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PUNISHMENT AS PREVENTION OF CRIME IN JEREMY BENTHAM'S THOUGHT

A THESIS

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degree of

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By

WALTER MUTSUMI NABAKWE

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Dedicated to my parents, the Rev. and Mrs. W.O. Nabakwe, for whom waiting for their son to finish writing this thesis has been a punishment unto itself.

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THE PROBLEM

The problem of punishment resides in the plausibility of its justification. Philosophers have grappled with this problem for centuries and the arguments they have offered to justify the institution of punishment appear to be either retributive or utilitarian in nature.

Writers on the legal justification of punishment point out that punishment may be justified by retribution, deterrence and reformation.

Literature on the subject identifies the retributive theory of punishment with its connection with guilt, and the utilitarian theory with its deterring and reforming effects.

For retributivists[1], the intrinsic value of punishment is punishment itself. No other effect should be expected of it, such as deterrence and reformation. In fact, retributivists object to the application of punishment for these purposes, contending that to do so, would imply the justification of punishment of innocent people.

By contrast, the utilitarian argument offers a more flexible approach to the problem of punishment, the utility of which is established by its deterring and reforming ef-

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[1] S.I. Benn, "Justification of Punishment", Encyclopedia of Philosophy, P.E. Edwards ed., New York: Macmillan & Free Press, 1967, 8 vols., vol. 7, p. 30.

fects[1], the ultimate end of which is to bring happiness to the greatest number, not only by physically removing the offender from the community[2], but also by removing from him the desire and capability to offend and, through his example, also deter others from crime.

Retributive[3] and utilitarian[4] theories remain vehemen-

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[1] Ibid., p. 31. See also G. Ezorsky ed., Philosophical Perspectives on Punishment, New York: State University of New York Press, 1972, pp. xi-xvii.

[2] "The power is taken away by physical restraint. To take away from an offender the will to offend again, is to reform him; to take away the power of offending is to incapacitate him." J. Bentham, The Principles of Penal Law, J. Bowring ed., Edinburgh, 1838-43, vol. 1, p. 366. (Hereafter cited as P.P.L. and page number).

[3] G.W.F. Hegel, "Punishment as a Right", The Philosophy of Right, T.M. Knox trans., London: Oxford University Press, 1969, sec. 100.

H.L.A. Hart, "Prolegomena to the Principles of Punishment", Punishment and Responsibility, Oxford: at the Clarendon Press, 1968, pp. 1-13.

K.G. Armstrong, "The Retributivist Hits Back", Mind, vol. 70, 1961, pp. 471-490.

H. Morris, "Guilt and Suffering", Philosophy East and West, vol. 21, 1971, pp. 419-434.

[4] K. Marx, "Capital Punishment", Marx & Engels: Basic Writings on Politics and Philosophy, L.S. Feuer ed., New York: Doubleday, 1959, p. 488.

T.H. Green, Lectures on the Principles of Political Obligation, London: Spottswoode, Ballantyre & Co., 1960, pp. 180-205.

J. Rawls, "Two Concepts of Rules", The Philosophical Review, vol. 44, 1955, pp. 3-32.

T.L.S. Sprigge, "A Utilitarian Reply to Dr. McCloskey", Inquiry, vol. 8, 1965, pp. 264-291.

ly opposed to one another. Many authors on the subject contend that the quarrel lies in the justification of punishment and the kinds of punishment retributivists and utilitarians mete out.

What is lost from sight is the fact that the dispute, although endless, is a family one. The two schools of thought have divided between themselves one definition of punishment, so that either one is correct in claiming to be more orthodox than the other.

The Oxford English Dictionary defines the verb "punish" as

> 1. to cause (an offender) to suffer an offence; to subject to judicial chastisement as retributive or requital; or as a caution against further transgression; to inflict a penalty on.
>
> 2. to requite or visit (an offence, etc.) with a penalty inflicted on the offender; to inflict a penalty (for something).[1]

While the retributivists adhere to one part of the definition, that punishment should be inflicted because a law has been broken, the utilitarian's view is that punishment is a caution against further wrongdoing.

Utilitarians view the retributivist stance on punishment as based on the "lex talionis" principle, while retributivists regard the utilitarian position as aiming, if necessary, at punishing innocent people in order to deter would-be wrongdoers.

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[1] The Oxford English Dictionary, unabridged ed., Oxford : at the Clarendon Press, 1961, first published in 1933, 13 vols., vol. 8, p. 1603.

and, in the process, bring greater happiness to the greatest number.

This conflict has become crucial in recent studies of Bentham's position on punishment. More specifically, J.D. Mabbott[1] and H.J. McCloskey[2] identify Bentham with the utilitarian theory of punishment, in rejecting which they advocate a retributive stance as a more humanitarian way of dealing with the problem of punishment, because it emphasizes guilt and desert. Mabbott contends that both reformation and deterrence justify the punishment of the innocent, as in the case of a person believed to be guilty, and condemned, by those likely to commit the same crime in future; or in the case of a man who is reputedly bad, although not necessarily a criminal, but charged as such. His objection to deterrence and reformation is based on the argument that their proponents only seem to consider the consequences of punishment, and not its rightful application. A person could be justly punished, but this would not necessarily deter others; or he might be reformed without being punished. Furthermore, on Mabbott's view, punishment rarely reforms criminals, and never deters others, according to the evidence of prison authorities discouraged by the failure of punishment.

Because Mabbott identifies the utilitarian view of the

---

[1] J.D. Mabbott, "Punishment", Mind, vol. 48, 1939, p. 152.

[2] H.J. McCloskey, "A Non-Utilitarian Approach to Punishment", Inquiry, vol. 8, 1965, p. 254.

ends of punishment with the justification of the means, he rejects the utilitarian theory on the grounds that punishment need neither deter nor reform. He feels that the utilitarian theory is unable to deal with the justification of punishment. Although his arguments lean heavily on justification, they betray him as actually questioning just that.

Twenty-six years after the publication of Mabbott's article, McCloskey continued the attack against the utilitarian position, arguing that it aimed at preventing future crime, with very little thought being given to whether the culprit is the actual offender. For him punishment is justifiable only in the case of someone who, being a responsible agent, commits an offence.

McCloskey rejects not only the utilitarian justification of punishment, but its purpose as well. His position is thus as inadequate as Mabbott's, for it does not confront the whole theory of the utilitarian system of punishment.

The retributionist position is more tenable because it inflicts punishment when a crime has been committed; utilitarians, on the other hand, support suffering as a form of "social surgery or quarantining."[1] This is hardly an argument to justify punishment as useful and hence just. On the contrary, it accommodates unjust and undesirable punishment.[2]

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[1] Ibid., p. 254.

[2] What is shocking about this, and what most utilitarians now seek to avoid admitting to be the implication of utilitarianism, is the implication that grave injustice in the form

cont'd

The Problem

A.C. Ewing also finds the utilitarian position on punishment unsound since a purely deterrent theory leads to drawbacks and paradoxes.

> (1) as long as there are any criminals left undeterred, punishments should be made as severe as they can possibly be; (2) there is no special connection between guilt and punishment; (3) if in any case the punishment of the innocent should deter as much as a punishment of the guilty which would cause equal pain, it would be equally justifiable.[1]

More recently Mabbott and McCloskey have gained the support of C.K. Poupko, who argues that, since according to the utilitarians the value of punishment lies in its deterrence, it can be inferred that such a value would justify harsh punishment for trivial offences. But considering that the utilitarians regarding both punishment and offence as evils operate on the assumption that prevention of mischief promotes happiness, they assert that the amount of punishment should not exceed the evil of the offence. From this Poupko draws the conclusion that:

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of punishment of the innocent, of those not responsible for their acts or harsh punishment of those guilty of trivial offences, are dictated by their theory. We may sometimes best deter others by punishing, by framing, an innocent man who is generally believed to be guilty, or by adopting rough and ready trial procedures, as is done by army courts martial in the heat of battle in respect to deserters, etc.; or we may severely punish a person not responsible for his action, as often happens with military punishments for cowardice, and in civil cases involving sex crimes where the legal definition of insanity may fail to cover the relevant cases of insanity. Sometimes we may deter others by imposing ruthless sentences for crimes which are widespread, as with car stealing and shoplifting in food markets. (Ibid., pp. 253-4).

[1] A.C. Ewing, The Morality of Punishment, Montclair, N.J.: Patterson Smith, 1970, first publ'd in 1929, p. 55.

The Problem

> ... punishment for Bentham is justified if it deters and if the suffering involved is not greater than that which would result if he were not punished.[1]

Yet examination shows that while all these scholars regard Bentham as the major representative of the utilitarian school and supporter of its theory of punishment, none of them has investigated whether his actual position on this subject differed at all from that of traditional utilitarians. In addition, since there is no study showing Bentham's view as retributive, he has been associated only with the utilitarian school.

The purpose of this thesis is to delineate the conflict between the interpretation of Bentham's position on the problem of punishment by contemporary philosophers, and his actual contribution to the problem. We shall support the hypothesis that Bentham's theory of punishment aimed at prevention of crime.

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[1] C.K. Poupko, "Political Ideas Underlying the Utilitarian Approach to Punishment", Philosophy Today, vol. 18, 1974, p. 288.

INTRODUCTION

Since Mabbott published his article in 1939, scholarship on punishment has concentrated, almost exclusively, on the problem of its justification, causing two sides to be formed, one supported by retributivists, the other by utilitarians, neither one of which has ventured to question what, specifically, Bentham's position on the matter entails.

Because precious studies on punishment only alluded to Bentham's work on the subject, mainly on the assumption that his stance would be, perforce, utilitarian, one cannot but observe that contemporary philosophers have either underestimated or misunderstood the significance of his contribution to the problem of punishment, especially capital punishment.

In order to illustrate Bentham's position adequately, we shall deal with his approach to various kinds of punishment. Emphasis will be given to the death penalty because this appears to be his greatest contribution, which has been overlooked by contemporary writers on the problem.

One of the authentic sources for the formulation of Bentham's theory of punishment is his letter to Rev. John Forster. In it, Bentham acknowledges the influence of Cesare Beccaria and Claude Helvetius in expounding his principle of utility, in promoting the happiness of society,

and as a means to determine what is right or wrong. He also admits that both William Eden and John Howard influenced him in advocating the change from transportation punishment to hard labour, houses for which were to be built throughout England. We shall illustrate how Beccaria's influence and Bentham's own knowledge of law led him to reject William Blackstone's view of the laws of England.

We also gather from this letter that Bentham is preoccupied with the formation of a plan for a general reform in jurisprudence, by doing which he is finally "determining upon fixed principles (what ought to be the law) the best law under every head of Jurisprudence." Also, in this reform he investigates "who should make law?" (the monarch or Parliament), and how "ex post facto" punishment are applied.

In reading this letter, we realize that Bentham classifies offences into those against the person, property, reputation and condition. He suggests that his theory deals with different kinds of punishment.

Finally, this letter also provides us with information on the texts Bentham used to formulate his theory.

Bentham first outlined the purpose of punishment in A Comment on the Commentaries, and later expounded it in A Fragment on Government, Panopticon versus New South Wales, The Principles of Penal Law, An Introduction to the Principles of Morals and Legislation, and Of Laws in General.

From these works relevant passages will be extracted, de-

scribed, analysed and interpreted. These writings are specifically selected because through them Bentham attempted to answer the question: What is the purpose of punishment? We shall pursue the explanatory "why" underlying his writings.

Our purpose is not to criticize the various interpretations of Bentham; in fact, this thesis does not concentrate on criticism at all, rather it attempts to explain, analyse, synthesize and describe, historically, the problem of the purpose of punishment according to Bentham, relying as much as possible on his own style and words.

This thesis is not however meant to be, in any way, a definitive statement of what Bentham either says or implies in any of his writings. Rather, it suggests that he contributed to the problem of punishment far more than his critics give him credit for. That is why we hope that the readers will return to Bentham's work with the intention of ascertaining for themselves some of the claims made in this thesis. It is only after such an investigation that Bentham's position on punishment, and its purpose, may clearly emerge.

The thesis will be divided into six chapters. The first is a background chapter whose purpose is to provide us with the necessary knowledge for understanding Bentham's notion of punishment. In the second, we shall establish Bentham's position in refuting the objectives of the New South Wales project, misapplied punishments and Blackstone's notion of the three forms of government, the British Constitu-

tion and supreme power. In the third chapter we shall briefly examine Bentham's perspective on punishment, together with the retributivists' and utilitarians' positions, in order to offer a general view of the problem. In the fourth, we shall demonstrate how moral sanctions and legal punishments prevent crime. In the fifth, we shall examine the role of torture and imprisonment in preventing crime through physical, moral and religious means. In the sixth chapter we shall analyse Bentham's position on capital punishment in order to establish the reasons behind his rejection of it.

Finally, we shall formulate the conclusion to be drawn from this study.

The bibliography will be divided into four parts: works by Bentham, works on Bentham (although some books and articles are only partially on him), works on punishment and ones on utilitarianism.

This selection has been made in order to provide a general perspective on utilitarianism in relationship to punishment and, in particular, a perspective on Bentham's position on the problem at hand.

ABBREVIATIONS

C.C.	= A Comment on the Commentaries
Corr.	= Correspondence
F.G.	= A Fragment on Government
I.P.M.L.	= An Introduction to the Principles of Morals and Legislation
O.L.G.	= Of Laws in General
P.P.L.	= The Principles of Penal Law
P.V.N.S.W.	= Panopticon versus New South Wales
Works	= The Works of J. Bentham, J. Bowring ed., (1838-43), 11 vols.

CHAPTER ONE

THE GENESIS OF BENTHAM'S IDEA OF PUNISHMENT

Bentham's concept of punishment is interwoven with his view of law reform, penal reform and parliamentary reform.

In order to synthesize these ideas adequately, we shall briefly analyse the influence of Beccaria,[1] Eden and Howard[2] on Bentham's thought. Finally, we shall extract Bentham's idea of punishment[3] from his criticism of Blackstone's view of laws.

From Bentham's letter to Rev. John Forster we learn that he was preoccupied with the writings of a Theory of Punishment. He states that he has consulted Cesare Beccaria's (1738-1794) book, On Crimes and Punishment,[4] and the Empress of Russia instructions for law, and acknowledges that they have given him fresh incentive and further light on the subject of punishment.

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[1] J. Bentham, Correspondence of J. Bentham, Collected Works of J. Bentham T.L.S. Sprigge ed., London: Athlone Press, 1968, vol. 2, pp. 98-114.

[2] Ibid.

[3] J. Bentham, A Comment on the Commentaries and Fragment on Government, Collected Works, J.H. Burns and H.L.A. Hart eds., London: Athlone Press, 1977. (Hereafter referred to as C.C. and page number).

[4] Bentham also acknowledges Beccaria's influence on punishment and the Greatest Happiness Principle in P.P.L. vol. 1 pp. 444-5.

The Genesis of Bentham's Idea of Punishment

In his letter[1] Bentham also suggests that both his and Beccaria's books would answer questions pertaining to criminal jurisprudence. He is consequently delighted that the Government of Moscow, which requested that some jurists study several questions regarding this topic, finds these books of great interest.

Bentham is primarily interested in the formation of a plan for a general reform in jurisprudence, "determining upon fixed principles (what ought to be the law) the best law under every head of jurisprudence."[2]

Beccaria's Influence

Beccaria's aim was to correct the western judicial system by abolishing capital punishment, long sentences and procedural injustices. For this reason his book[3] has a great impact on the western penal procedure and great influence on Bentham's thought.

Bentham adopted from Beccaria the view that punishment is justified if it prevents crime. Through Beccaria's notion of the Greatest Happiness Principle and punishment[4], Bentham

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[1] Bentham, Corr., op. cit., p. 100.

[2] Ibid., p. 100.

[3] C. Beccaria, On Crimes and Punishments, H. Paulucci trans., Indianapolis: Bobbs-Merrill, 1963, first published in 1764.

[4] "If we glance at the pages of history, we will find that laws, which surely are, or ought to be, compacts of free men, have been for the most part, a mere tool of the passions of some, or have arisen from an accidental and temporary need. Never have they been 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." Ibid., p.8.

formulates the utilitarian concept of punishment, according to which: "The good of the community cannot require, that any act should be made an offence, which is not liable, in some way or other, to be detrimental to the community."[1] He arrives at this position by applying two principles, practical and ethical: the practical enforcement of prudence by legislation belongs to the field of public ethics, which aims at the happiness of the community; while private ethics leads man's actions towards his own happiness.[2]

Beccaria influenced Bentham's position on punishment especially in the areas of purpose of punishment, the notion of infamy, the use of torture and capital punishment. We shall see this in the subsequent chapters.

Although Bentham acknowledges that he learnt the principles of utility from Beccaria and Helvetius[3], this notion was not foreign to the British philosophical tradition; in fact, it is very possible that some of Bentham's utilitarian formulations, especially his idea of communal pleasure[4], took shape after reading the Earl of Shaftesbury's[5] book, An In-

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[1] J. Bentham, Collected Works of J. Bentham: An Introduction to the Principles of Morals and Legislation, J.H. Burns and H.L.A. Hart eds., London: Athlone Pr., 1970, p. 188. (Hereafter the book will be referred to as I.P.M.L., and page number).

[2] Ibid., p. 282-6.

[3] Bentham, Correspondence, vol. 2, p.

[4] Earl of Shaftesbury, An Inquiry Concerning Virtue, Selby-Bigge ed., British Moralists, 2 vols., New York: Bobbs-Merrill, 1964, first published in London, 1896, vol. 1, p. 40.

