the immediately preceding chapter.

If any doubt remains that Bentham was writing an introduction to a penal code, one wonders what it would take to convince the skeptic "beyond a reasonable doubt." The last quote of Bentham's summarizes the book for it is a perpetual lesson to the legislator on avoiding arbitrariness in legislation. It is a map, based on the principle of utility, of universal delinquency, and as such it guides anyone who would plan and place a new road through the wilds of jurisprudence.

## END NOTES

- <sup>1</sup> Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, introduction by Laurence J. Lafleur, The Hafner Library of Classics (New York: Hafner Publishing Co., 1948), p. 178, n. 1.
- <sup>2</sup> Ibid., pp. 204-205.
- <sup>3</sup> Ibid., p. 205.
- <sup>4</sup> Ibid., p. 204, n. 1.
- <sup>5</sup> Ibid.
- <sup>6</sup> Ibid.
- <sup>7</sup> Ibid., p. 213, n. 2.
- <sup>8</sup> Ibid., pp. 205-206.
- <sup>9</sup> Ibid., p. 206.
- <sup>10</sup> Ibid., pp. 206-207.
- <sup>11</sup> Ibid., p. 207.
- <sup>12</sup> Ibid., pp. 207-208.
- <sup>13</sup> Ibid., pp. 302-303.
- <sup>14</sup> Ibid., p. 303.
- <sup>15</sup> Ibid., p. 305.
- <sup>16</sup> Ibid., p. 305, n. 1.
- <sup>17</sup> Ibid., p. 153.
- <sup>18</sup> Ibid., p. 306.
- <sup>19</sup> Ibid., p. 172.
- <sup>20</sup> Ibid., p. 245, n. 2.

- <sup>21</sup> Ibid.
- <sup>22</sup> Ibid., p. 307.
- <sup>23</sup> Ibid., 245, n. 2.
- <sup>24</sup> Ibid., 207, n. 2.
- <sup>25</sup> Ibid., p. 308.
- <sup>26</sup> Ibid., p. 234, n. 1.
- <sup>27</sup> Ibid., p. 302.
- <sup>28</sup> Ibid., p. 299.
- <sup>29</sup> Ibid., p. 298.
- <sup>30</sup> Ibid., pp. 299-300.
- <sup>31</sup> Ibid., p. 301.

CHAPTER IX  
CONCLUSION AND APPLICATION

Introduction

This work has argued for the thesis that An Introduction to the Principles of Morals and Legislation is an introduction to a penal code. Evidence in support of this thesis has come from Bentham's correspondence and every chapter of IPML. This evidence is obvious in the preface and Chapters XIII-XVI since these chapters discuss the topics one would expect to find in a penal code, e.g., offences, punishment, and rules for punishment. Chapters VII-XII prepare for the analysis of Chapter XIII and the chapters which follow. Even the early chapters, e.g., I and II, which contain the principle of utility, explain and argue for this principle with respect to government and punishment. The first four terms of the calculus were taken from Beccaria's work on punishment. The calculus chapter is addressed to the legislator, and ends with an illustration from government.

In writing all this a more comprehensive, unified, and correct view of IPML has been given. Halévy and Harrison have been vindicated by the detailed picture, while Baumgardt has been shown to be one-sided, at the least, or

misguided at the worst. In one sense only Lyons has not been completely answered. This chapter contains a partial answer to Lyons via an analysis of part of Chapter XVII, and then ends with a general application.

#### The Limits of the Penal Law

The beginning of Chapter XVII appears to be confusing. It begins with "offence," moves to "law," and then speaks of the connection between the civil and criminal law. The next sentence contains information about "legislation" and "private ethics."<sup>1</sup> One may wonder why Bentham switches from one topic to another. The explanation is fairly simple for Bentham is introducing this chapter by indicating the use of the chapter. This is a change for in all the other instances in IPML where he has indicated a use for the chapter, this paragraph or paragraphs has come at the end of the chapter, not at the beginning. This paragraph does establish the questions to be discussed in this chapter, and they are: 1) what is the difference between private ethics and legislation, and 2) what is the difference between penal law and criminal law? He answers the first and the second is aborted before any definitive conclusion is reached.

Bentham proposed to answer the first question using dichotomous division - the technique explained in the discussion of offences.<sup>2</sup> Using that technique, one determines the common characteristics of the terms - "private ethics"

and "legislation" - then demonstrates their differences.