[5] Anthony Ashley Cooper, 1671-1713.

quiry concerning Virtue. He was also familiar with F. Hutcheson's book[1] (1694-1746), On the Nature and Conduct of the Passions and Affections, in which he demonstrates that man's actions aim at the public good; and with D. Hartley (1705-1759), who in his book Observations on Man tries to explain the origin and nature of passions in general, and introduces the idea that passions are states of considerable pleasure or pain.[2] Bentham was also acquainted with W. Paley's (1743-1805) book The Principles of Moral and Political Philosophy, in which he defines virtue as "the doing good to mankind, in obedience to the will of God and the sake of everlasting happiness."[3] Bentham would agree that God's will and the desire for everlasting happiness constitute moral obligation.

Bentham concurs with David Hume's[4] (1710-1776) rejection of the laws of nature because Hume has clearly explained how man is at the mercy of two masters: pleasure and pain.[5] Bentham and Hume maintain that man is control-

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[1] F. Hutcheson, On the Nature and Conduct of the Passions and Affections, Selby-Bigge ed., British Moralists, 2 vols, New York: Bobbs-Merrill, 1964, first published in London, 1896, vol. 1, p. 393.

[2] D. Hartley, Observations on Man, 2 vols., New York: Garland Pubns., 1971, vol. 1, pp. 368-9.

[3] W. Paley, Principles of Moral and Political Philosophy, Selby-Bigge ed., British Moralists, 2 vols., New York: Bobbs-Merrill, 1964, first published in London, 1896, vol. 2, p. 357.

[4] J. Bentham, A Fragment on Government, in A Comment on the Commentaries and A Fragment on Government, Collected Works, J.H. Burns and H.L.A. Hart eds., London: Athlone Press, 1977, p. 439. (Hereafter referred to as F.G. and page number).

[5] Bentham, I.P.M.L., p. 11.

led by interest, and not by natural laws. People observe law insofar as law protects their interest. So too, our political duties are nothing but a convention, and the premises of obedience and promise are rooted in public opinion. Bentham and Hume reject the social contract theory because they think conventions are more binding[1]. Nevertheless, Bentham, accepted Beccaria's view on punishment despite this latter's adherence to the social contract theory of state.

We have made specific reference to these writers' works because Bentham lived and wrote between 1770-1830, and it is likely that they had some impact on his formulation of the Greatest Happiness Principle.

In addition, the letter to Forster alludes to William Eden's bill in Parliament aiming at changing transportation punishment into hard labour to be served in England. But Bentham did not think the bill went far enough. While, though, this bill rekindled Bentham's belief in this reform, John Howard's book, The State of Prisons in England and Wales (1777), strengthened his faith in it by showing him the way. Bentham remarks:

> His book is a model for method and for the sort of stile that is competent to his subject. He carries his plan with him in his head. He is set down at the door of a prison, makes enquiries under a certain number of heads which exhaust the subject, does his business and drives off again to another. His thoughts, his conversation, his writings are confined to this one object. Prospects, palaces and pictures he passes by with an indifference equal to that of the Cynic and much better grounded.[2]

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[1]Bentham, F.G., pp. 439-447; D. Hume, Treatise of Human Nature, T.H. Green and T.W. Grose Eds., 4 vols., Aalen: Scientia Vlg., 1964, first published in London, 1882, vol. 2, pp. 300-28.

[2]Bentham, Corr., op. cit., p. 106.

The Genesis of Bentham's Idea of Punishment

Bentham observes that Howard is extremely busy and lives a hard life; he admits that his field work has greatly inspired him, although his pioneering ideas were at first quite difficult for Bentham.

Undoubtedly, Eden's book, The Principles of Penal Law, his hard-labour bill and Howard's book influenced Bentham to venture into introducing the panopticon prison system.

Bentham began to develop a notion of punishment in reaction to Blackstone's[1] view of the laws of England in general, and municipal law in particular[2]. In our discussion we shall confine ourselves to Bentham's criticism of Blackstone's interpretation of municipal law, set out in the Commentaries on the Laws of England, and delivered as a set of Oxonian lectures concerning the laws of England. These lectures covered the following areas: law in general, Municipal law[3], common law, statute law, interpretation of law, and parts of law.

According to Blackstone common law is an ensemble of established rules and maxims that state, for example, "the

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[1]First Vinerian Professor of English Law at Oxford. He was the author of the Commentaries on the Laws of England.

[2]By municipal law Bentham means statutory law as opposed to Blackstone's laws of nature. Because England has one central government, municipal law is nationally compared to provincial or state law in Canada and USA.

[3]J. Bentham; A Comment on the Commentaries and A Fragment on Government, Collected Works, J.H. Burns and H.L.A. Hart eds., London: Athlone Press, 1977. (Hereafter referred to as C.C. and page number).

king can do no wrong." He views statute law as being public or private, declaratory or remedial, whose functions are enlarging and restraining. He notes that since legislature allows great room for partiality and oppression, law should not be interpreted as being legislative. For Blackstone, law comes from Nature, the Revelation, Nations and Municipalities. Blackstone points to the following as being the essential parts of law: Declaratory, Directory, Remedial and Sanctional. Bentham found faults with all these notions. We shall examine his reaction later. We shall now turn to Blackstone's notion of law in general and municipal law in particular.

Blackstone

Blackstone defines law in general as "a rule of action, which is prescribed by some superior, and which the inferior is bound to obey."[1] Because his view of laws is derived from those of nature, he defines municipal law as: "A rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."[2] Instead of explaining what municipal law is, he dwells on the view that society originated from a single family to develop first into natural and then into political society.

The Nature of Law

Blackstone interprets law in general as moral law, gravitational law and laws of nations. He identifies the origin

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[1] Ibid., p. 5.

[2] Ibid., p. 38.

and characteristic of these laws with the creation of matter.

> When the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform.[1]

He points out that man conforms to these laws because God created him with free will and the faculty of reason to follow the immutable laws of human nature.

The Purpose of Law

Blackstone divides the function of law into four parts: Declaratory, Directory, Remedial and Sanctional. He explains that the declaratory part[2] defines the rights to be observed, while the directory spells out the consequences of non-observance of those rights. The purpose of the remedial part is to restore a man's private rights, or redress his private wrongs. The sanctional or vindicatory part of law is what establishes the penalty to be applied to anyone who commits public wrongs, or neglects his duties.

Bentham

After considering Blackstone's overview of laws, we shall turn to Bentham. He maintains that common law should not serve as law because nobody would know the validity of its obligation.*

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[1]Bentham, C.C., p. 8.

[2]Ibid., p. 59.

*R.H. Graveson, "The Restless Spirit of English Law", Jeremy Bentham and the Law, G.W. Keeton & G. Schwarzenberger eds., Westport: Greenwood Pr., 1970, first published in UK, 1948, ch. 6, pp. 101-121. In this chapter Graveson tells us that cont'd

The Genesis of Bentham's Idea of Punishment

Bentham believes that the role of statute law is to restrain man's conduct, and criticizes Blackstone for not considering "what is it a statute should enlarge in order to be an enlarging statute or restrain in order to be a restraining one."[1] For him the legislature should interpret the law; and the end of law should be the suppression of mischief. Finally he points out that Blackstone forgot to mention that part of law which lays down the punishment for any public wrong or neglect of one's duty. With these general comments in mind, we shall now proceed to his definition of municipal law.

Bentham defines law as follows:

> A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasions be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.[2]

Bentham's definition of law elucidates that law should be the will of the legislator. Accordingly, he feels that on the one hand each of the following terms: Command, Commandment, Order, Injunction, Precept, Decree, Statute, Ordinance,

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Bentham's emphasis lays on the method of making law, not on its content, a fact that coloured most of his theories and made him an iconoclast with regard to the English system of case law in general and the doctrine of precedent in particular.

[1] Ibid., p. 136.

[2] J. Bentham, Of Laws in General, p. 1.

Edict, Constitution, Regulation, Establishment, Institution, and Mandate[1] conform to his definition. On the other, he realizes that they do not, but he uses these words in order to give the term Law "a general idea."[2]

The Nature of Law

Bentham does not see how Blackstone, interpreting moral laws, gravitational laws and laws of nations as derivative of laws of nature, connects them to the principle of justice and human felicity.[3] The difference between Blackstone and Bentham is that the former identifies the laws of England with those of nature, while the latter's concept of law is legislative.

According to Bentham, Blackstone, instead of "teaching us Jurisprudence, chose to lecture us in Divinity",[4] especially on how the laws of nature are related to the Divine.

For Bentham, natural laws do not sanction a person's behaviour; rather, it is conscience and fear of law that achieve this purpose. Consequently, Bentham's concern with jurisprudence is to show that the will of the legislator represents the sanctional part of law which restrains through conscience and respect of law.

Bentham criticizes Blackstone's use of the words "right" and "wrong" because it does not agree with their legal definition. For Bentham, the word "right" denotes an act which

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[1] Ibid., p. 10.

[2] Ibid., p. 10.

[3] Bentham, C.C., p. 18.

[4] Ibid., p.21.

conforms to law, and "wrong" one that is likely to bring punishment as its consequence. For this reason Bentham finds Blackstone's statement "the king can do no wrong"[1] (a maxim of common law) invalid, ambiguous, paradoxical, and meaningless, and advises that the statement should rather be interpreted to say: "the king cannot do any act that is wrong without subjecting himself to punishment."

Bentham also object to Blackstone's definition of common law as established customs and maxims because people would not know what they are, and their validity would be hard to prove. He argues that, for established customs to be legal, they must undergo the legal process to make them obligatory so that punishment can be applied if they are not observed.

Bentham advises that the definition of law should carefully state what is law and what is not, in order to determine validity, utility and observance of the law. He believes that a clear understanding of law in general would lead to a more precise interpretation of law in particular.

Bentham rejects Blackstone's definition of law as "rule of civil conduct prescribed by the supreme power in a state commanding what is right and forbidding what is wrong"[2] - because this definition implies that sovereignty is external or has a theocratic origin. For him the definition fails to show the connection between municipal law and the supreme power that makes it, and how the law commands and fordibs.

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[1] Ibid., p. 180.

[2] Ibid., p. 38.

He rejects Blackstone's view of municipal law because it implies the presence of a supreme power that can be traced back to the despotic rules of feudal or Roman times. He objects to external sovereignty because it would allow monarchs and judges to be law makers, thus justifying tyrannical and oppressive laws. Misrule and injustices arise out of the monarch's corruption and abuse of power, both of which find justification in common law, as happened in feudal times. Bentham attributes the failure of law to its partial, tyrannical and oppressive application on the part of the judges, a fact that brings him to declare: "I might move for shutting up Westminster Hall and for throwing all law books into the fire."[1] It would be hard to disagree with him.

Laws of nature form the core of Blackstone's thought; he interprets laws as divine; he relates natural society to civil government, and accepts that the common law should serve as the law of the country. Since Bentham doubts Blackstone's view of law, he questions: where is it prescribed? how can it be prescribed? what is there in it to prescribe? who made it? who prescribed it? of whom is it the will?

Because Blackstone adheres to the laws of nature, he fails to notice that the effectiveness of the law is in the will of the legislator.* Instead he interprets the directory and san-

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[1]Bentham, C.C., pp. 18-19, 143.

[2]Ibid., p. 43.

*L.J. Lysaght, "Bentham and Legal Theory", Northern Ireland Legal Quarterly, Vol. 24, 1973, pp. 385-398. In his article Lysaght presents the four ways which, according to Bentham, cont'd

ctional parts of law as vindicatory, and identifies them with punishment, rather than reward, whose purposes are:

> 1. The quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of the municipal (law) are in themselves the best and most valuable of all rewards.
> 2. Were the exercise of every virtue to be enforced by the prospect of particular rewards ...
> 3. The dread of evil is a much more forcible principle of human actions than the prospect of good.[1]

Bentham objects to the first argument as not holding sufficient truth to achieve the purpose, and adds that the second one may have truth, but it is so uncouthly presented as to make its meaning ambiguous. The third is so loosely worded that, as a consequence, one hardly knows whether to agree or disagree with it. On the whole, therefore, Bentham objects to Blackstone's concept of the purpose of punishment which, according to Bentham, should cause people to observe that mode of conduct which, if not observed, would have punishment as a consequence of the transgression.

Bentham criticizes Blackstone for failing to indicate that the role of the vindicatory part of law is to establish what acts are right or wrong, and what would be the consequence of non-compliance. For Bentham the efficacy of law resides in the penalty annexed to it. This is why he affirms that the sanctional part of law cannot stand without the di-

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express the will of the legislator, namely, command, non-command, prohibition and permission.

[1]Bentham, C.C., p. 73.

rectory one. The sanctional part will establish, for example, that "you shall be hanged" as being the expression of the will of the legislator, while the directory one is completed in itself as a logical proposition "you shall be hanged if you steal", thus suggesting the condition for the will of the legislator.

The Purpose of Law

The purpose of law should be to restrain the conduct of criminals, and therefore Bentham objects to Blackstone's concept of the function of some aspect of law, such as the declaratory, directory, remuneratory and vindicatory. He points out that when the declaratory and directory aspects of law proclaim "Thou shall not steal", both lack the sanctional part which lays down the condition "You shall be hanged if you steal". Bentham does not believe the vindicatory aspect of law to be important, rather that its main strength lies in the penalty annexed to it. Bentham puts a strong emphasis on the sanctional part of law: he maintains that its purpose cannot be vindicatory* because, like all law, it is the expression of the legislature.

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*David Lyons, "On Reading Bentham", Philosophy, vol. 47, 1972, pp. 74-79. In his article Lyons tells us that Bentham conceives law primarily as a system of social control whose special features and place in human life provide it with the greatest potential for producing positive good, but also with the capacity for bringing about great evils. He adds that Bentham regards law essentially as a system of restrictive rules (commands, prohibition). Furthermore, he observes that Bentham quite clearly argues for the practical necessity of punishment against reward, and for using legal sanctions instead of relying on extra-legal sources of motivation, mainly on the grounds of rehabilitation and efficiency.

The Genesis of Bentham's Idea of Punishment

> Legislators and their Laws are said to compel and oblige; not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation: but because, by declaring and exhibiting a penalty against offenders, they bring to pass that no man can easily choose to transgress the Law; since, by reason of the impending correction, compliance is in high degree preferable to obedience. And even where rewards are proposed as well as punishment threatened, the obligation of the Law seems chiefly to consist in the penalty; for rewards, in their nature, can only persuade and allure; nothing is compulsory but punishment.[1]

In Bentham, Law is binding only if it is an act of parliament. The legislature should be supreme, and no court should have the power to overturn its intentions. Accordingly, in matters concerning law, legislature "shall be the standard", because it conforms to the interest of the people, thus making law more just than judges' decisions.

> When the guilt of the offender is in question: viz. whether he has done the act charged, whether he is liable to the punishment demanded, whether the act he is charged with if done by him (?) is an act forbidden by the Law, if forbidden whether forbidden under this Punishment, in case of doubt, the Judge should always be disposed to favour that construction which is favourable to the accused; that construction the effect of which is to exempt him, in whole or in part (according as the doubt respects the commission or the description of the offence on one hand, or the description of the punishment on the other) as the case is, from suffering.
> When the guilt of the offender is not in question, but merely the propriety of the mode of charging it, of the allegations made or steps taken to bring him to punishment, then the Judge should have no such bias.[2]

Bentham's criticism of Blackstone is justified because he clearly demonstrates how Blackstone confuses the laws of nature with legislative ones, common law with statutory laws,

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[1] Ibid., p. 79.

[2] Ibid., p. 145.

and established customs and maxims with statutes, thus allowing power to be absolute and judges and common law both to serve as the law of the country. According to Bentham, sovereignty over law should belong to the legislature, and laws should be the product of its will, whose aim should be the protection of the community. Blackstone's faults are mainly of definition, especially with regard to municipal law, which Bentham finds particularly vague and meaningless, and which he redefines[1] as follows:

1. municipal law should command a right action, and prohibit a wrong action;

2. the action it commands must be already right, and the one it prohibits already wrong;

3. commanding what shall (or is to) be right, prohibiting what shall (or is to) be wrong.

CONCLUSION

We have seen that when Bentham accepted the principle of utility as a measurement of right and wrong, he did so in objection to Blackstone's maxim: "the king can do no wrong." For Bentham, the idea of right implies conformity to law, while wrong is an act liable to punishment.

He maintains that conformity to law is empirically influenced by pain and pleasure, while he finds that natural laws

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[1] Ibid., p. 53.

cannot be thus interpreted, and that is why he rejects them.

Not only does he advocate that law should be statutory and the expression of the will of the legislator, so that its validity, utility and observance be clearly defined, but also that it be just, since its purpose is to control human actions.

CHAPTER TWO

BENTHAM'S REFUTATION OF THE NEW SOUTH WALES PROJECT, MISAPPLIED PUNISHMENTS AND BLACKSTONE'S CONCEPT OF SOVEREIGNTY

In this chapter we shall investigate Bentham's reasons for rejecting the New South Wales project, and why he thought some punishments to be misapplied. Also, we shall examine his reasons for objecting to Blackstone's concept of the three forms of government, the British constitution and the supreme power.

Bentham's Rejection of the New South Wales Project

Punishment by which criminals were banished from England to Australia was known as punishment by transportation. It was introduced because jails in England became overcrowded and, as a result, the British Government decided to banish the worst criminals to Australia. "In January 1788 the ships reached New South Wales, and the first settlement was planted."[1]

Bentham states the four aims the British government tried to achieve through transportation punishment, and later demonstrates how they all failed. He writes:[2]

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[1] J.A. Williamson, The British Empire and Commonwealth, London: Macmillan, 1956, first ed., 1935, p. 244.

[2] J. Bentham, Panopticon versus New South Wales, J. Bowring ed., New York: Russell & Russell, 1962, first published in Edinburgh, 1838-43, vol. 4, pp. 173-248. (Hereafter the book will be referred to as P.V.N.S.W. and page number).

Bentham's Refutation of the New South Wales Project, etc.