The common genus of private ethics and legislation is "ethics at large" or "ethics in general." Ethics is defined as

...the art of directing men's actions to the production of the greatest possible quantity of happiness, on the part of those whose interest is in view.

What then are the actions which it can be in a man's power to direct? They must be either his own actions, or those of other agents.<sup>3</sup>

The new element here is "the art of directing men's actions." Why is "directing" the key word and does "actions directed" replace "persons affected" in Bentham's scheme of things? Lyons has argued the latter occurs, but his answer can be shown to be misguided.

The common bond between private ethics and legislation is "directing men's actions." This does not mean, however, that "persons affected" has been replaced<sup>4</sup> for "actions directed" has been an implicit part of IPML from the first chapter. Both views have existed throughout the work: "direction" comes to the fore in this instance.

As Bentham says at the beginning of this chapter, "the law" prohibits and commands.<sup>5</sup> This is also affirmed in the prior chapter and later in this same chapter.<sup>6</sup> How does the law accomplish this? Is it simply self-evident, obvious, and accepted by all citizens? The legislator plays an integral part in this directing for he applies the

necessary motives or motivation.<sup>7</sup> Motives move one to obey the commands of the law.

What are these motives? Good will, love of reputation, and the desire of amity are three major ones.<sup>8</sup> However, the greatest of these is good will.<sup>9</sup> The dictates of good will are the "...surest of coinciding with those of utility."

For the dictates of utility are neither more nor less than the dictates of the most extensive and enlightened (that is well-advised) benevolence.<sup>10</sup>

What is a dictate? Bentham's defines it by stating

When a man is supposed to be prompted by any motive to engage, or not to engage, in such or such an action, it may be of use, for the convenience of discourse, to speak of such motive giving birth to an imaginary kind of law or dictate, injoining him to engage, or not to engage, in it.<sup>11</sup>

This passage includes a footnote with the reference, "see Ch. i." In that chapter, Bentham writes

When an action, or in particular a measure of government, is supposed by a man to be conformable to the principle of utility, it may be convenient, for the purposes of discourse to imagine a kind of law or dictate, called a law or dictate of utility: and to speak of the action in question, as being conformable to such law or dictate.<sup>12</sup>

To summarize: people are prompted to action by motives. Motives give rise to laws or dictates, and thus people are law-controlled or law-governed. These laws or dictates are internal, and they may be consistent with the

principle of utility, or they may not. Thus, if human behavior is analyzed on the basis of motives, its actions will be called "directed." The direction comes from the motive which moves one to action.

The legislator is also a motivator. He enacts laws which command and prohibit, and thus call for obedience.<sup>13</sup> If these laws are properly constructed they will prompt obedience because they (the laws) are consistent with utility. Utility, therefore, is the legislator's ally. It also is used to evaluate any act of legal punishment, so the wise legislator uses the principle of utility in enacting and enforcing any laws. This whole procedure may be called "the legislator directing the citizens."

According to Lyons "being directed" is the key to understanding Bentham's utilitarianism. "Being directed" does come to prominence in this chapter, but it does not accomplish what Lyons claims it does.

Given Bentham's view that the law can only "...be employed in prohibiting and commanding,"<sup>14</sup> and his question about the connection between legislation and private ethics, he needs to find some common denominator between these two. Both come from the genus "ethics in general" and share the common property of directing men's actions. In both cases, i.e., legislation and private ethics, someone is directed. In private ethics, the individual directs himself/herself. The art of government necessitates the direction of others.

Since Bentham held that the law prohibited and commanded, it is natural for him to select directing men's actions as the common bond between private ethics and legislation. He is defining by genus and difference, and actions directed serves as the common link between government and private ethics. This is a necessary preliminary step: later in the chapter he stated the difference between legislation and private ethics.

So "actions directed" comes to the fore at this point for a limited purpose: it explains the common element between private ethics and legislation. This does not mean it replaces the rules for evaluating the "...tendency of any act, by which the interests of a community are affected, ..." of Chapter IV.<sup>15</sup> Actions which are directed would still need to be evaluated by the calculus. If the interests of others are affected by act, those interests would need to be considered even though the people involved might not be directed.

Nor is this all. As the information from IPML which was cited earlier in this section shows, "being directed" via a law or dictate of utility has been an implicit part of IPML from the first chapter. A law comes from a motive; motives move one to act or to forebear from acting. The motive of benevolence is the premier motive, and it moves one to act according to the dictate or law of utility. Given that there is a law of utility, and that a law directs,

"being directed" by utility has been latent in IPML from Chapter I.

The crucial question, however, is whether in the "actions directed" section of IPML Bentham foregoes any consideration of the interests of persons affected by an action, when he considers private ethics. According to Lyons, others may be affected by a private ethical act, but they actually do not count, since "in private matters one should serve his own best interests." In other words, "actions directed" in private ethics replaces and supercedes "persons affected."<sup>16</sup>

Before evaluating Lyons' view any further, it might prove helpful to consider Lyons intent in emphasizing "actions directed." If actions directed is the crucial feature of Bentham's utilitarianism, then one of the traditional major problems of Bentham's system disappears. If, as the traditional interpretation holds, one is the best judge of one's own interest, but must also consider the effect of any action on other people, then a problem is created. One cannot always act on the basis of what one deems best for himself/herself for other people and their interests must also be included in any calculation. However, if one directs oneself on the basis of self interest, and that is the sole criterion of private ethics, then one does not need to consider the effects of one's actions on the lives of other individuals. Others may be affected,

according to Lyons, but this does not matter in private ethics for they are not being directed. So if being directed is the one and only criterion in private ethical decisions, one may justifiably act on the basis of self interest since others being affected is not a consideration. One does not need to consider the interests of others in private ethical matters for one only considers actions directed in these cases, and the only actions one directs in these cases are one's own acts.

Lyons' view does not do justice to the breadth and scope of Bentham's views in IPML. It simply disregards the calculus, for example. The first four circumstances of the calculus were intended to evaluate a single pleasure or pain for an individual. The act of producing this pleasure or pain was then considered with respect to its tendency for fecundity and/or purity. If more than one person could receive pleasure or pain from an act, then one must consider the tendency of an act on the basis of its extent, or "...the number of persons to whom {it} extends; or (in other words) who are affected by it, "plus the other six circumstances. The calculus evaluates acts by their tendency to affect the interests of a community, but the evaluation is made on a person by person basis.<sup>17</sup> Persons affected, not directed, makes "extent" significant, however Lyons either ignores "extent" or avoids it by making "actions directed" primary. Even making actions directed primary does not eliminate any

consideration of persons affected as a crucial portion of Chapter XVII will show.

Since happiness was also mentioned in the "new" definition of ethics, Bentham explains how it is produced. Again, applying the method of dichotomous division, Bentham divides behavior which produces happiness into two parts: "...such parts as none but himself are interested in;..." and "...such parts of it as may affect the happiness of those about him." The former is called duty to one's self, or prudence; the latter duty to one's neighbor, or probity or beneficence, depending on whether it is negative or positive respectively.<sup>18</sup>

This leads Bentham to the question, "Apart from legislation and religion, why would anyone consider the happiness of another person?" Another way of asking this, according to Bentham is

...What motives (...) can one have to consult the happiness of another? by what motives, or, which comes to the same thing, by what obligations, can he be bound to obey the dictates of probity and beneficence?<sup>19</sup>

The answer to this question is straightforward: "...the only interests which a man at all times and upon all occasions is sure to find adequate motives for consulting, are his own." A person will always consider his/her own happiness, but that does not mean there is no benevolence in operation. For "...there are no occasions in which a man has not some motives for consulting the happiness of

other men." Benevolence, or the dictate of utility, is always in operation, along with the love of reputation and the desire of amity in many instances. So one will always consider one's own interest, but will also be motivated by benevolence. Clearly, this is at least paradoxical, but it does indicate Bentham's assumptions about human motives, and how a person may be genuinely concerned about the happiness of another even in private ethical matters.<sup>20</sup>

These two paragraphs (6, 7 of Chapter XVII) are problematic for Lyons. An individual may have a duty to others if his conduct "...affects the interests of those about him." If their happiness is affected either positively or negatively, then it needs to be considered. This is not consistent with Lyons' view that "...in private matters one should serve his own best interests," or that the standard which applies in private ethics is self interest. Having a duty to someone and/or being motivated by benevolence for someone implies that one must consider that individual's happiness in any putative action. One considers one's own interest first, but this does not mean the interests of others are not considered at all.<sup>21</sup>