> 1st example - prevention of similar offences on the part of individuals at large; viz. by the repulsive influence exercised on the minds of bystanders by the apprehension of similar suffering in case of similar delinquency.
>
> 2dly, reformation - prevention of similar offences on the part of the particular individual in each instance, viz. by curing him of the will to do the like in future.
>
> 3dly, incapacitation - prevention of similar offences on the part of the same individual, by depriving him of the power to do the like.
>
> 4thly, compensation or satisfaction, viz. to be afforded to the party specially injured where there is one.

After studying these objectives for almost ten years, Bentham became convinced that none of them could be achieved through transportation punishment. Consequently, he wrote a letter to Lord Pelham, Minister of the Treasury, detailing his arguments and suggesting the panopticon penitentiary system as an advantageous alternative to replace the New South Wales project.

Prevention

Prevention of crime depends on whether, through punishment, criminals are made aware of their wrongdoing. This can happen when they are exposed to public ignominy or to the horrors of solitary confinement, darkness and hard diet in prison. Only if these methods succeed, we can say that the criminal has been reformed and deterred from further transgressions. Bentham's own belief is that consciousness of wrongdoing is the ultimate factor that prevents crime, since it is rooted in the moral and religious awareness of the cul-

Bentham's Refutation of the New South Wales Project, etc.

prit. He writes:

> ... a man for the acceptance of any such offer - to commend him for the refusal of it - is to employ so much of the force of the popular or moral sanction, in a direction diametrically opposite to that of the action of the political sanction; diametrically opposite to the interest of society - of every society, but that of malefactors.[1]

His position is based upon the comparison he made between the different outcomes of the New South Wales and the American penitentiary system. He considers the latter more efficacious because it pivots upon the moral and religious awareness of the prisoners. He cannot understand how transporting criminals to New South Wales could either reform them or prevent crime in England, since in the first case they were not exposed to the ignominy of punishment, and in the second people had no direct experience of the consequences of crime.

Reformation

Another reason for Bentham to favour the panopticon system is that it contemplates, as part of its programme, religious instruction, which Bentham considers extremely important in the process of reforming criminals. He doubts whether in New South Wales prisoners would be exposed to the same discipline and its positive influence in reversing their attitudes and objectives. He hypothesizes that, if this were done, then delinquency "would have been shut out,

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[1] Ibid., p. 226.

not merely by spiritual bars, by [redacted]al bars, but by physical ones."[1]

To fulfill this purpose of punishment in New South Wales, Bentham believes that not only are civil and military officers needed, but also religious ministers. Still, he doubts whether their presence would be of any consequence, considering the lax atmosphere of the penal colony in which no discipline, especially religious, was enforced by the authorities. Rather, he points out that the only interest shown by the governors of New South Wales was in the benefit derived from the prisoners' labour.

Another problem in New South Wales was the consumption of alcohol by the convicts, thus making rehabilitation more difficult. The lack of religious instruction, which was present in the American penitentiary system, also inhibited rehabilitation. During a visit to the States, Bentham observed that because of "a long and continual practice of moral habits"[2] ninety-five percent of the convicts were reformed.

Incapacitation

Bentham points out that in New South Wales when convicts finish the term of their sentences, generally they are neither incapacitated nor reformed, thus showing that the project is a dismal failure. We have seen that Bentham's

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[1]Ibid., p. 174.

[2]Bentham, P.V.N.S.W., vol. 4, p. 235.

notion of prevention of crime is rooted in the principles of moral and religious consciousness. But he has observed that there was a total absence of these principles amongst convicts in New South Wales. He contends that, by disregarding these, reinforcing laws may lead to injustices. He asserts that giving convicts extra punishment implies a new system of compulsive colonization which is attained at the expense of justice.

> The fixation thus performed, there comes upon the back of it another punishment - a punishment of prodigiously greater magnitude - a punishment added by one knows not who, added by an invisible hand, added by the hand of power (for in default of literal designation we must resort perforce to figurative) - added by the hand of power, without a hearing, and to all appearance without thought. In truth, so oblique was the course by which the object was pursued, that no adequate idea of it can possibly be conveyed by any concise form of words: a description of it will be attempted a little further on.[1]

Furthermore, he considers keeping ex-convicts in New South Wales, when they have finished serving their sentence, a violation of the existing laws, and compares this manner of law enforcement with threats.

> A strong man has thrown a weak man into a dungeon, turned the key upon him, and left him there to starve: not a syllable to forbid his acting, not a syllable to forbid his coming out. The wretch lives for a week or so, and then expires. Physical obstacles, which rendered it impossible for him to escape and live, are employed in preference to ineffective threats. What follows? - that while he lives, it is not false imprisonment? that when he dies, it is not murder? No; but that the imprisonment is so much more rigorous, the murder so much more barbarous.[2]

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[1] Ibid., p. 187.

[2] Ibid., p. 188.

Bentham's Refutation of the New South Wales Project, etc.,

Although the Act of 1779* which established the New South Wales project, set the sentence to be seven to fourteen years, in practice transported criminals were not returned to England. Bentham interprets this punishment to be oppressive, a fraud and a "solemn mockery of justice."[1] He questions why parliament strains itself in the effort to redefine a statute that cannot be obeyed. He is bitter that nothing has been done to correct these injustices.

> The price, in the way of injustice - the whole price is thus paid for the expected benefit: and it is but an imperfect degree that the benefit is reaped. The proportions of penal justice are confounded; the poison of perfidy is infused into the system of government and still the obnoxious vermin remain unextirpated.[2]

Bentham is aware that, if the sentences were served in England, more people would be aware of them and possibly demand a rectification of the law.

Compensation

By compensation or satisfaction Bentham means that clause by which the criminal pays back the injured party for the loss or any other suffering his offence has caused him. Bentham interprets compensation as past or future satisfaction. In the former case, reparation is less than the evil committed, in the latter, it is equivalent to the offence because its function is to prevent more crime in future.

*Sir William Holsworth, "Bentham's Place in English Legal History", California Law Review, vol. 28, 1940, pp. 568-586. In his article Holsworth observes that Bentham was mainly concerned with correcting abuses and anomalies of law, and reforming and restating the offender by direct action of the legislature.

[1] Ibid., p. 189.

[2] Ibid., p. 191.

> The idea of compensation being, in such a case, so novel - novel to a degree which you yourself, Sir, have even been forward to acknowledge - the absence of it cannot, consistently with justice, be objected as a blemish to that system of punishment, of which the scene was laid in New South Wales.[1]

In sum, Bentham rejects these four objectives that justified transportation to New South Wales because punishing criminals there does not prevent crime in England; attempts to reform and incapacitation result in injustices, and, the convicts' earnings were so low that they could not possibly repay for the damages and other losses they had caused.

He, then, introduces his own objective, the economy of punishment.

Economy of Punishment

Bentham criticizes the British government for spending large amounts of money for each convict in New South Wales, while the panopticon penitentiary system would result in considerable lower expenses, and allow each convict to pay for his maintenance through his labour. In New South Wales the government not only had to look after the convicts, it also had to pay for the maintenance of the colony.

Bentham's concern with New South Wales is to expose the need for penal reform. For example, A View of the Hard-Labour Bill reveals that Bentham[2] is preoccupied with the reform of penal law; the bill, he says, does not adequately deal with the problem of reform. But Bentham feels that the

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[1] Ibid., p. 200.

[2] J. Bentham, A View of the Hard-Labour Bill, J. Bowring ed., New York: Russell & Russell, 1962, first published in Edinburgh, 1838-43, vol. 4, pp. 3-35.

clause referring to the transportation of convicts to New South Wales, in 1775, gave rise to an act of parliament as a consequence of which long prison sentences were broken down into a multitude of shorter ones. Bentham looks upon this as "one of the most signal improvements that have ever yet been made in our criminal legislation."[1] His sarcasm hardly escapes notice.

Bentham rejects the New South Wales project because it fails to prevent crimes in England, as people there are not directly exposed to the ignominy of punishment. He observes that lack of close supervision and control over convicts has resulted in failure to reform them, leading instead to excessive punishment which, Bentham complains, is applied at the expense of justice.

Misapplied (Mis-seated) Punishments[2]

Bentham examines four modes of punishment: vicarious, transitive, collective and random, in order to demonstrate the abuse and misuse of the law by the British judicial system of his time, which allowed the punishment of innocent people on the basis of their natural or accidental relationship with the author of a crime.

Vicarious Punishment[3]

Vicarious punishment is inflicted on a substitute when it is not possible to punish the actual culprit, as in

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[1] Ibid., p. 5.

[2] Bentham, P.P.L., vol. 1, pp. 475-490.

[3] Ibid., p. 479.

the case of a person that commits suicide and whose relatives get punished.

Bentham thinks that, since the family has already been deprived of one member, adding punishment is not only a superfluous aggravation, but might also impair their subsistence.

Transitive Punishment

The punishment falling upon the children, parents or other relative of the person guilty of a crime is known as transitive punishment. Bentham objects to this kind of punishment in the following way:

> Let us suppose, for the purpose of the argument, that every man loves his wife as much as he does himself: on this supposition, ten degrees of grain (or by what other name soever it shall be thought proper to call so many aliquot parts of punishment) must be laid upon the wife, in order to produce, the effect of five grains laid directly upon the husband. On this supposition, then in 49,999 cases out of 50,000, half the punishment that is laid in this way, is laid on in waste.[1]

Bentham advises that the whole stock of direct punishment be exhausted upon the offender, and that innocent people be not used as scapegoats.

Although he is convinced that in the case of rebellion or treason, transitive punishment would prove unnecessary to restrain criminals, he affirms that:

> Let the crown be empowered, immediately upon the attainder of a rebel, to seize into its hands the

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[1] Ibid., p. 481.

> possessions, real as well as personal, of his wife, his children, and his other descendants too; with a power to continue the seizure from year to year upon special mention of each person, in so many proclamations to be issued for that purpose: and this too, under whatever title such property may be held, without suffering the law, as it is now, for giving to property such modifications as render it unforfeitable.[1]

Bentham concedes that the seizure of the criminal's property is appropriate in the case of treason, and also believes that by doing so the guiltless people are cleared. However, he does not recommend that the Crown be given the power to punish the family of the criminal because, since treason is an offence against conscience and arises from all sources, it is no more a family offence than robbery or murder. Consequently he objects to the punishment of the guiltless family members since their suffering would be without reason and in waste.

Concerning certainty, Bentham contends that this mode of punishing is deficient except in the case of rebellion. He holds this position because a man without a family has nothing to forfeit "and it will be found that the punishment will be inoperative in nine hundred and ninety-nine cases out of a thousand is good for nothing."[2]

Regarding equability, transitive punishment is less effective because, to a man who has no thought about his wife, children, or has taken a dislike to them, whether they are

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[1] Ibid., p. 482.

[2] Ibid., p. 482.

punished or not is a matter of indifference to him.

Regarding frugality, Bentham points out that this punishment is defective, and it only produces boundless evil.

> Consider the chain of domestic connexion, and calculate the number of descendants that a man may have; the suffering communicates from one to another, and destroys the peace of the most extensive families. To produce a direct punishment, which may be estimated as unit, indirect and mis-seated punishment must be created equal to ten, twenty, thirty, a hundred, or perhaps a thousands, & c.[1]

Bentham believes this way of punishing to lack the property of exemplarity, because the innocent who is punished suffers a secret and unavailing misery.

Always according to Bentham, transitive punishment lacks popularity because it is directly opposed to the general sentiments of sympathy and antipathy.

> When the delinquent is punished, the public vengeance is satiated, and receives no satisfaction from any ulterior punishment: if he be pursued beyond the tomb, and his innocent family be offered up as victims, feelings of pity are excited; and indistinct feeling accuses the laws of injustices, humanity declares itself against them, and on all sides the respect for the laws is weakened.[2]

Collective Punishment

Collective punishment is that which is imposed upon a large group of people on the assumption that the delinquent or delinquents are amongst them. For example, when a mob in Edinburgh seized and killed a guard, the Lord Provost of the town was punished for lax leadership and the corporation fined. Bentham considers the Lord Provost's punishment as

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[1] Ibid., p. 483.

[2] Ibid., p. 483.

"in propriam personam", because his negligence deserves it, while he sees the punishment of the corporation as unjustified: "The fine on the corporation was a collective punishment, falling on as many persons as might find themselves in any shape prejudiced by such fine."[1] He contends that:

> Now, from such a punishment, considered in itself, it is not probable that any great effects could have been expected. It served, however, to point the moral sanction against the offence, and to help to express, as in the words of the act, the "highest detestation and abhorrence" of the criminal transaction.[2]

In another case concerning collective punishment, Bentham tells us that for some years, in the borough of New Shoreham, a group of voters belonging to a Christian society,* sold seats in parliament for that borough. In the long run, they were punished for that practice. Although he maintains that this punishment is "proprias personas", he thinks that this punishment is unjustified because it is not treated as an "ex post facto"** punishment. Consequently, he calls it self-defence, because it is punishment against an evil still impending. Moreover, he considers this punishment to have been in "alianas personas."

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[1] Bentham, P.P.L., vol. 1, p. 483.

[2] Ibid., p. 484.

*Accused of corruption.

**H.F. Jolowicz, "Jeremy Bentham and the Law", Current Legal Problems, vol. 1, 1948, pp. 1-14.
In his article Jolowicz shows that Bentham tries to make law an exact science controlling human actions, and that intelligent legislators must use law as a means to induce individuals to do that which would produce the greatest happiness for the greatest number.

> Considered in this light, it was not expedient, since it was not necessary; for the innocent not only could be, but actually were, distinguished from the guilty. But in whatever light it may appear, considered with reference to the particular persons subjected to that trifling disadvantage, as a measure of reformation it cannot be too highly praised. It stands as the pattern and ground-work of a great plan of consitutional improvement.[1]

Perhaps Bentham would be tempted to justify collective punishment if it could achieve two aims: that the guilty be punished along with the innocent; and that the suffering of both the innocent and the guilty be not greater than the benefit of the punishment. He is aware that the first is easy to determine, but the second is not.

In the example given above, Bentham justifies the punishment of the Lord Provost because the neglect of his duties resulted in great evil; but he believes the suffering of innocent people to be totally unnecessary and their punishment more expensive than the prevention of a similar crime in future.

Random Punishment

When a delinquent and another person who is a total stranger are punished together, this punishment is called random, since the latter has been involved by chance. Bentham illustrates this kind of punishment with two examples:

> An individual commits a secret murder, and sells you an estate: twenty years after he is discovered, prosecuted, attained, the king, that is, somebody who assumes his name, seizes the estate. If you have devised it, changed it, sold it - if, besides yours, it has passed through fifty other hands, it makes no difference. If it was your wife who had been murdered,

[1] Ibid., p. 484.

> it would make no difference: you would lose your wife by the crime, and your fortune by the punishment.[1]

In another example Bentham says that if a farmer sends his son with a wagon, and the son falls down and is run over and killed by it, the king or somebody on his behalf would seize the wagon. He sees this kind of loss as unfair, because if it had been a ship to kill the son, it would not have been seized because it belongs to the king. Furthermore, he points out that random punishment can be the result of false testimony or ignorance based on prejudice.

In an attempt to prevent this abuse, Bentham cautions that punishment should be carefully defined so that it does not affect a person related to the guilty party "in the virtue of their connexion."[2]

He suggests eight rules to guard against mis-seated punishments:

1. a delinquent's offence cannot consitute justification for the punishment of the innocent;

2. if the punishment is directed to the delinquent, then it should be inflicted sufficiently. But if it is directed towards the wrong person, Bentham warns that the legislator should neither prescribe nor authorize any punishment at all;

3. people who have no share in the crime should not be punished;

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[1]Bentham, P.P.L., vol. 1, p. 485.

[2]Ibid., p. 477.

4. punishing an innocent person does not prevent any crime, it only draws sympathy for the victim;

5. public sympathy for the innocent who is punished lessens the effect of punishment of the delinquent;

6. if it is necessary to punish any of the offender's connexions, that punishment should be less than the punishment of the offender;

7. the judge should not rely only on the delinquent's connexion, but should depend on conclusive evidence collected concerning this connexion;

8. if reparation is the mode of punishment applied to the innocent, then the legislator and the judges have power to make the delinquent repay for the damages caused.

In our discussion on vicarious punishment we have seen Bentham object to the punishment of one person for the offence of another, since this does not prevent mischief.

We have also seen Bentham object to transitive punishment because it involves unnecessary suffering for whoever is related to the offender, without actually preventing the repetition of the crime. He himself allows, however, that in case of rebellion, not only the culprit, but also his wife, children and other descendants, should be punished and his property seized, because he believes that this would prevent the culprit from repeating his action, by compelling him to serve his sentence, while at the same time allowing the state to safeguard itself.

Bentham's Refutation of the New South Wales Project, etc.

Bentham refutes the idea that collective punishment is unjustified because laws are fixed after the offence has been committed. But it is in some cases justified, as in the examples he gives of the Lord Provost of Edinburgh, whose punishment was the consequence of his ineptitude, or the Christian society of New Shoreham for selling parliament seats for the borough. In both cases punishment has achieved the aim of preventing further evil at the lowest expense to the government.

Finally, Bentham condemns random punishment because, again, it involves the suffering of innocent people through loss of property, etc., without actually preventing crime. Bentham's concern with misapplied punishment was to lead him to call for law reform.

Three Forms of Government[1]

Blackstone observes that there are three forms of government: the Monarchy, in which the power to make laws is in the hands of one person; the Aristocracy, in which said power is in the hands of a few chosen ones; and Democracy, in which the power to make laws resides in the hands of all. Bentham doubts whether any of these is the best form of government, since all allow some form of tyranny. He refutes the idea that Monarchy is perfect and Aristocracy wise and good. Rather, he sees Democracy as an acceptable form of government. Blackstone himself observes that in a democracy:

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[1]Bentham, F.G., pp. 449-460.

> ... where the right of making laws resides in the people at large, public virtue or goodness of intention, is more likely to be found, than either qualities of government.[1]

Bentham questions the wisdom of an absolute ruler, wondering how one man can be wiser than several. That is why he asserts that wisdom and goodness belong rather to a democratic government, in this differing from Blackstone who identifies these two qualities with an aristocratic government.

> The qualifications of goodness, I think it was, that belonged to the Government of all, while there was such a Government. This having taken its flight, as we have seen, to the religion of nonentities, the qualification that was designed for it remains upon his hands: he is at liberty, therefore, to make a compliment of it to Aristocracy or to Monarchy, which best suits him. Perhaps it were as well to give it to monarchy; the title of that form of government to its own peculiar qualification, power, being, as we have seen, rather an equivocal one: or else, which, perhaps, is as good a way of setting matters as any, he may set them to cast lots.[2]

The British Constitution

The British government consists of the Monarchy, the House of Lords, and the House of Commons. Executive powers belong to the Monarchy while the legislative powers are in the House of Commons, since knowledge of the law is found among its members: "In whom shall we expect to find so much knowledge of Law as in a professed Lawyer? of Trade, as in a Merchant."[3] Bentham allows that the aristocrats too have some knowledge of the law, although their experience is co-

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[1] Ibid., p. 458.

[2] Ibid., p. 460.

[3] Ibid., p. 467.

incidental compared with that of the democrats, who are more active among the people.

> Does experience come to men when asleep, or when awake? Is it the members of the House of Lords that are the most active, or the House of Commons? To speak plain, is in the House of Lords that there is most business done, or in the House of Commons? Was it after the fish was caught that the successors of St. Peter used the net, or was it before? In a word is there most wisdom ordinarily where there is least, or where there is most to gain by being wise?[1]

Bentham and Blackstone agree that the right to make laws lies in the hands of the supreme power which, for the former, is the House of Commons, and for the latter, the Monarchy. According to Blackstone: "... there is and must be in all of them a supreme, irresistable absolute uncontrolled authority, in which the jura summi imperi, or the right of the sovereign,* resides".[2]

Bentham disagrees:

> I take it, rather too much: it would be saying that there is no such thing as government in the German Empire; nor in the Dutch Provinces; nor in the Swiss Cantons; nor was of old in the Achean league.[3]

Bentham vehemently rejects Blackstone's position because he believes that absolute monarchical power leads to oppressive and partial laws; furthermore, Parliament should not be under the influence of the Crown; a situation, he observes, which has caused the annulment of parliamentary acts

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[1]Bentham, F.G., p. 469.

[2]Ibid., p. 479.

*Bentham's view of sovereignty is well explained by J.H. Burns in "Bentham on Sovereignty: an Exploration", Northern Ireland Legal Quarterly, vol. 24, 1973, pp. 399-416; and H.L.A. Hart in "Bentham on Sovereignty", Irish Jurist, vol. 2, M.S. 1967, pp. 327-335.

[3]Ibid., p. 489.

on the part of the judges appointed by the Crown, and the suppression of the voting rights of the citizens - thus perpetuating the partiality of magistrates.

Supreme Power

Bentham and Blackstone agree in principle on the meaning of supreme power. But they disagree in that Blackstone, hiding behind long words and Latin definitions, concludes that such power should be in the Crown. Bentham's conclusion is that a democratic parliament should make laws instead, thus assuring the accrual of happiness to the largest number in the community.

In expounding the Greatest Happiness Principle Bentham is aware that it could not be adequately applied to law unless there is first a parliamentary reform. This could not be easily achieved, as it would entail the eradication of monarchical and aristocratic influences on the government. Nevertheless, Bentham is quite determined to bring this reform about.

> - sad condition of human nature! until the cup of calamity, mixed up with misrule, has been drunk to the very dregs, never has the man a chance of being heard, who would keep it from men's lips.[1]

As early as 1809 Bentham points out that England is in ruins because Monarchy and Aristocracy have far too much power in pursuing their own interests. Since this power is sheltered, Bentham suggests the election of a democratic assembly to

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[1] J. Bentham, Plan of Parliamentary Reform, T.J. Wooler ed., AMS Press, 1977, first published in London, 1818, p. 1.

represent the interest of the majority of the people. Monarchy and Aristocracy have accrued wealth and power at the expense of the people, Parliament supplies money to the Crown. The monarchical interest thus acquired is a sinister one,* because it is counter to the universal interest of the people.

> Extinguish Monarchy? Suppress, extirpate the peerage? Oh, not I indeed; nothing would estinguish: nothing would I extirpate: that which you have, continue to have, and God bless you with it - in all matters of reform, insofar as is not inconsistent with the very essence of the reform, this is, and has ever been, with me a ruling principle. Leaving, with all my heart, the full benefit of it to Monarchy and Aristocracy - to the ruling few, my aim and wishes confine themselves to the securing a participation in that same benefit to democracy - to the subject many - to the poor suffering and starving people.[1]

Bentham accuses the English Cashier General of being instrumental in the corruption of aristocrats, and blames the Bank of England for corrupting both Monarchy and Aristocracy, practices which call for a reform.**

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[1] Ibid., p. 10.

* A.J. Mitchell, "Bentham and His School" Juridical Review, vol. 35, 1923, pp. 248-284. In his article Mitchell points out that Bentham is concerned with law reform because he saw faults in the unreformed constitution and the sinister interest of the ruling class, and that is why he became a zealous advocate of parliamentary reform, the principles of which he laid down in his constitutional code.

** see
R.C. Fitzgerald, "Bentham and Parliamentary Reform", in Jeremy Bentham and the Law: a Symposium, G.W. Keeton and G. Schwarzenberger eds., Westport: Greenwood Pr., 1948, pp. 123-151.

W.H. Alexander, "Jeremy Bentham Legal Philosopher", New York University Law Review, vol. 7, 1929-30, pp. 465-473.

D.Alfange, "Jeremy Bentham and the Codification of Law", Cornell Law Review, vol. 55, 1969, pp. 58-77.

Bentham is confident that the change could be achieved by universal suffrage, although he is aware that the Duke of Richmond attempted, and failed, both in 1780 and 1783 to restore to the people their inalienable right to elect the members of the House of Commons. Bentham believes that: "... radical parliamentary reform is the only means, by which either that immediate end, or political salvation, the ultimate, can be accomplished."[1]

He objects to property being the qualification for election.

> Well, then, look to Westminster; look first to present time, see now what you have there. See you not Lord Cochrane? What do you see there? See you not blood and property in one? - blood from ancestors - property from the most priced source - the source from whence all your oldest property sprung - enemies blood, with plunder for the fruit of it? See you not Sir Francis Burdett? - have you not seen their blood enough and property enough? Look now a little back before you had either Cochrane or Burdett, had you not Charles Fox? - had you not him as long as the country had him?[2]

Rather, Bentham believes that deputies ought to be elected by the people according to their own merit and virtues, as he thinks that property cannot be a substitute for honesty and industry.

> Pitt the Second, and Charles Fox, the greater leaders of the opposition parties, each, in his day, a minister, - a situation in which the demand for appropriate honesty should have been at the highest pitch - what was the honesty of these men? The one, from the first, had but little, and that little to the last drowned in debt; the other never had any at all. Well neither of them having on principle, one of them not having even by law,

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[1] Ibid., p. 15.

[2] Ibid., p. 42.

> a right so much as to sit in the house, how came they to be there? Oh! the difficulty has been removed by the usual instruments - House of Commons' craft and lawyers' craft. Lawyers have been to work, and set up a manufactory of sham qualification. Lawyers get their fees; disqualified men their seats; - the work which would have been performed by sincerity, was bungled out by the more acceptable hand of fraud: - and thus, in the Blackstone phrase, everything was as it should be.[1]

Bentham proposes a constitutional monarchy with a universal suffrage based on the American model of government which allows freedom, private property and free religious worship. He feels this reform would grant the majority a substantial representation, although he is aware that rampant corruption would still enable wealthy candidates to buy votes.

Nevertheless, Bentham believes that universal suffrage might better constrain corruption and tyranny in government because the pleasure of the greatest number would be protected by legislation.*

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[1]Bentham, op. cit., p. 61.

*James Mill, An Essay on Government, introd. by Ernest Barker, London: Cambridge University Press, 1937. In this book Mill supports Bentham's position, that democracy is the best of three forms of government because it represents the interest of the community, compared with either monarchy or aristocracy, which represents the sinister interest of few. (Ibid., pp. 15-16).
He also agrees with Bentham that corruption and tyranny in the British government of their time could be corrected if the members of the House of Commons were elected every five years. Both Bentham and Mill feel that wealth or blood-descendancy should not be qualification for holding public office. (Ibid., pp. 35-42).

CONCLUSION

Bentham warns that failure to adhere to the Acts of Parliament can lead to injustice. For example, longer sentences than those authorized by the statute may be meted out, as it was often the case in the New South Wales project. Also, we have seen this project fail because convicts lacked, among other things, moral and religious consciousness, qualities fundamental to deterrence and reformation.

Bentham sees misapplied punishments as an evil uselessly employed since this punishment does not lead to reformation, deterrence or disablement. Moreover, he points out that punishing guiltless persons violates the fundamental principle of justice.

Bentham strongly objects to the corruption of monarchy and aristocracy and advocates, therefore, a democracy in which elected members of Parliament make laws.

CHAPTER THREE

BENTHAM

AND THE RETRIBUTIVIST AND UTILITARIAN VIEW OF PUNISHMENT

In this chapter we shall briefly review Bentham's justification of punishment, and examine the position of some retributivist authors in order to shed more light on the concept of punishment.

We shall also analyse two debates on capital punishment, one held in the House of Commons in 1868, the other, in the House of Lords in 1956, to bring into view the utilitarian perspective on the deterrent effects of the death penalty.

In the previous chapter we have seen Bentham reject the four objectives of the New South Wales project because of punishment being, in most cases, virtually endless; misapplied punishments because, if not undeserved, they can be greater than the offence they are supposed to correct; and Blackstone's notion of three forms of government, the British constitution and supreme power, because they fail to state, clearly and carefully, the conditions for meting out punishment, such as the agent's intention, motive and consciousness in performing an act.

Bentham & Retributivist and Utilitarian View of Punishment

Bentham's Justification of Punishment

Bentham considers the role of intentionality, consciousness, and motive, and the importance of establishing their influence on a person's actions, in order to justify the application of punishment.

Intentionality[1] belongs to the agent who is fully aware of the consequences of his deliberate action. Bentham advises that intentionality can be oblique or inexclusively intentional, when the action produces an unexpected result.

Consciousness[2] is what brings an agent to perform what Bentham calls "advised acts", while unadvised acts are those whose consequences were not foreseen by the agent.

Motive[3] is what brings an action to completion, or prevents an action from being carried out. It is, according to Bentham, the product of a thinking mind. Motive manifests itself in internal or external modes, the former as the perception of the expected results, a deciding factor in establishing whether any particular

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[1]Bentham, I.P.M.L., pp. 84-89.

[2]Ibid., p. 90-95.

[3]Ibid., p. 98.

action should be performed or not; the latter, as the fulfillment of the expected pleasure or pain deriving from the completion of the action.

The purpose of examining whether a person's actions are deliberate or accidental is to establish the importance of intentionality, consciousness and motive in carrying them out. Bentham maintains that a person's actions should accrue pleasure to the community. Should he fail to do so, then punishment must be applied. By the same token, no person who is not conscious of his actions should ever be submitted to punishment, at least not before a thorough examination of the circumstances that led to the completion of his actions.

Bentham feels that, for punishment to be just, it should be considered and evaluated according to: the ends of punishment[1], (what is that punishment aims to achieve), cases "unmeet for punishment" (is punishment deserved or not), the proportion between punishment and offence (the former must not be disproportionate with respect to the latter), and properties to be given to "a lot" of punishment, which determine what kind of punishment should be applied.

Bentham suggests that to deprive criminals of the power or desire to offend is what the ends of punishment are all about: prevention of crime. To apply punishment, therefore, when it is not deserved would be inefficacious[2], as punishment

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[1] I.P.M.L., pp. 158-172.

[2] Ibid., p. 159.

must not involve any evil, only prevent it. Bentham is particularly concerned with "ex post facto" situations, because there is nothing for punishment to prevent and it would be, therefore, totally useless.[1]

Bentham also proposes some guidelines to ensure that the proportion between punishment and offence be preserved and observed. After establishing the four aims of punishment as: i) to prevent all offences; ii) to prevent the worst offences; iii) to keep mischief down; iv) to act at the least expense, he adds that punishment must never be less than the profit of the offence. In the case of two or more offences, punishment should consider the greater offence, the punishment for which must be sufficient to bring ~~the~~ person to conform to the law.[2]

Bentham suggests properties to be given to "a lot" of punishment, so that the balance between punishment and offence be maintained.[3] They are: variability, equability, commensurability, characteristicalness, exemplarity, frugality, subservience to reformation, efficacy with respect to disablement, subserviency to compensation, popularity, remissi-

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[1] Ibid., p. 160.

[2] Ibid., pp. 165-174.

[3] Ibid., p. 175.

bility,* all of which, in their individual capacity, play an important role in the administration of punishment.

Retributive and Utilitarian Perspectives on Punishment

Immanuel Kant sees justice as a categorical imperative, and suggests that punishment should not aim at benefiting either criminal or society, but rather to maintain the balance of justice.

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*Bentham defines variability that property of punishment that affects either the profit of the offence or its mischief.

Equability means uniformity, and it should be applied when punishment implies more pain than intended, or less than expected.

Commensurability is a way of applying punishment according to the offence. But in the case of two offences, punishment should be greater for the greater offence.

Characteristicalness establishes to the criminal that he deserves the hurt and damages the crime caused him.

Exemplarity is the warning of what happens when a law is broken.

Frugality is a way of translating the ratio of suffering from real to apparent.

Subserviency to reformation means that punishment must be enough to deter the culprit from breaking the law again.

Efficacy with respect to disablement means that punishment must incapacitate the offender so as to prevent him from repeating his crime.

Popularity means that punishment should be prescribed by the legislator.

Subserviency to compensation means that the offender must repay for the damages he has caused.

Remissibility is allowing punishment to be either modified or altogether suspended in the case in which it has been wrongly applied. (Bentham, I.P.M.L., pp. 175-186).

Bentham & Retributivist and Utilitarian View of Punishment

All criminals should be punished, he says, but only after being found guilty, and the value of punishment should not exceed that of the offence. He warns against the perils of "serpent-winding utilitarianism",[1] according to which "It is better that one man should die than the whole people should perish."[2]

Kant objects to the application of punishment for the advantage of an individual or a community, "for one man ought never to be dealt with merely as a means subservient to the purpose of another ...",[3] because he believes in the intrinsic value of the human being, forsaking which can lead to misapplied justice.

> What, then, is to be said of such a proposal as to keep a criminal alive who has been condemned to death, on his being given to understand that if he agreed to certain dangerous experiments being performed upon him, he would be allowed to survive if he came happily through them? It is argued that physicians might thus obtain new information that would be of value to the commonweal. But a court of justice would repudiate with scorn any proposal of this kind if made to it by the medical faculty; for justice would cease to be justice, if it were bartered away for any consideration whatever.[4]

F.H. Bradley agrees with Kant's argument that there should be a connection between punishment and guilt in order for punish-

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[1] I. Kant, The Philosophy of Law, pt. II, W. Hastie trans., Edinburgh: T.T. Clark, 1887, pp. 194-8. In Philosophical Perspectives on Punishment, E. Ezorsky ed., New York: State Univ. of New York Pr., 1972, p. 104.

[2] Ibid., p. 104.

[3] Ibid., p. 104.

[4] Ibid., p. 104.

ment to be justifiable.

> We pay the penalty, because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be. We may regard for whatever considerations we please - our own convenience, the good of society, the benefit of the offender; we are fools, and worse, if we fail to do so. Having once the right to punish, we may modify the punishment according to the useful and the pleasant; but these are external to the matter, they can give us a right to punish, and nothing can do that but criminal desert.[1]

Antony Flew in his article[2] is concerned with a clear definition of punishment that would render it justifiable.

Punishment, Flew says, must be unpleasant to the culprit; it must be for an offence, and of the offender; it must be the work of personal agencies (which would distinguish it from penalty); it has to be imposed by virtue of some special authority or conferred through or by institutions against the laws or rules of which the offence has been committed.[3]

Flew's preoccupation lies with definitions: of what is understood by justification and punishment. He argues that

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[1] F.H. Bradley, Ethical Studies, Oxford: at the Clarendon Press, 1927, pp. 26-27.

[2] A. Flew, "The Justification of Punishment", Philosophy vol. 29, 1954, pp. 291-307.

[3] The following authors agree with this definition: H.L.A. Hart, Punishment and Responsibility, p. 5.
S.I. Benn, "An Approach to the Problem of Punishment", Philosophy vol. 33, 1958, pp. 325-6; T. Kasachkoff, "The Criteria of Punishment: Some Neglected Considerations", Canadian Journal of Philosophy, vol. 11, 1973, p. 363.

justification of punishment based on severity is radically misguiding because, among other considerations

> ... it embodies and hides certain questionable assumptions: that "our moral convictions" are in agreement, and that they are unchanging. Both are false. Though in both cases, of course, it depends a lot on whom "our" is referring to. But with the former assumption, even taking British professional philosophers as the us-group, it is difficult to believe that debate about the ethics of contraception, abortion, homosexuality, and suicide, would not reveal differences both in the weight given to different admitted prima facie obligations, and even perhaps in what were admitted as obligations at all.[1]

Moreover, Flew ponders whether the justification of punishment comprises elements of retribution. He analyses Mabbott's position, finding it inadequate in certain areas:

> ... there must be a "retributive" element in punishment, inasmuch as punishments to be punishments must be of an offender for an offence; though this is not a matter of universal logical necessity but only of "necessary truth in the great majority of cases", since there can be occasional exceptions. Mabbott's main mistakes were, I think: first to insist that punishment is necessarily and always 'retributive' in this (non-ethical) sense; second, I think that such a supposedly necessary truth about punishment (or anything else) could constitute a retributive or any other sort of moral justification of it (or anything else). To attempt to justify from the concept alone is like trying to prove existence from the concept alone - The Ontological argument. Though there is this at least to be said for it: that if "our moral convinctions" are to be accepted as the arbiter, then the attempt to justify from the concept alone will amount to an appeal to the popular moral convictions incapsulated in ordinary language.[2]

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[1] A. Flew, op. cit., p. 298.