Bentham makes this point explicitly, when he writes:

Ethics, then, insofar as it is the art of directing a man's actions in this respect, may be termed the art of discharging one's duty to one's neighbour.<sup>22</sup>

In this quote Bentham uses the language of "directing

actions" and at the same time states that one has a duty to others. One may act selfishly according to the calculus, but only if one pleasure or pain is being considered for one person and only one person. If more than one person is involved, extent must be considered, and that means all the persons affected. Even in the midst of the "actions directed" passage Bentham did not forget this. One's behaviour "may affect the interests of those about him," and that creates a duty to them. Benevolence, or the dictate of utility, comes into play at this point, and one, even while being directed, considers the interests of others. In doing this, self interest is not the only consideration; it is at least tempered by benevolence. "Being directed" in private ethics does not remove all concern for persons affected.

Bentham is now ready to give a general answer to the question of the difference between private ethics and legislation. Both have happiness for their ends; both concern "...every member, of any community that can be proposed,..." They differ in the acts which they recommend.

There is no case in which a private man ought not to direct his own conduct to the production of his own happiness, and of that of his fellow-creatures: but there are cases in which the legislator ought not (in a direct way at least, and by means of punishment applied immediately to particular individual acts) to attempt to direct the conduct of the several other members of the community.<sup>23</sup>

This general directive is followed by one which is a bit

more specific. A private person ought to perform any act which promises to be beneficial and abstain from any act which would be pernicious, but the legislator should not compel a person to perform the prior act, or necessarily abstain from the latter.<sup>24</sup>

Thus one only needs to indicate the cases in which ethics ought to "interfere" in the lives of the citizens and legislation ought not. Legislation interferes via punishment, and so, one may investigate cases where one ought not punish, and if ethics may properly interfere in those cases, the boundary between private ethics and legislation will be determined.

Since the four general cases in which one ought not punish have already been isolated in Chapter XIII, one may rely on that analysis to answer the present question.<sup>25</sup> The general cases where punishment is unprofitable becomes the prime candidate very quickly. It has been established that there are certain offences which one ought not punish because the expenses of the punishment would outweigh the profit of it. This will especially be the case where those who commit the offence are not likely to be detected and so punishment is very uncertain. This uncertainty must be compensated by an increase in magnitude, i.e., intensity and duration, and this increase renders the punishment unprofitable. Private ethics could be reasonably applied in such cases, even though punishment could not. For

instance, fornication may be censured ethically, but that does not mean it should be punished legally.<sup>26</sup>

The limits between private ethics and legislation is also shown by one further analysis. Consider the three branches of private ethics: prudence, probity, and beneficence. Legislation cannot benefit the first because each person will consider his/her own interest, and will only fail in ascertaining his/her interest because of some miscalculation. Legislation, by its very nature ought not to interfere with prudence for legislation only operates "...with respect to those broad lines of conduct in which all persons, or very large and permanent descriptions of persons, may be in a way to engage,..."<sup>27</sup> Beneficence suffers a similar fate. The legislator may command benevolence, but it is best left to free and voluntary acts of individuals, who are motivated by sympathy and good will. Probity is a different matter for it is the one area of private ethics in which the legislator may be of assistance. People ought not to diminish the happiness of their neighbors, but they do. When this occurs, legislation is needed as a corrective.

Thus legislation should not interfere with the lives of individuals, qua individuals, to make their existence better, and it should not compel one to make his/her neighbor's life better by some positive action. However, it can and does improve one's neighbor's happiness by ensuring,

via the threat of punishment, that one does not diminish that happiness.

Bentham concludes this section with an answer to the question of the difference between private ethics and legislation.