[2] Ibid., p. 306.

Bentham & Retributivist and Utilitarian View of Punishment

A.M. Quinton's article[1] points to the difference between the retributive and utilitarian theories of punishment, the former being logical as opposed to the latter, which is moral. While observing that retributivists usually accuse utilitarians of punishing innocent people, Quinton contends that these allegations are unreasonable.

> Essentially then, retributivism is the view that only the guilty are to be punished. Excluding the punishment of the innocent, it permits the other three possibilities: punishment of the guilty the non-punishment of the guilty and the non-punishment of the innocent. To add that guilt is also the sufficient condition of punishment, and thus to exclude the non-punishment of the guilty, is another matter altogether. It is not entailed by the retributivist attack on utilitarianism and has none of the immediate compulsiveness of the doctrine that guilt is the necessary condition of punishment.[2]

Retributivists aim at accounting for punishment. Consequently their theory is not a moral, but a logical one. Whereas utilitarians attempt to justify punishment on the grounds of utility and consequences, the latter comprising prevention, deterrence and reformation.

> ... there is no logical relation between punishment and its actual or expected utility ... But that utility is the morally necessary or sufficient condition, or both, of punishment are perfectly reputable moral attitudes. The first would hold that no one should be punished unless the punishment would have valuable consequences, the second that if valuable consequences would result punishment ought to be inflicted (without excluding the moral permissibility of utility - less punishment).[3]

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[1] A.M. Quinton, "On Punishment", Analysis vols XIII-XIV, 1954, pp. 133-142.

[2] Ibid., p. 136.

[3] Ibid., p. 140.

Bentham & Retributivist and Utilitarian View of Punishment

Quinton adds:

> ... the retributivist case against utilitarians falls to the ground as soon as what is true and essential in retributivism is extracted from the rest. This may be unwelcome to retributivists since it leaves the moral field in the possession of the utilitarians.[1]

Kurt Baier's article[2] emerges first of all from his preoccupation with the corruption and fallibility of punishment:

> ... have hardship inflicted on him as punishment, although he was guilty of no offence, since he may have been found guilty without being guilty. For all judges and jurymen are fallible and some are corrupt.[3]

Baier proposes that punishment, which he defines as "the infliction of hardship on an individual ... preceded by his having been found 'guilty' of an offence",[4] is retributive. But he also points out that punishment can be non-retributive, as when hardship is inflicted upon an individual found to be not guilty. Whatever the case, Baier says, retribution is intrinsic part of punishment whose meaning and use are the same whether prosecuting the guilty or the innocent. In this he differs from Flew, who states that when an innocent person is punished, it is not punishment.

> A system of punishing people does not turn into a system of inflicting unpleasantness on scapegoats, simply in virtue of the fact that in this system innocent people happen frequently to get punished.[5]

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[1] Ibid., p. 140.

[2] K. Baier, "Is Punishment Retributive", Analysis, vols. XV-XVI, 1954-56, pp. 25-32.

[3] Ibid., p. 27.

[4] Ibid., p. 32.

[5] Ibid., p. 28.

Bentham & Retributivist and Utilitarian View of Punishment

In his article S.I. Benn[1] considers both the retributivist and utilitarian theories of punishment. He points out that the main contention between them is about the justification of punishment. He illustrates the claim of the former as follows:

> Some retributivists argue that while punishment is a prima facie evil, and thus in need of justification, it is less objectionable than that the wicked should prosper. This is to subsume the rule "Crime ought to be punished" under a more general rule: either "The wicked ought to be less well off than the virtuous" or "The wicked ought not to profit from their crimes". Now "wickedness" involves assessment of character; we do not punish men for their wickedness, bur for particular breaches of law.[2]

Benn refutes the retributivist allegation that, because utilitarians justify punishment on the grounds of deterrence, prevention and reform, they also justify the punishment of innocent people.

> "Punishment" implies, in its primary sense, inflicting suffering only under specified conditions, of which one is that it must be for a breach of a rule. Now if we insist on this criterion for the word, "punishment of the innocent" is a logical impossibility, for by definition, suffering inflicted on the innocent, or in anticipation of a breach of the rule, cannot be "punishment".[3]

Benn argues that retributivists fail to relate punishment to guilt. The utilitarian theory which does not have this shortcoming, becomes, in his view, moral and just.

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[1] S.I. Benn, "An Approach to the Problem of Punishment", Philosophy, vol. 33, 1958, pp. 325-341.

[2] Ibid., p. 327.

[3] Ibid., p. 331.

Bentham & Retributivist and Utilitarian View of Punishment

Parliamentary Debates on the Death Penalty

In the debate for the abolition of capital punishment J.S. Mill opposed the motion brought forward in Parliament by Mr. Gilpin[1] in 1868, advocating instead not only the retention of the death penalty, but also the strengthening of punishments in general. He objects to the arguments of the philanthropists not because he finds them faulty in themselves, but because he perceives them as being misguided in their fervor.

Mill argues that, with regard to the sanctity of human life, a person who commits a murder denies such sanctity in himself by violating it in another, and therefore the death penalty is the only appropriate punishment for such a crime.

> ... I confess it appears to me that to deprive the criminal of the life of which he has proved himself to be unworthy - solemnly to blot him out from the fellowship of mankind and from the catalogue of the living - is the most appropriate, as it is certainly the most impressive, mode in which society can attach to so great a crime the penal consequences which for the security of life it is indispensable to annex to it.[2]

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[1]Hon. Mr. Gilpin, "Parliamentary Debate on Capital Punishment Within Prison Bill", in Hansard's Parliamentary Debates, 3rd. series, April 21, 1868 (London: Hansard, 1968) in Philosophical Perspectives on Punihsment, G. Ezorsky ed., New York: State University of New York Pr., 1972, pp. 262-270.

[2]J.S. Mill, "Speech in Favor of Capital Punishment 1868", in Hansard's Parliamentary Debates, 3rd. series, April 21, 1868 (London: Hasard, 1868) in Philosophical Perspectives on Punishment, G. Ezorsky ed., New York: Stae University of New York Pr., 1972, pp. 272.

With respect to the deterrent effects of this punishment Mill suggests that hardened criminals may not be intimidated by it, but that, if it were restricted and unfailingly imposed in cases of atrocious crimes, it would then have an impact on the popular imagination. He laments the laxity of the judicial system that imposes the death penalty for petty crimes, only to transmute the sentence into a lesser one, thus diminishing considerably the efficacy of such punishment in the eyes of the public.

Gilpin is opposed to Mill's view because he feels that capital punishment does not deal adequately with the problem of prevention of crime. Rather, he feels that this punishment is ineffective and unjust. He observes:

> ... capital punishment was inexpedient and unnecessary; that it did not ensure the purposes for which it was enacted; that it was unjust in principle; that it involved not infrequently the sacrifice of innocent human life, and further, that it afforded an escape for many guilty of atrocious crimes.[1]

Both Earl Russell and Gilpin reject the death penalty because it involves some injustices. For example, Russell observes how this punishment presents judges with almost insurmountable difficulty in deciding whether to apply it or not, especially in the light of the recent change in public opinion towards it, which accorded an unprecedented amount of sympathy to the culprit sentenced to death. Russell

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[1] Gilpin, op. cit., p. 262. Mill agrees with Gilpin that if an innocent person were executed because of judicial error, the mistake can never be corrected; all compensation, all reparation for the injustice is impossible. (Mill, op. cit., p. 276).

reflects:

> ... nothing would be lost to justice, nothing lost in the preservation of innocent life, if the punishment of death were altogether abolished. In that case a sentence of a long term of separate confinement, followed by another term of hard labor and hard fare, would cease to be considered as an extension of mercy. If the sentence of the Judge were to that effect, there would scarcely ever be a petition for remission of punishment, in cases of murder, sent to the Home Office. The guilty, unpitied, would have time and opportunity to turn repentant to the Throne of Mercy.[1]

The popular feeling against capital punishment had reached the point where jurors would look for all possible reasons, such as insanity for example, for alternate punishment rather than sentence anyone to death. The general concern was to avoid, at all costs, condemning the innocent, as the horrors of recent judicial mistakes, mainly caused by cases of mistaken identity, had stricken deep into the popular conscience.

Charles Dickens, who wrote several letters on the subject of capital punishment, observed:

> I entreat all who may chance to read this letter to pause for an instant, and ask themselves whether they can remember any occasion on which they have in the broad day, and under circumstances the most favorable to recognition, mistaken one person for another, and believed that in a perfect stranger they have seen going away from them, or coming towards them, a familiar friend.[2]

These considerations were sufficient, in Mr. Gilpin's opinion, to advocate the abolitionists' cause. Furthermore,

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[1] Ibid., p. 264.

[2] Ibid., p. 267.

the religious feelings of the time bore a strong influence on the argument against capital punishment, which, Gilpin pointed out, was nothing else than an antedating of the final sentence that awaits us all. The culprit sentenced to death is granted time to reconcile himself with the Almighty, who alone shows forgiveness for the repentant sinner. If we call ourselves Christian, Gilpin argues, should not a human jury show the same kind of mercy, and grant the culprit the possibility to reform.

> He therefore moved the Amendment ... convinced that by the entire abolition of capital punishment ... the sanctity of human life would be regarded more highly than it had hitherto been, ... that sanctity ... would result in a great lessening of the crime of murder, and consequently in increased security to the public of this country.[1]

Almost a century later, in 1956, another debate on capital punishment was held in the House of Lords. It raised much interest not because of its legal outcome, but because of the moral complexities it dealt with, as W.G. Gallie points out in his article.[2]

The current moral divisions over capital punishment put forward by Public Utilitarians and Active Advocates, as Gallie calls the two groups engaged in the debate, cannot any longer be explained on the basis of the commonly accepted aims of pun-

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[1] Ibid., p. 270.

[2] W.G. Gallie, "The Lords' Debate on Hanging 1956: Interpretation and Comment", Philosophy vol. 32, 1957, pp. 132-147.

ishment: retribution, reformation and deterrence, as both groups offer a different interpretation of these terms.

The Public Utilitarians maintain that the welfare of the community ought to be the prevalent factor in deciding whether certain social measures ought to be applied, especially so with respect to capital punishment. Lacking the statistical evidence that such punishment is indeed deterrent, the Public Utilitarians advocate its abolition as it does not add to the pleasure of the greatest number.

In analysing the debate one cannot but notice that Active Advocates present a divided front: there are the Draconians, who invoke the "lex talionis" as the moral justification of capital punishment (an axiomatic position which does not allow much ground for discussion); the Tolstoyans, whose main preoccupation is the preservation of the "continuous humanity" that bonds all men, from saint to thief, and therefore look upon capital punishment as nothing else than crime added to crime, capital punishment being in this case the worst as the result of cold blooded decision; and the Spinozists, who call upon scientific methods to prove the efficacy of capital punishment, and the same kind of evidence to prove the guilt of the alleged culprit.

Gallie calls these last two groups "different colouring of utilitarianism" because indeed the same argument is used by all, only towards different goals: the utilitarians for legislative reform, Tolstoyans for the preservation of the "sanctity" of men, the Spinozists to promote the applica-

tion of scientific methods to social issues.

The Retentionist cause is thus somewhat unstable. Not wanting to perpetuate the traditional liaison with the Draconian principle that justified capital punishment until now, they too opt for utilitarian arguments for their ends, thus making the borderline between Utilitarian Retentionist and Utilitarian Abolitionist rather thin. In addition to which their "utilitarian" argument, that capital punishment is "euthanasia for the good of the rest of us" hardly disguises Draconian arguments.

The Retentionists go further to dispel the Utilitarian preoccupation with the execution of the innocent simply by stating that no innocent man has ever been executed, and that capital punishment is never applied unless there is sufficient evidence of the guilt of the offender. To this one might object, as Gallie does, that evidence is built on common sense, and that historical research proves how fallacious evidence thus obtained can be.

To further their cause, Retentionists argue that Abolitionists let sentimentality interfere with their reasoning: such as their alleged reaction to the physical aspect of capital punishment, while in fact their objections are based on the Tolstoyan and Spinozist view of capital punishment as crime added to crime. Abolitionists also argue that the intentional taking of life cannot be compared to accidental death, as Retentionists would like to have it. The Retentionists

question the "trendiness" of the Abolitionist belief that, since their position is progressive, it must therefore be right. This criticism of course would loose its validity once the Abolitionists succeed in presenting crime as a social problem that can be solved only socially, thus diverting the criticism that they ignore the practical consequences of legislative reform.

Of course one of the fallacies of the Abolitionist argument is the invoking of statistics in support of their view that capital punishment is not a deterrent. Countries that have pioneered the idea have done so on a humanitarian basis and because of inconclusive statistics. It might in fact aid the Abolitionist cause to admit that in certain instances where capital punishment was abolished for certain kinds of crime, these increased for a short time after, although in most cases this, happily, did not occur in a significant manner.

Gallie concludes his analysis of the debate by offering a tongue in cheek advise to the Abolitionists:

> ... the English are, in general, a very humane people. But, on the evidence available regarding capital punishment, ... - in comparison with their northwest European neighbours ... in respect to practice - the annswer must be NO. But the English are also highly sensitive to injustice, and especially to any injustice to themselves. Therefore, let the above inescapable verdict be widely advertised by Abolitionists: and even if in the short term it should add to their unpopularity, in the long run it might well prove a winner.[1]

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[1] Ibid., p. 147.

CONCLUSION

We have seen that, according to Bentha, before a person can be punished, it must be clear that he is conscious of his actions and motives, and that these are therefore intentional.

In addition, the punishment must be deserved, that is, the criminal must be found guilty and the punishment must also prevent further crime.

Bentham advises that punishment should prevent all offences, the worst offences, should eradicate mischief and act at the least expense.

He also adds properties to the given to "a lot", or a portion, of punishment in order to help measure the effects of punishment.

In discussing B entham's position, we have seen that he establishes punishment on retributive principles and administers it on utilitarian ones.

We have also seen that, although some retributivist theorists reject entirely the utilitarian stance, later they accept some of the utilitarian arguments to justify punishment. For example, Bradley has observed that "we modify the punishment according to the useful and the pleasant." While most retributivists have accused the utilitarians of meting out severer punishment, Flew feels that they themselves fall into the same trap. Quinton maintains that the difference between the two theories

is that the retributive is a logical approach to punishment, whereas the utilitarian is a moral one.

Benn criticizes the retributivists, whom we have seen accuse the utilitarians of failing to relate punishment to guilt, for falling into the same ambush. He says: "this shortcoming renders the utilitarian theory moral and just".

From this discussion we come to see that the relationship between retributivism and utilitarianism is not only more evident that it might appear at first sight, but is also a very close one. They both aim at prevention of crime.

We have seen that, although Mill and other members of the House of Commons and the House of Lords think that the legal use of capital punishment is justified, a close examination of their arguments contradicts their advocacy of this punishment.

We can conclude from what we have examined above that, according to Bentham, the purpose of punishment is to prevent crime without bringing injustice.

Also, Bentham's retributivist and utilitarian perspectives shed a new light on his stance on the problem of punishment.

CHAPTER FOUR

MORAL SANCTION AND LEGAL PUNISHMENT

In this chapter, we shall examine moral sanction and how it is related to legal punishment. Our idea of moral sanction shall focus on public condemnation and shame (ignominy). We shall also demonstrate how publicity of wrongdoing and legislative powers sanction a wrongdoer by depriving him of reputation, money, marital and child statuses.

Bentham defines utility as something leading to product, benefit, advantage, pleasure, good or happiness of both the individual and the community. He uses these words synonymously and all in opposition to mischief, pain, evil or unhappiness. He believes that pleasure influences the will in choosing right actions. The function of will is tantamount to that of conscience since they are both influenced by pleasure (when choosing actions) and aim at right actions. A person should choose a good or right action because it conforms to the law, while bad or wrong actions violate the law and are liable to punishment. Therefore, moral and legal sanctions are interwoven.

This concept of moral sanction grew out of his[1] rejection of Blackstone's position that human laws (the laws of the country) do not increase the moral guilt of murder. Because the former believes that fear of condemnation, fear of hatred, and fear of punishment are closely related, he asserts that human law increases moral guilt through fear of wrongdoing.

But the fear of condemnation and hatred, according to Bentham

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[1]Bentham, C.C., pp. 30-33.

do not derive from fear of the law, but are the workings of conscience, which is conducive to fear of the law. Obedience to one's conscience precedes obedience to law, the former operating as a moral sanction and the latter as legal sanction. The two are closely related, as Bentham points out when he says that shame "follows the finger of the law",[1] because conscience sanctions the ignominy that derives from punishment. Conscience compels us to obey the law, and law binds our conscience to suffer, if we do not obey it.

Both morality and law condemn crime as "bad" or "wrong", and both punish it as such, the former through blame and disapproval, the latter through a court of law. Bentham conceives "right" to be an act that conforms to the law, and "wrong" an act which, as its consequence, entails punishment. For Bentham, "wrong" act and punishment are correlated (interdependent).

People of good moral calibre enjoy and cherish the esteem, affection, good offices and love of their fellowpersons and, consequently, are less likely to do any act that might deprive them of this goodwill. They are more aware of the consequences of wrongdoing, thus proving the efficacy of moral sanctions in preventing crime, when, having committed one, they are ostracized by their peers.

> If I avoid them, I by that means already deprive myself of their good offices: if I put myself in their way, the guilt which is legible in my countenance, advertises and increases their aversion: they either give an express denial to my request, or, what is more common, anticipate it by the coldness of their behaviour. The reception gives fresh keenness to the sting of shame,

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[1] Ibid., p. 69.

> or (in the systematical language I have ventured to make use of), the experiment I have made use of the casual evils adds force to the characteristic evils of sanction.[1]

Bentham maintains that shame derives its efficacy from fear of wrongdoing. Ernest van den Haag clearly brings out this point in Bentham when he writes:

> The deterrent effect of punishment depends on stigmatization as well as on material suffering. Punishment removes from the community, temporarily or permanently, those who violate its laws. Whatever the tangible effects, that removal has a symbolic meaning of surpassing importance. It vindicates the social order by branding crime as antisocial, the criminal as outcast. The moral solidarity of those who live within the law is reaffirmed by casting out those who break it.
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> ... The stigmatizing effect of conviction is greater and more deterrent the higher the status of the convict: conviction may cause a painful loss of reputation and end the career, or bar from his profession a lawyer, accountant, physician, politician, or executive. The stigmatizing effect also depends on the attitude of one's social group.[2]

Bentham holds that those who are deterred by fear of wrongdoing are moral and rational people, for whom the fear of punishment in itself is secondary to the deterrent effect of moral and religious consciousness.

Ewing elucidates this concept in Bentham by affirming that fear of crime derives from the moral condemnation that would follow. He points out that moral education teaches people to dread wrongdoing - but that neither the retributive nor the deterrent aspect of punishment itself achieve this goal.

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[1] J. Bentham, P.P.L., vol. 1, p. 454.

[2] E. van den Haag, Punishing Criminals, New York: Basic Books, 1975, pp. 63-4.

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Moral education teaches people the value of good habits and consequently it is not the fear of punishment that controls their behaviour, because even when punishment is not an issue, they still would respond to the dictates of moral consciousness.

Fear of wrongdoing is acquired only when the concept of "wrong" and the consequent condemnation are clearly interdependent in everybody's mind.

> The moral effects of society are therefore much more important as a justification for state punishment than the moral effects on the criminal himself. Punishment in education on the other hand is intended almost exclusively to reform the individual punished, and for various reasons it certainly can do very much more in this direction than is the case with state punishment. But I should add that the chief point about punishment is the condemnation of a harmful or unworthy act which it expresses, not the pain inflicted, and in consequence the punishment should be reduced to verbal censure where that is possible. The externally inflicted pain is only needed to impress the censure more on the mind of the offender and on others, where mere words would not impress it on them enough.[1]

Bentham observes that the deterrent effect of law lies in the individual's fear of moral stigma, closely related, in his mind, to social stigma. Herbert Parker interjects[2] that the latter is more effective than law itself. He categorizes offences into those with strong moral stigma, such as sexual offences, etc., and those with less social stigma, such as gambling, etc. He points out that a laxity in the law would not lead to more crimes in the first category, but certainly would in the second.

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[1] Ewing, "Punishment as a Moral Agency: an Attempt to Reconcile Retributive and Utilitarian Views", Mind, vol. 36, 1927, pp. 299-300.

[2] H.L. Parker, The Limits of Sanction, California: Stanford U. Pr., 1968, pp. 296-331.

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Therefore it is not law enforcement that deters crime with strong social stigma, but rather the moral consciousness of wrongdoing that would derive from committing this type of crime.

Bentham is aware that moral sanctions are not always analogous to the offence, as it is difficult to determine their impact or duration.

Moral sanctions make the offender the object of contempt and aversion on the part of friends and acquaintances. They are, therefore, more effective for people whose social status makes them public figures.

When a person forfeits his reputation, this is known only to the few who witness a small part of his suffering. Consequently, moral sanctions can hardly be said to be an exemplary punishment.

Moral sanctions are reformative because they make a person more sensitive to shame, which keeps him from repeating the offence.

Bentham develops this theme further in this way: moral consciousness restrains a person from transgressing the law by making him conscious and consequently ashamed of his wrongdoing.

Active or laborious punishment[1] compels the individual to react to either physical or moral stimuli, as when the delinquent is exposed to ignominy while working in public places, as was customary in England and Eastern Europe in Bentham's time. The ignominy of this mode of punishment will prevent a criminal from offending again, as it is his faculty of volition that is influenced by it.

According to Bentham, this punishment can be converted into

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[1]Bentham, P.P.L., vol. 1, pp. 437-441.

profit, as in the case of poor people who have committed crimes for which they cannot provide any compensation, yet they can repay through their labour.

It is also frugal, not only because the offender pays through his work for the expenses incurred in keeping him, but because sometimes his labour produces more than the government pays for his sustenance.

By confining a person to labour, who had not been used to any kind of restriction and is now prevented from pursuing pleasurable activities, this punishment also proves to be equitable. In addition, it is variable.

For example, Emperor Joseph II sentenced people of high rank to labour in public places, which exposed them to infamy.[1] But when he condemned some protestant ministers to the gallows, their followers looked upon this sentence as an injustice against innocent people; in this case the punishment did not carry out the intended purpose of exposing the ministers to public infamy.

Finally, because this punishment confines criminals to hard work under close and strict supervision, thus preventing them from applying their inventiveness towards future criminal projects, it can be said to be reformative.

As Bentham says:

> So much for the tendency this punishment has to keep men from growing worse. It has, besides this, a positive tendency to make them better. And this tendency is more obvious and less liable to accident than the other. There is a tendency, as has been already observed, in

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[1] Ibid., p. 440.

> man's nature, to reconcile and accomodate itself to every condition in which it happens to be placed. Such is the force of habit.[1]

We are now going to extend Bentham's concept of moral sanction to cover religious and social sanctions and show how they operate among some African traditional societies. For example, the Baganda of Uganda impose social sanctions upon a criminal: when a person is found stealing, the person robbed shouts "omuubi" (thief). The call is immediately taken up by anyone in the vicinity that hears it, and whoever does not participate is thought to harbour and pamper the culprit. After the capture of the thief, everybody present denounces him, thus imposing the social sanction, which is a prevalent way of condemnation in most parts of Africa. In "Tribes without Rulers" we see how ritual ties among members of a tribe function as behaviour control, as in the way the elders administer a curse, for example, as a deterrent from wrongdoing, or how ritual ties are an extension of agnate ties, as among the Konkomba of Northern Ghana. Whenever there are disputes, some members of the tribe gather to seek a solution to the problem, and in the case of violation of somebody's rights, the whole tribe puts pressure on the transgressor. David Tait, in his discussion on the nature of sanction, writes as follows:

> The supernatural sanction is very strong and the necessary conditions for murder do not occur, for a brawl between kinsmen leads to the intervention of their kin to prevent bloodshed. Whereas a brawl between men of a

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[1] Bentham, P.P.L., vol. 1, p. 440.

different clan leads to a swift line-up of opposing sides.[1]

As we have pointed out the leaders enforce the established social and religious norms, this can be seen operating among the Konkomba. That is to say, kinsmen who prevent bloodshed by intervening and who also lead in lining-up of opposing sides are elderly men. On the other hand, the social sanctions the elders apply are in turn looked upon as supernatural sanctions.

Continuing this notion of social sanctions, we will show how the pronouncement from the elder (known as "Mar") is a drastic social sanction against wrongdoing among the Mandari.

The Mandari of Southern Sudan refer to a person with the title "Mar"[2] as the most powerful person in the tribe and he is regarded as the chief of their country. Although the "Mar's" office is hereditary, the "Mar" should have good standing with his subjects. He also should conform to the social norms accepted by the Mandari. Nevertheless, the Mandari contend that the "Mar" can never be deposed or killed by his own people. Furthermore, the mouth of "Mar" ("kutuku na mar") is revered by the Mandari who also think the "Mar's" pronouncements come from God. Consequently, when there is any dispute, the "Mar's" pronouncements will be sought and heeded. In this discussion regarding the Mandari, one can see that the "Mar" is a vicar of the ancestral guardian spirits, accordingly, a mere pronouncement from him serves as social sanction.

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[1] D. Tait, "The Territorial Pattern and Lineage System of Konkomba", Tribes without Rulers, J. Middleton and D. Tait eds., London: Routledge & Kegan Paul, 1958, p. 189.

[2] Ibid., p. 70. "... he was placed as a religious and temporal head, mar, he also being given power to intercede for rain and perform rites for the land and forests".

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For the Dinka, "order" or rule is employed as a social sanction against wrongdoing. They use the word "cieng" (noun) and "cieng bai" (verb) to mean "look after" or "order". Here the term "order" or "rule" is employed to mean "custom" or "customary rule, if you will. This simply means that, since the Dinka do not have rulers, this order (custom), with help from the warriors and spearmasters[1], serves to control tribal feuds. In other words, the Dinka look upon the "customary rule" as a supreme rule to such a degree that they are indefatigable in adhering to the custom.

The obedience which the Bwamba give to the elderly person is essentially that which is given to the "Mar". Also, advice from the Bwamba elder is equivalent to the Dinka order. The Bwamba appear to be a gerontocratic state: the group is controlled by the old person. For instance, "in some cases where people are found arguing violently, any elder whatsoever may stop and tell them that he will gather people to hear their dispute in a day or two."[2] During the hearing, the leders take the opportunity to warn the culprit to correct his ways. The elders in the Bwamba tribe command great respect such that when a young person disrespects them, he is fined by the disrespected elder.

And elder is also head of the Lugbara compound, and he is known as "aku" in the Lugbara language. The "aku" (elder) acquires his status because of his geneological seniority. He is of great moral

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[1] Ibid., p. 104. "The symbol of religious office of these priests of the Dinka is sacred fishing spear (bith), and the members of priestly clans, mostly elderly men, who actually function as priests may be addressed as "beny", chiefs (who Dr. Lienhardt prefers to call "masters") of the fishing spear."

[2] Edward Winters, Bwamba, Cambridge: W. Heffler & Sons Ltd., n.d., p. 156.

significance because he represents his group at the sacrifice and also as its ritual representative. It has been observed:

> Elders can invoke the ghosts against their own dependents within the family cluster and ghosts may themselves bring sickness for a misdemeanor, both within the cluster and on the part of elders one against the other within the major lineage, the widest group with common ghosts. The significant aspect of these processes in this context is that sickness is brought for breaches of kin-group solidarity and that it is cured by promise of sacrifice. At the sacrifice representatives of the major lineages, and of the whole subclan and even clan, gather together to share the meat and to bless the victim to show that they have no grudges in their hearts and that they consider the well-being of the group to have been restored satisfactorily.[1]

From the above quote, we can see that the elders have the power to destroy an evil-doer by handing down a curse. Similarly, they can vindicate the evil-doer through the performance of sacrifice.

Now we come to the Tiv of Nigeria. The Tiv are held together by elders and persons of prestige[2]. These men are heads of compounds. Moreover, the Tiv employ the term "u ya" to describe "man of the compound (head)". He is the oldest man and the over-seer of the compound. As a result, he is responsible for what the people, members of the compound, are doing. Furthermore, it must be added that he has such authority that, to live in the compound, a person has to have his permission. Similarly, he has power to expel anybody who is making trouble. This means that the "u ya" is obeyed because his subjects fear a curse from him. In fact, this fear, in turn, plays the role of social sanction.

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[1] Tribes without Rulers, op. cit., p. 220.

[2] Ibid., p. 54. "A man of prestige, on the other hand, is a man whose wealth, generosity, and astuteness give him a certain influence over people."

Moral Sanction and Legal Punishment

Forfeiture of Reputation

The importance of the mass media is nowadays taken for granted in most manifestations of public opinion. It influences choices, from grocery products to presidential candidates. It might also be argued that the media reflects public opinion.

Whatever the case, Bentham was keenly aware of the importance of the role the press plays in moral sanction by influencing, or reflecting, the attitudes of the people. It is also thought to be a powerful means of preventing crime by publicly condemning wrongdoing, more so than law itself. He recommends the use of the press for this purpose: not only should the offence be reported, but also the name of the offender "... may be recorded in indelible characters and circulated through the whole state."[1] Publicity proves, for Bentham, to be a powerful deterrent which, conversely, can also be used in the wrong circumstances, to destroy the innocent.[2]

But Bentham's preoccupation with publicity however was merely to underline the moral aspect of punishment, to which the Dreyfus case clearly belongs.[3] Furthermore, in his work Securities against

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[1] Bentham, P.P.L., p. 460.

[2] "This is an example of a particular type of punishment which Bentham called 'instructive ignominy'. It consists in the performance of certain ceremonial actions, trivial in themselves, whose significance consists entirely in the message they convey. By a convention familiar to all concerned, they betoken a terrible reality of social condemnation and dishonour. This visible stripping of the outward marks or rank proclaims the nation's deliberate casting down and casting out a traitor, and it is from this emblematic significance that it derives all its impressiveness." Walter Moberly, The Ethics of Punishment, Hamden, Conn.: Archon Books, 1968, p. 202.

[3] In 1892, Captain Dreyfus of the French Army, was found guilty of having procured for a foreign power documents connected with the national defence.

Misrule[1], he points out that publicity would censure the conduct of rules, in order to protect the subjects from injustices.

Considering how paramount the press was in arousing public condemnation in the Dreyfus trial, it can hardly escape anybody's attention that publicity with respect to wrongdoing can be for the offender much more painful than punishment itself: the effect of public moral condemnation can be quite shattering for its inflexibility.

Law only intervenes once the offence has been committed. Public opinion, on the other hand, is always present, ready to intervene at any moment, and apply a gradually increasing pressure on the individual. It is more prompt and preventive than law, and it regulates in many more ways people's behaviour.

Although publicity rouses and makes the common sentiment more universal and effective, the message it conveys is not uniformly received because communities are not homogeneous. For example, an offender might escape publicity by taking refuge among his peers, among whom crime is excused and condoned: this sympathetic attitude mitigates the effects of publicity.

It might be added here that publicity is better, in a certain respect, than legal control, because it is more likely to take into consideration mitigating, or aggravating, circumstances of time, place and motive that might have caused the act in question; it takes into account past services to condone present faults, and present good behaviour to wipe out past infamy. Consequently, public consciousness prevents more people from wrongdoing than law itself.

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[1]J. Bentham, Securities against Misrule, vol. 8, pp. 557-600.

Moral Sanction and Legal Punishment

Bentham would undoubtedly not only agree that publicity is more effective than law, but he would recommend it as a cheaper means of administering justice. To expose a wrongdoer to public reprobation is much less costly than to have him undergo a legal trial. Legal action must be invoked, though, when public condemnation fails to deter..

However, it must be pointed out here that public opinion is not always objective or enlightened by a logical process of thought, and can therefore be determined by prejudices or gratuitous hostile sentiments that can lead to erroneous conclusions. In other words, it cannot entirely replace law because it lacks accuracy.

However, there is a way to increase its effectiveness and legality. Bentham suggests that it be integrated with legislative powers. If the moral code is broken, its integrity should be maintained:

1. through the enforcement of certain laws prohibiting certain behaviour;

2. by letting people know what are the consequences of law breaking;

3. by persuading people to respect the law for the benefit of society;

4. by censuring the offender immediately and demanding that he account for his offence;

5. in the case in which there are two or more offences, by punishing the criminal more heavily for the most serious one.

Bentham's theory of forfeiture is based on his concept of

pleasure and pain. He argues that deprivation of pleasures, of the senses of wealth, or of reputation, and the pain resulting from it should deter wrongdoing and promote obedience to law.

We shall now examine some of the aspects of forfeiture.

Pecuniary or quasi pecuniary forfeiture is another sanction advocated. Here the offender's money is seized, or whatever is exchanged for money, in order to repay for the offence.[1]

On the whole forfeitures are effective because the community pressure operates as a means of moral reproach on the wrongdoer, thus making the offender sensitive to the import of his offense, which has already deprived him of his pleasure.

By forfeiture of condition Bentham intends the loss of civic status because of wrongdoing. For example, if a man is mean to his family, he can be punished for forfeiting his property and his status with respect to the family. Bentham lists some of the pleasures forfeited under this punishment as follows:

1. pleasures of the senses;

2. pleasures that depend partly on the senses and partly on the imagination;

3. numberless small pleasures of all kinds obtained from inexigible services pertaining to a husband's authority;

4. the pleasures resulting from the use of the property derived from the wife;

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[1] a) An amount of money equivalent to the cost of the offence to be seized from the delinquent and deposited into the account of the person injured;
b) taking the offender's possession and selling it in order to produce the amount necessary for the reparation of the offence;
c) to compel the delinquent to produce the sum or to punish him if he fails to do so;
d) his property to be legally seized either in money or other effects. (Bentham, P.P.L., vol. 1, p. 468).

5. pleasure of expectation founded on the pleasures deriving from the possession of wealth;

6. pleasures derived from affectionate friendships;

7. pleasure derived from the esteem and goodwill of a wife;

8. pleasures accrued from benevolence or goodwill;

9. pleasures of familial services;

10. pleasures attained from the power to control the family funds;

11. pleasures derived from fatherhood.

CONCLUSION

In short, in Bentham's thought, moral sanction should become part of the statutory law so that it may become more effective in depriving wrongdoers of their legal titles, such as paternal, maternal, etc. It is also effective as punishment itself.

Because fear of human law and moral guilt are one and the same, Bentham has shown how the moral stigma of punishment affects those who are conscious of their wrongdoing and how moral awareness constrains criminals' behaviour and encompasses conformity to law.

However, what must be pointed out here is that Bentham's concern with the connection between moral sanction and law is related to his notion of how crime is to be prevented. And his preoccupation in this regard was to establish how moral sanction interacts with law to achieve this goal.

CHAPTER FIVE

TORTURE[1] AND IMPRISONMENT

In this chapter we shall examine the function of torture and imprisonment in preventing crime through physical, moral and religious means.