Private ethics teaches how each man may

...dispose himself to pursue the course most conducive to his own happiness, by means of such motives as offer of themselves; the art of legislation...teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is most conducive to the happiness of the whole community, by means of motives applied by the legislator.<sup>28</sup>

Both private ethics and legislation aim at producing happiness for each man. In private ethics "each" is considered individually; in legislation "each" is considered collectively, but in both cases everyone is considered. The difference between them is the source of the motives which moves the citizen to act. In private ethics these motives are internal and moves one to think of his or her own happiness, and the happiness of others as well. An individual left to himself/herself will act in a manner which he/she thinks will bring him/her happiness while not forgetting others. The motivation for obeying legislation is external; it comes from the legislator. The legislator enacts laws for the common good, but will resort to punishment to ensure this common good. The legislator cannot always ensure that benevolence will be supreme, for he must

support his pronouncements with punishment, which may not be desirable in some cases. The full range of motives is not therefore available to the legislator. He can punish and prohibit, very rarely does he reward and encourage. The skillful legislator will ply his trade in such a manner that happiness is produced, even though he may not use certain motives. More often than not he will use artificial tutelary, or restraining, motives. He will encourage the citizen to disregard those strong self-regarding motives and practicing probity for sure, and possibly beneficence.

Lyons is answered, then, in two different ways. Chapter XVII is not explaining the principle of utility in a different manner. The principle of utility has not even been mentioned, but it has been assumed as the basis for Bentham's reply to his own query: what is the difference between private ethics and legislation? In order to indicate the difference Bentham began by showing the characteristic which they had in common: "actions directed." This characteristic was implicit from the first chapter of IPML, since an action consistent with the dictate of utility was explained there. Later it was shown that motives give rise to dictates, and motives move one to action, whether that one is a private individual or a legislator. So Chapter XVII uses a phrase - "actions directed" - which has not been used in any prior chapter, but has been assumed. This chapter does not explain the principle of utility in a

different way. It explains "actions," "private ethics," and "legislation" in such a way that Bentham's view of the difference between the last two is clearly shown on the basis of the prior chapters.

One final point: Lyons avoids any consideration of the calculus, and with good reason. When the calculus considers the seventh variable - "extent" - and gives general direction for application where more than one person is affected, its language is replete with phrases such as "tendency of an action" and "numbers of those affected."<sup>29</sup> One applies the principle of utility by calculating the consequences of an action with respect to its production of pains and/or pleasures. The interest of any and all affected is supposed to be considered in all cases, as Bentham's explanation of the calculus indicates.<sup>30</sup> The difficulties in this procedure are well known and, in part, these difficulties stem from the application of extent in instances of punishment. Since each person counts for one and only one, the desire of an innocent person not to be punished may be discounted if one hundred people would wish to have him punished. Given the calculus and Bentham's system of counting, this paradoxical result cannot be avoided.

### Application

IPML rests solidly on the principle of utility. That principle approves or disapproves of an action according to the tendency or consequences which it has to increase or

decrease the happiness of any party whose interest might be affected by the action in question. Happiness is determined by pleasure, or the absence of pain.

Pleasure and pain may be calculated by means of the calculus. If a proposed act would produce more pleasure than pain, it would have a good tendency. An evil tendency would be indicated by an act which would produce more pain than pleasure. (Bentham did not consider the case of acts being equal in pleasure and pain.) Any act which is consistent with the principle of utility is "one that ought to be done or at least it is not one that ought not to be done."<sup>31</sup>

There are two types of acts which Bentham mentions in IPML: those of a private individual and those of a government. Since Bentham was writing a logic of the will one might expect the information in IPML to be directed toward the private individual. He writes about the actions, motives, and intentions of the individual, but in order that the legislator may understand actions and their mischievous consequences so that punishment may be consistent with the principle of utility.

Bentham sees no real need to give directions to the individual with respect to that which will bring him/her pleasure. Each person can and does determine his/her own best interest, and fails in determining this only in cases of mis-supposal or erroneous calculations. In other cases, the interest of other persons must be considered. For

Bentham this presents no problem for he was convinced that "on all occasions" a person has "the purely social motive of sympathy or benevolence:..."<sup>32</sup> Benevolence cannot be ignored by Bentham for the "dictates of utility" are the same as "the most extensive and enlightened (that is well advised) benevolence:."<sup>33</sup>

Thus an individual will always consider his/her own best interest, but also will "on all occasions" consult the happiness of others because he/she is guided by the motive of benevolence or utility.

The foregoing presents Bentham with at least two questions: 1) why does anyone ever do harm to another, if the motives of benevolence are in operation on all occasions? (It would seem that a person motivated by benevolence would do good and not evil.) 2) Why are no recommendations made in IPML to seek "the collective good" via positive legislative enactments or laws? One answer to the first question has already been given: people miscalculate at times. A person motivated by benevolence may think the act he/she is doing will produce the most good, yet he/she may be wrong. Proper motivation does not guarantee correct calculation. Anyone may be guilty of this: the robber, the rapist, or the social reformer.

In addition, other motives are in operation and these may prove stronger than benevolence. Benevolence is the preeminent motive, but that does not mean that it cannot be

overcome by other motives, such as physical desire, the love of wealth, ease, and life.<sup>34</sup>

Benevolence always operates, but that does not mean that it is the sole determinor of action. Man is a mass of conflicting motives, and thus one is not always certain as to which motive, or set of motives, will produce the act.

The answer to the second question is consistent with what has been written throughout this work. IPML is an introduction to a penal code, and any suggestions for a positive application of legislation is beyond the scope of IPML. Penal law commands and prohibits, and anyone who fails to follow the commands must face the sanction of the law. The sanctions produce pain, and thus Bentham must justify the use of that which is contrary to utility, but a part of utilitarian theory. He argues for laws and punishment, not in and of themselves, but because of their public good. They do not produce a positive public good, but they protect the public good by preventing harm. The laws are not good in themselves, but they produce good by reining in evil. The legislator does not demand beneficence, only probity. Beneficence comes as a by-product of the latter, in that the absence of harm is good. The broader question of the producing social good via legislation was left for another work and generation. It was not considered in IPML because that was not the purpose of IPML.

END NOTES

- <sup>1</sup> Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, introduction by Laurence J. Lafleur, The Hafner Library of Classics (New York: Hafner Publishing Co., 1948), p. 309.
- <sup>2</sup> Ibid., p. 204, n.1.
- <sup>3</sup> Ibid., p. 310.
- <sup>4</sup> David Lyons, In the Interest of the Governed (Oxford: Clarendon Press, 1973), pp. 31-32.
- <sup>5</sup> Bentham, An Introduction to the Principles, p. 309.
- <sup>6</sup> Ibid., p. 224, n.1 and pp. 330-31, n.1.
- <sup>7</sup> Ibid., p. 323.
- <sup>8</sup> Ibid., p. 167.
- <sup>9</sup> This is not exactly the case. Good-will or benevolence is highest motive when the motives are graded by the principle of utility, and when the interests of a "set of persons" is considered. It is thus the prime tutelary or restraining motive. (See An Introduction to the Principles, pp. 141-143 and p. 179, n.1.) The seducing or impelling motives are also in operation. (See An Introduction to the Principles, p. 142, p. 167, and p. 179, n.1.) On page 167, Bentham writes "Now the motives, whereof the influence is at once most powerful, most constant, and most extensive, are the motives of physical desire, the love of wealth, the love of ease, the love of life, and the fear of pain: all of them self-regarding motives." He overlooked the "love of power" from his original list on page 121.
- <sup>10</sup> Bentham, An Introduction to the Principles, p. 121.
- <sup>11</sup> Ibid., p. 121, n.1.
- <sup>12</sup> Ibid., p. 3.
- <sup>13</sup> As Bentham says, the law opposes seducing motives with

its own artificial tutelary motives. Bentham, An Introduction to the Principles, p. 146.

- <sup>14</sup> Ibid., p. 309.
- <sup>15</sup> Ibid., p. 30.
- <sup>16</sup> Lyons, In the Interest of the Governed, p. 32.
- <sup>17</sup> Bentham, An Introduction to the Principles, pp. 29-31.
- <sup>18</sup> Ibid., p. 312.
- <sup>19</sup> Ibid., pp. 312-313.
- <sup>20</sup> Ibid., p. 313.
- <sup>21</sup> Ibid., pp. 312-313.
- <sup>22</sup> Ibid., p. 312.
- <sup>23</sup> Ibid., p. 313-314.
- <sup>24</sup> Ibid., p. 314.
- <sup>25</sup> Ibid., "Cases Unmeet for Punishment," pp. 170-177.
- <sup>26</sup> Ibid., pp. 315-318.
- <sup>27</sup> Ibid., p. 319.
- <sup>28</sup> Ibid., p. 323.
- <sup>29</sup> Ibid., pp. 30-31.
- <sup>30</sup> Ibid.
- <sup>31</sup> Ibid., p. 4.
- <sup>32</sup> Ibid., p. 313.
- <sup>33</sup> Ibid., p. 121.
- <sup>34</sup> Ibid., p. 167.

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