When external factors control a person's actions, other than his own free will, these actions are said to be coerced. As in the case of a businessman, for example, trying all sorts of persuasive means, such as the promise of a new car, to persuade his son to follow in his steps. Should the son comply, the result cannot be but a coerced one. Similarly, in Bentham's view, the purpose of law is to coerce obedience, especially from trespassers. If a person is found guilty after being fairly tried, it is justifiable to coerce him, physically or otherwise, to obey the law.[2]

Torture

The concept of torture has developed from this background. Torture involves more physical pain than any other ordinary punishment. It is administered

> ... where a person is made to suffer any violent pain of body in order to compel him to do something or to desist from doing something which done or desisted from the penal application is immediately made to cease.[3]

Torture should be employed only in cases "where the exigency will not wait for a less penal method of compulsion."[4]

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[1] W.L. and P.E. Twining, "J. Bentham on Torture", Northern Ireland Legal Quarterly, vol. 24, 1973, pp. 305-336.

[2] Bentham, P.P.L., vol. 1, pp. 393-4.

[3] Twining, op. cit., p. 309.

[4] Ibid., p. 314.

Torture and Imprisonment

Also it should be employed only "where the safety of a whole state may be endangered for want of that intelligence which is the object of it to procure".[1] Torture should be in the hands of people qualified to judge responsibly when it is necessary to use it. It ought to be consistent with the purpose for which it is administered. Culprits have been made to confess through torture when other methods were available which, had they not answered satisfactorily, would make them suspect anyway. For example, Bentham thinks that in England it is no use to torture a man to bring him to trial because, if he refuse to cooperate by not answering, his silence would be taken as a confession. Since in England and other European countries imprisonment is employed to compel debtors to fulfill their obligation without worrying whether they are capable of doing so or not, Bentham interprets this to be a kind of slow torture, although

> ... it is not strictly speaking torture because it is not certainly productive of any particular intense kind of bodily pain, it is however, owing to its duration, very frequently more than equivalent to torture. It is not strictly speaking torture but something worse.[2]

Torture, according to Bentham, is to be employed solely for the purpose of forcing a recalcitrant culprit to confess. For this reason he lays down the following rules for its application, as he believes that, if applied unnecessarily, torture can jeopardize the aims of punishment:

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[1] Ibid., p. 315.

[2] Ibid., p. 319.

Torture and Imprisonment

1. the consequence of torture should not be prolonged pain as, once the purpose has been achieved, any additional misery would be immoral and in waste;

2. torture ought to be applied only when a person has failed to do what he is supposed to do:

> ... that is the same strength of evidence ought to be required as is requisite to convict a man of a crime for which punishment of that kind and degree would be inflicted for the ordinary purpose of prevention.[1]

3. the purpose of torture is to compel the criminal to provide answers quickly - and possibly, true answers.

Bentham observes that many people support the view that torture is the most universally efficacious form of afflictive punishment. He says that if

> ... torture is to be justified, it is that of procuring a discovery of accomplices from criminals convicted of crimes of the first magnitude. Incendiarism for instance, and some of the most mischievous kinds of murder, such as assassination for hire. It is not to be doubted but that the introduction of torture in these cases gives the public a considerable additional security against these crimes: whether that security would be worth the purchase on other accounts, is another question.[2]

One of Bentham's objections to torture lies in the abuse of it, when, as its result, a false confession is made, thus leaving the door open to a dreadful consequence: the punishment of the innocent who pleads guilty only to avoid further pain. Bentham maintains that bad laws have caused the introduction of torture: because of fear of them, people are unwilling to give information or evidence, and through the application of torture, a man is compelled to give evidence against himself.

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[1] Ibid., p. 322.

[2] Ibid., p. 325.

Torture and Imprisonment

Bentham quotes five cases in which Beccaria too objects and condemns the use of torture:

1. when it is applied to a man in order to extract from him the full confession for the crime he is believed to be guilty of;

2. when it is applied to force him to account for the contradictions he has fallen into in the course of his examination;

3. when it is applied to force him to denounce his accomplices;

4. when it is applied to force him to confess to crimes he is believed to be guilty of;

5. when it is applied under the notion of purging him of infamy.

Bentham agrees with Beccaria that the first point offers a conclusive reason against applying any punishment at all, and therefore against compulsive punishment. He also agrees that there is no need to force the culprit to become his own accuser: "This practice in criminal matters is reprobated by the English Law".[1]

Bentham thinks that when there is sufficient proof to believe that the party accused is guilty, torture can be applied to extract a general confession; and that, if it is believed that the accused had an accomplice, torture can force him to reveal the name. He justifies the use of torture in the latter case because

> The offence he is punished for is his contumacy in not giving the information which has been required of him,

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[1] Ibid., p. 329.

> which it is for the interest of the community he should give, which it is his power to give, and which (notwithstanding) he persists in refusing to give.[1]

How Torture is Allied to Punishment

Bentham believes torture to be tied to punishment when considered as an application of continual castigation until the delinquent ceases offending. He maintains that although torture might be applied for the purpose of punishment, its real aim is to extract evidence from a criminal who "has been subjected to those dolorific applications which are commonly (?) made use of for that purpose".[2]

Bentham contends that torture is necessary to back active punishment, since, according to him, torture is related to it as the essence of torture in that punishment continues until the delinquency comes to an end. And, at that, torture ceases.

Torture, or other forms of active punishment, may be considered as a continual application of successive punishment against continual offending: the main offence consisting in not doing what one is supposed to do. Punishment ceases when the offence ceases.

Torture, though, might appear at times as a perverted aspect of punishment, when applied not to extract evidence, but for the sole purpose of inflicting pain.

Bentham looks at torture in a positive way. His con-

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[1] Ibid., p. 330.

[2] Ibid., p. 330.

cept of it is consistent with his view of punishment, but does not encompass the sordid details commonly attributed to it. Rather, he compares it to the way imprisonment was applied in some European countries to enforce payment of debts, although he does not recommend it for this purpose.

Torture as punishment, Bentham says, aims at preventing wrongdoing by physical means. But he advocates its use only when the guilt of the accused has been proven beyond any reasonable doubt. This stance was intended to counteract the legal procedure adopted since Roman times, of trying cases in private, with the prisoner having no right to counsel. In these instances, when the judge felt almost sure of the guilt of the accused, he would order torture to be applied, to extricate a full confession to prove his belief. But Bentham does not think trials should be based on guess work: according to him, torture is part of law, and should be applied only to those proven guilty, to get a confession and to set an example of what might happen to potential transgressors. Conversely, Bentham warns that it is utterly unjustifiable to apply torture when no guilt has been proven.

The use of torture, then, is in accordance with the law. It might be cruel, impolitic, unconstitutional, but certainly not illegal.[1] The subject and object of law are the people and things related to it.[2] The object is the act towards which the law is directed: it originates from a person and

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[1]Bentham, O.L.G., pp. 1-17.

[2]Ibid., p. 34.

its progress might be through things or people. A person may come under the notice of the law either as an active agent or a passive subject.[1]

In accordance with this definition, when Bentham affirms that law is directed towards the subject and the object, it justifies torture, if the person apprehended is the actual offender.

Bentham says that law is the will of the sovereign whose purpose is to control the conduct of the subjects by condemning some acts as criminal and imposing punishment[2] for any transgression. Therefore torture plays the role of punishment when it is applied to prevent crime.

Imprisonment[3]

We are going to see how imprisonment through solitude, darkness and hard diet deprives and alters a person's attitude towards wrongdoing.

Bentham has observed that imprisonment restrains

> ... the faculties of the individual, by hindering him from receiving agreeable impressions, or from doing what he desires: they take from him his liberty with respect to certain enjoyments and certain acts.[4]

The resulting restrictions have both moral significance and physical consequences: morally, the individual is prevented from choosing the acts he wishes to perform; physically, he is threatened with increasingly restrictive punishment which might confine him to a particular territory.

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[1] Ibid., p. 54.

[2] Bentham, O.L.G., p. 67.

[3] Bentham, P.P.L., vol. 1, pp. 420-435.

[4] Ibid., p. 420.

Torture and Imprisonment

According to Bentham, imprisonment affects a person in the following ways:

1. deprives him of the pleasures deriving from the faculty of seeing and enjoying the diversity of his environment;

2. denies him the pleasure of pursuing pastime activities;

3. prevents him from attending to his health needs;

4. deprives him of public diversions;

5. ostracizes him from family and friends;

6. prevents him from carrying on a business for a living;

7. prevents him from pursuing public offices of honour and trust;

8. takes away his opportunity for advancement or association with people, as, for example, in the case of marriage for himself or his descendants.

According to Bentham, solitude is an aspect of imprisonment which affects a person by making him feel remorseful. For example, as to confirm this belief, J. Howard observes that when criminals in the Newgate prison were sentenced and brought to the confinement cell, they would often break down into tears. He quotes Mr. Hanway as saying:

> I remember an instance, some years before the law for proceeding to sentence upon evidence, of a notorious malefactor, who would not plead. It was a question, whether he should be brought to the press; but the jailor privately recommended to the magistrate to try solitary confinement in prison. This produced the effect, for less than twenty-four hours, the daring, artful felon chose to hold up his hand at the bar, and

> quietly submit to the laws, rather than remain in such a solitary state without hope.[1]

The horror of solitary confinement proves to be a strong deterrent for criminals, since the impression they receive from such experience affects their mind in such a manner as to give way to tricks of the imagination and infantile fears because of the lack of immediate contact with reality. In addition, solitude brings the criminal closer to God and the realization of his wrongdoing. But Bentham is aware that:

> Darkness, too, has, in circumstances like this, a peculiar tendency to dispose men to conceive, and in a manner to feel, the presence of invisible agents. Whatever may be the reason, the fact is notorious and undisputed. When the external senses are restrained from action, the imagination is more active, and produces a numerous race of ideal beings. In a state of solitude, infantile superstitions, ghosts, and spectres, recur to the imagination. This, of itself, forms a sufficient reason for not prolonging this species of punishment, which may overthrow the powers of the mind, and produce incurable melancholy. The first impression will, however, always be beneficial.[2]

Through this experience the criminal is restrained from pursuing his wicked disposition by simply being denied the opportunity to interact with others.

Hard diet affects the criminal in an almost similar way: the pangs and pain of hunger take so much of his imagination that he practically thinks of nothing else..

> The most natural of all will be to retrace the events of his past life: the bad advice he received; his first deviation from rectitude, which has led to the commission of the offence for which he is at the time undergoing punishment - a crime, all the pleasures deprived

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[1] Ibid., p. 426.

[2] Ibid., p. 426.

> from which have been already reaped, and of which all that remains is the melancholy suffering that he endures. He will recall to his recollection those days of innocence and security which were formerly his lot, and which, contrasted with his present wretchedness, will present themselves to his imagination with splendor. His penitent reflections will naturally be directed to the errors of which he has been guilty: if he has a wife, or children, or near relations, the affection that he once entertained for them may be renewed by the recollection of the misery that he has occasioned them.[1]

Human beings need to find relief from feelings of guilt. In religious people this is achieved through repentance, which is a recognition and acceptance of the guilt emphasized by a determination to do better. Repentance is commonly expressed through confession; there are numerous descriptions of the spiritual or emotional relief of repentance - the passing from the misery of a torturing conscience to a great sense of alleviation and profound and satisfying peace.

Guilt may be conceptualized as a negative self-evaluation which occurs when an individual acknowledges that his behaviour is at variance with a given moral value to which he feels obligated to conform. In abstraction, it is the reaction of an injured conscience, the injury consisting in the perception of the violation of the moral values conscience feels compelled to abide to. Hence, one might hypothesize that, before feelings of guilt can become operative, the following conditions must be present: i) the individual must accept certain standards of right and wrong, or good and bad, as his own; ii) he must accept the responsibility of governing his behaviour to conform

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[1] Ibid., pp. 425-6.

to whatever standards he has thus adopted; iii) he should be able to discern when a discrepancy between behaviour and internalized values occur.

According to the Christian tradition when a person realizes that what he has done is evil, he tries to restore himself through repentance. Bentham's writings are not sufficient to elaborate this stance adequately, but J.H. Seelye states that:

> A valid repentance must be the act of an offender, not because the sovereign requires it, but because the offender has been led to require it of himself. To repent may be a command of the sovereign, but the repentance cannot be because of this command. The command could only be addressed to the transgressor, and it is a command that he renounce and abhor the very act of his transgression. But how can he do this, as a real and not simply a formal utterance, except through some new view or feeling, in his own soul, respecting the sovereign, the law, or his transgression? If he does it, therefore, it is because he sees or feels the reason for it, and not because it is commanded by the sovereign. Hence to do it leaves his transgression. so far as it relates to the sovereignty, exactly as it was before.[1]

In Bentham's view, when an individual realizes, and repents for his wrongdoing, pledging never to repeat it again, he is reformed, the fear of wrongdoing leading, in its turn, to conformity to law.

In evaluating the effects of imprisonment we see that, with regard to efficacy to disable, this kind of punishment deprives the offender of the opportunity and power of doing

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[1] J.H. Seelye, "Punishment: its Meaning and Ground", Hours at Home, vol. viii, 1869, p. 569.

mischief; it is not frugal, however, since the inmates do not work to pay for their sustenance.

During Bentham's time, imprisonment was not exemplary because the public had no direct experience of its efficacy. For this reason he believes that the panopticon prison system would be much more useful in making the public aware of the efficacy of imprisonment. He also documents some inequalities in the treatment of inmates, in health standards, for example, and how well-to-do inmates were allowed to enjoy the company of relatives and friends, while the poor were neglected and made to endure miserable conditions.

The three purposes of imprisonment are punishment, compulsion and safe custody. Bentham cautions that when imprisonment is employed as punishment, one ought to take into consideration the criminal's age, sex, rank, physical condition and the nature of the offence before sentencing. In some cases, he advocates harsher measures because of the comparatively low degree of intensity and magnitude of imprisonment, when he believes that the same effect can be obtained through intensity and duration, and at a lower cost.

When Bentham wrote about the effects of imprisonment he was fully aware of the appalling conditions existing in England and other countries, and that is why he called for a reform. Although he was convinced that solitary confinement, for example, was necessary to bring the accused to admit his

wrongdoing, his concern was mainly to establish how this mode of punishment could be applied to prevent crime. Hard core criminals should be in solitary confinement, he believes, because they would otherwise use any association with others to plan further evils; while, by preventing them from having any contact with other wrongdoers, there might be a possibility of reforming them. By the same token Bentham points out that this kind of punishment might lead to unjustifiably long prison terms, and possibly result in failure, as was the case with convicts in New South Wales. Rather, he believes that close supervision with enough prison personnel would improve the conditions of the prisoners and the chance of reformation.

CONCLUSION

We have demonstrated how torture is related to punishment and plays a role in it. Bentham justifies torture on the ground that it prevents crime. Accordingly, one might venture to maintain that torture is related to law.

We have also seen how solitary confinement, darkness and hard diet induce a criminal to realize his wrongdoing. Also, remorse for wrongdoing is an incentive to obey the law in the same way that conscience prevents breaking it.

From this discussion we come to see that torture and imprisonment in Bentham aim at preventing crime.

CHAPTER SIX

CAPITAL PUNISHMENT

In this chapter we show that Bentham rejects capital punishment because it is a cruel punishment, involves injustice and does not prevent crime. In order to do this, we examine Bentham's work in the light of the following questions: does capital punishment deter? is capital punishment oppressive? is capital punishment popular?

For both Bentham and Beccaria the effectiveness of punishment resides in the impression it makes on the popular imagination. Bentham believes that this impression is produced by the intensity of punishment, while Beccaria's opinion is that duration of punishment is what deters crime: according to him, capital punishment is inefficacious because it does not provide

> the long and painful example of a man deprived of liberty, who, having become a beast of burden, recompenses with his labours the society he has offended, which is the strongest curb against crime.[1]

Although their positions might appear to differ, Bentham and Beccaria agree on the rejection of capital punishment, the former because of its lack of intensity, the latter for its lack of duration, elements which they respectively consider fundamental to the ultimate object of punishment which, they agree, is prevention of crime.

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[1] C. Beccaria, op. cit., p. 47.

Bentham goes further to explain that even if duration of capital punishment could be established by law, it still would not function as a deterrent on the masses and it would only result in a general demoralization such that

> sentiments of pity and sympathy for the sufferer will succeed, the heart of the spectator will revolt the scene he witnesses, and the cry of suffering humanity will be heard.[1]

Laws based upon duration of punishment bring disenchantment to people, which is reinforced by the observation that countries that enforce such laws "have the most ferocious robbers".[2] Bentham adds that:

> The fate with which they are threatened hardens them to the feelings of others as well as their own: they are converted into the most bitter enemies, and every barbarity they inflict is considered as a sort of reprisal.[3]

Bentham is sceptical about the way capital punishment can be abused by rulers who could apply it to gratify their passion for power, considering how easy it would be for them to corrupt and intimidate judges, who would readily give in to any such pressure, since this kind of punishment is contemplated in the statute books and therefore can be employed even when it is not needed.

Beccaria reminds us that judges have shown a beastly inclination to inflict painful death in the name of law - performed as a normal and ingenious formality. He contends that, by sentencing someone to death, the judges destroy his fundamental liberty, apart from setting an example of barbarity.

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[1] J. Bentham, P.P.L., p. 443.

[2] Ibid., p. 443.

[3] Ibid., p. 443.

Capital Punishment

> What must men think when they see learned magistrates and high ministers of justice, who, with calm indifference, cause a criminal to be dragged, by slow proceedings, to death; and while some wretch quakes in the last throes of anguish, awaiting the fatal blow, the judge who, with insensitive coldness, and perhaps even with secret satisfaction in his personal authority, passes by to enjoy the conveniences and the pleasures of life? "Ah!" they will say, "these laws are but the pretexts of force; the studied and cruel formalities of justice are nothing but a conventional language for immolating us with greater security, like victims destined for sacrifice to the insatiable idol of despotism. Assassination, which is represented to us as a terrible misdeed, we see employed without any repugnance and without excitement."[1]

Because capital punishment does not produce any impression on the mind of either the victim or the innocent, Bentham and Beccaria maintain that it is not a deterrent and cannot prevent crimes. They believe that the aim of laws is to bring happiness to the community. Although they both are opposed to the death penalty, still they would justify it if it prevented crime. Their concern was, whether this could be achieved without causing injustice.

For example, in the case of a person murdering another and being sentenced to death for his crime, Bentham would say that the punishment is analogous to the offence, and therefore justifiable. But if asked why, his answer would be, because it prevents crimes since it is equivalent to the offence.

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[1] Beccaria, op.cit., pp. 50-1.

Capital Punishment

Does Capital Punishment Deter?

Because pain and pleasure influence human behaviour, Bentham asserts that man is a psychological hedonist. Furthermore, he contends that an action is approved or disapproved by principles of utility, according to whether it would increase or decrease human happiness. Consequently he feels that legislators should adhere to these principles in deciding the rules to be followed.

It is plain from these remarks that Bentham not only argues for hedonism as a doctrine of motivation, but also for hedonistic utilitarianism as a norm for action, which somehow is to be seen as based on the former. He never makes it clear how "psychological" hedonism justifies "normative" hedonism, although he does explain how a person's quest for pleasure justifies a hedonistic standard of morals. Nevertheless, he is surely correct that it behooves the legislator to keep in mind psychological facts about a person's motivations.

Can any idea of "right" and "wrong" be grounded on the principle of pain and pleasure? Bentham believes so. Actions that are right conform to the law, while those that are wrong are in violation of the law. The former belong to the principle of pleasure, while the latter, to that of pain. He pursues this view in his evaluation of the death penalty as a deterrent.

To prove that capital punishment does not deter, Bentham cites the example of two people, the first one of whom has some pleasure to lose if sentenced, while the second would look upon

capital punishment as the end of his miserable life, as would one who, wishing to put an end to his life, lacks the courage to execute his plan by his own hand. Thus, to him, capital punishment is not deterrent.

> When a man is prompted to seek relief in death, it is not so much by the sudden vehemence of some tempestous passion, as by a close persuasion that the miseries of his life are likely to be greater than the enjoyments; and, in consequence, when the resolution is once taken, to rest satisfied without carrying it immediately into effect; for there is not a more universal principle of human conduct, than that which leads a man to satisfy himself for awhile with the power, without proceeding immediately, perhaps without proceeding ever, to the act.[1]

Unlike Bentham, who merely advocates parliamentary reform through his writings, J.S. Mill was a member of Parliament elected in 1865 as an independent member for Westminster. He is labelled the classic utilitarian, and strong exponent of capital punishment. In a debate in the House of Commons in 1868, he strongly asserts that he is not going to support the philanthropists' idea that capital punishment should be abolished; unless they prove to him that when someone commits a crime, this "was an exception to his general character rather than consequence of it."[2] On the contrary, he supports the retention of the death penalty on the assumption that it is necessary for the purpose of deterrence. But, looking at its effect, he is persuaded that it does not deter repeaters. He affirms: "to compare good thing with bad, and old soldier is not much affected by

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[1]Bentham, P.P.L., vol. 1, p. 446.

[2]Mill, op. cit., p. 272.

the chance of dying in battle".[1] He recognizes that professional criminals' attitude towards the gallows is indifferent.

Ernest van den Haag[2] adopts, in his view on capital punishment, an attitude similar to Bentham's. He contends that, if the purpose of capital punishment is to rehabilitate and protect society, then it has failed to achieve this object, but instead can lead to the execution of both the innocent and the guilty poor or disadvantaged, who are more likely to be sentenced than the guilty rich. He contends that this punishment is not a deterrent because

> Most people refrain from offences because they feel an obligation to behave lawfully. This feeling of obligation internalizes social rules and social authority and is reinforced with the help of penalties ... Punishments deter those who have not violated the law for the same reasons - and in the same degree (except for reinforcement and internalization: moral obligation) - as do natural dangers.[3]

D.A. Conway's article on capital punishment was prompted by van den Haag's view on the subject.[4] The purpose of this article is to shed light on Bentham's notion that punishment deters those who have religious consciousness. Conway[5] concurs with this view and, moreover, he is convinced that,

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[1] Ibid., p. 273.

[2] E. van den Haag, "On Deterrence and Death Penalty", Ethics, vol. 78, 1967, pp. 280-288.

[3] Ibid., p. 282.

[4] D.A. Conway refers to van den Haag's interview in 1973, in which he supported the retention of capital punishment.

[5] D.A. Conway, "Capital Punishment and Deterrence: Some Considerations in Dialogue Form", Philosophy and Public Affairs, vol. 3, 1974, pp. 431-443.

if we agree that punishment deters - then we are faced with problems such as

> ... State A and State B have virtually identical crime rates but State A hasn't had C.P. for one hundred years. You reply, for instance, that this could be because State A has more Quakers, who are peace-loving folk and so help to keep the crime rate down. And, you say, with C.P. and all those Quakers, State A, perhaps, could have had an even lower crime rate.[1]

Bentham doubts whether capital punishment deters. Yet, he has suggested that it might deter those with moral and religious consciousness. This notion is linked to his concept of Greatest Happiness Principle, which we will now examine.

To evaluate the pain of capital punishment in terms of the Greatest Happiness Principle, Bentham points out that before committing a crime punishable by capital punishment, a person weighs out all the portions of happiness he would enjoy from not committing the act, and those he would derive by committing it. He would also consider the threat of punishment, and how it would curtail the duration of that happiness. According to Bentham, if the person finds, in the latter case, happiness to be equivalent to zero, then chances are he would go ahead with his criminal plans

> Now this is always the case with a multitude of malefactors. Rendered averse to labour by natural indolence or disuse, or hurried away by the tide of some impetuous passion, they do look upon the pleasures to be obtained by honest industry as not worth living for, when put in competition with the pains; or they look upon life as not worth keeping, without some pleasure or pleasures which, to persons in their situation,

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[1] Ibid., p. 442.

attainable but by a crime.[1]

Bentham points out that, in some cases, the person committing a crime punishable by death has self destructive purposes in mind, but is afraid to bring about his own death. Thus he chooses the kind of crime which will achieve this purpose for him. Bentham argues, though, that to employ capital punishment would, in this case, be playing into the criminal's hand, while other punishment might deter him not only from future crimes, but also from his suicidal tendencies.

Although Bentham concedes that the calculation of happiness might be inaccurate, he still maintains as the constant principle of his argument that human actions are guided by the consideration of the resulting pain or pleasure. Consequently, the death penalty would deter one who has more pleasures to lose rather than one who has none. Bentham argues that aristocrats are more likely to be deterred by capital punishment, while the attitude of the poor towards it is generally indifferent.

> Those who make laws belong to the highest classes of the community, among whom death is considered as a great evil, and an ignominious death as the greatest of evils. Let it be confined to that class, if it were practicable, the effect aimed at might be produced; but it shows a total want of judgment and reflection to apply it to a degraded and wretched class of men, who do not set the same value upon life, to whom indigence and hard labour is more formidable than death, and the habitual infamy of whose lives renders them insensible to the infamy of the punishment.[2]

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[1] Bentham, P.P.L., vol. 1, p. 446.

[2] Ibid., p. 450.

Capital Punishment

Bentham rejects the death penalty not only because it is a cruel punishment, although this might be one of the reasons. His main concern is, however, whether capital punishment could prevent crimes without incurring some injustice. He did not believe this to be possible, but rather viewed capital punishment as an instrument of oppression.

Is Capital Punishment Oppressive?

Bentham's rejection of the legal use of capital punishment can be traced to his objection to common law. He argues that customs and maxims should not serve as law because they are known, and interpreted, only by judges, and people should be aware of the laws before being punished for breaking them.

When he asks: "by whom is their validity to be determined?"[1], Bentham is in fact convinced that the approval of common law comes from the judges alone.

Furthermore, Bentham is critical of the British judicial system enforcing "ex-post-facto" laws because these are tantamount to a contradiction based upon another contradiction. He observes, for example, that when Cicero was punished under these laws - the pain inflicted upon him had more the nature of vengeance than punishment.

Bentham, being aware that the efficacy of punishment resides in the resulting effects it obtains on the popular imagination thus causing awe of the law, is also aware that capital punishment fails to obtain such results, and because it might be unjustly applied, as in the case of judges relying on false

[1]Bentham, C.C., p. 188.

evidence or public hostility towards the culprit.

Bentham also suspects repressive governments of using capital punishment to strengthen their control over the people, especially when trials are kept secret and evidence obtained from sources whose validity nobody could question.

Because Bentham does not trust the legal system, he draws our attention to the fact that, if a person were accused of an offence that meets with public reprobation - some witnesses then would act as accusers. For instance, in the melancholy affair of Calas, both the public and the judges were seduced.

> These melancholy cases, in which the most violent presumptions, which fall little short of absolute certainty, are accumulated against an individual whose innocence is afterwards recognized, carry with them their own excuse: they are the cruel effects of chance, and do not altogether destroy public confidence.[1]

Besides advising that this could be prevented by a careful detection of erroneous decisions, proofs of temerity, ignorance and other unreliable information, he cautions that the public should be aware of prejudices which would influence the judges in their verdicts.

Bentham, together with many others, bases his opposition to capital punishment on the observation that it hardly ever prevents crimes and because of its irreversible nature. The argument is that, if someone is fined for an alleged offence and subsequently found innocent, his money can be restored to him. Although partial and imperfect, still some compensation is possible also for those who, unjustly sentenced, have spent a number

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[1] Bentham, P.P.L., vol. 1, p. 448.

of years in prison: society can compensate the innocent with a considerable amount of money which may partially repay him for what he has suffered. No compensation is possible, however, in the case of capital punishment: once the life of the innocent has been taken, no restitution or remedy is possible.

> That it is the character of all judges to be actuated by these prejudices, I am far from thinking; but when the propriety of arming men with the power of indicting the punishment of death is in question under consideration, it ought not to be forgotten, before putting into their hands the fatal weapon, that they are not exempted from the weaknesses of humanity; that their wisdom is not increased, neither are they rendered infallible, by thus arming them.[1]

Bentham points out that, once a judge has erroneously imposed capital punishment, this mistake could hardly ever be detected simply because the alleged criminal is already dead.

> A judicial assassination, justified in the eyes of the public by a false accusation, with almost complete certainty assures the triumph of those who have been guilty of it. In a crime of an inferior degree, they would have had everything to fear; but the death of the victim seals their security.[2]

Bentham, and many other opposed to capital punishment becoming statutory law, argue that many a man has been hanged and, on later review of the case, found innocent, his execution brought on, in many cases, by the machination of personal enemies. For example, Polliziori[3] was tried and convicted for the Saffron murder. Subsequently a lawyer, Mr. Negretti,

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[1] Ibid., p. 448.

[2] Ibid., p. 448.

[3] Gilpin, op. cit., p. 267.

became convinced that the man was innocent, and consequently preoccupied himself with getting evidence to that effect. He finally satisfied the Home Secretary not only that the prisoner did not deserve capital punishment, but that he was altogether innocent. Polliziori was eventually set free. A few months later, a man named Giardinieri was sentenced to death for murder. Shortly before he was hanged, evidence showed him to be innocent.

Bentham's objection to the death penalty prompted him to search for criminal procedures which would guarantee an accused person justice. He sought stringent laws of evidence, lacking in the judicial system of his time, warning that evidence against a murderer must be thoroughly scrutinized. According to Bentham, a vast number of prosecutions left behind a strong element of doubt. For him, a trial, by its very nature, intends to distinguish between that which is certain and that which remains unconvincing. In many cases of acquittal, the accused is discharged not after being certified innocent and harmless, but only because the charges against him had not been proven valid beyond any reasonable doubt. Bentham advocates a system by which the accused is granted his freedom if there are any doubts about the allegations brought against him.

Although he favoured the retention of the death penalty, Mill too was apprehensive of mistakes: if a person is wrongly put to death, how can this error ever be corrected, how is any compensation or reparation every possible? Because injustices

have occurred and the innocent consequently punished, he is wary of the danger this kind of punishment represents to people.

> The argument is invincible where the mode of criminal procedure is dangerous to the innocent, or where the courts of justice are not trusted. And this probably is the reason why the objection to irreparable punishment began (as I believe it did) earlier, and is more intense and more widely diffused, in some parts of the continent of Europe than it is here.[1]

In the examples we have examined we observe that the use of capital punishment is in many cases unjustified because it fails to deter. It thus serves only one purpose--the repression of people--which Bentham ascribes to the corruption of judges.

As far as repressive governments are concerned, capital punishment proves to be an advantage in the process of subduing people, especially if this kind of punishment is contemplated in the statute books.

Bentham reiterates that a tyrant would argue that, if it is legal to punish certain offences by death, capital punishment is justified. Although this is true of some governments, yet the people who are executed have not always been duly tried. Bentham asserts that in countries in which capital punishment is legal, rulers justify its use to disguise their anarchical and tyrannical motives.

> Tyranny is much at its ease when exercised under the sanction of law, when there is no appearance of any departure from the ordinary course of justice, and when it finds the minds of people already reconciled and accustomed to this mode of punishment.[2]

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[1] Mill, op.cit., p. 276.

[2] Bentham, P.P.L., vol. 1, p. 448.

Capital Punishment

Since, according to Bentham, capital punishment does not serve any useful purpose, he argues that a legalized death penalty is equivalent to the justification of injustice, because tyrants would interpret this legalization as a means of defending their oppressive methods under the guise of law, or it gives them the advantage of imposing the death penalty for crimes that do not warrant it. For example, the Duke of Alba sacrificed many thousands believed to be heretics, because heresy was an offence punishable by death.

> Upon this occasion it is necessary to bear in mind that there are two branches of security, for each of which it is necessary to make provision. Security against the errors and corruptions in judicial procedure, and security against crimes. If the latter were not to be attained but at the expense of the former, there would be no room for hesitation. With respect to crimes, from whom is it that the terror is felt? From every person that is capable of committing a crime; that is to say, from all men, and at all times. With respect to the errors and corruptions of justice, these are the exceptions, the accidental and rare occurrences.[1]

The above quote establishes that Bentham's worry about capital punishment was based on the fact that by error or because of corruption, innocent people are killed. If capital punishment could be employed to prevent crimes, without ever risking the execution of the innocent, only then would Bentham accept it.

Is Capital Punishment Popular

In our discussion so far we have observed that Bentham's

[1] Ibid., p. 449.

arguments against capital punishment appear to be two-fold: he condemns its use by tyrants, and its application as a consequence of judicial corruption. He would condone its employment only if it could be ascertained that no injustice would ever occur as a result, and it could be proven to deter future crimes. For example, when an actual offender is duly convicted for an actual offence he has committed, Bentham concedes that some people would advocate the retention of capital punishment on the assumption that it is popular and justified.

> The attachment seems to be grounded partly on the fondness for the analogy, partly on the principle of vengeance, and partly, perhaps, by the fear which the character of the criminal is apt to inspire. Blood, it is said, will have blood, and the imagination is flattered with the notion of the similarity of the suffering, produced by the punishment, with that inflicted by the criminal.[1]

Although the popularity of this punishment is based on analogy, Bentham, after examining their relationship, finds it inconsistent.

> If in other respects any particular mode of punishment be eligible, analogy is an additional advantage: if in other respects it be ineligible, analogy alone is not a sufficient recommendation: the value of this property amounts to very little, because, even in the case of murder, other punishments may be devised, the analogy of which will be sufficiently striking.[2]

But he admits that if capital punishment proves to be efficacious and becomes popular, the public approval of it would be proportionate to its efficacy.

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[1] Ibid., p. 449.

[2] Ibid., p. 449.

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According to Bentham, popularity is not what makes an act justifiable. Rather, he looks for something which lessens greater evils. Therefore he argues that this punishment is far from being popular because its agonies are

> .. all equally contrary to the ends of justice: a disposition on the part of the individuals injured not to prosecute the offenders, for fear of bringing them to the scaffold; a disposition on the part of the public to favour their escape; a disposition on the part of the witnesses to withhold their testimony, or to weaken its effect; a disposition on the part of the judges to allow of a merciful prevarication in favour of the accused; and all these anti-legal dispositions render the execution of the laws uncertain, without referring to that loss of respect which follows upon its being considered meritorious to prevent their execution.[1]

To infer that the efficacy of a punishment rests on its popularity or deterrent effect is a mistake in judgment. A punishment might be popular or deterrent to one class in a given society, and at the same time unpopular and undeterrent to another class in the same society. For instance, to aristocrats the death penalty is a great ignominious evil, and consequently they are deterred by it. Thus Bentham suggests that this punishment be confined to this class, since here is where it would be effective. The other class, which he calls "degraded" and "wretched", would not be deterred by capital punishment since what they have to lose is only the drudgery and squalor of their daily life. Bentham believes that "indigence and hard labour" would be more effective to deter this class of people since this would be to them

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[1] Ibid., p. 449.

"habitual infamy of those lives renders them insensible to the infamy of whose lives renders them the punishment".[1] He exhorts judges not to employ capital punishment with this class, but rather to commute the sentence to life imprisonment with hard labour which

> ...would produce a deeper impression on the minds of persons in whom it is more eminently desirable that that impression should be produced, than even death itself.
>
> ...All the circumstances that render death less formidable to them, render laborious restraint proportionably more irksome. The more their habitual state of existence is independent, wandering, and hostile to steady and laborious industry, the more they will be terrified by a state of passive submission and of laborious confinement, a mode of life in the highest degree repugnant to their natural inclinations.[2]

Since Bentham believes that the popularity of any punishment depends on the general consensus of the society in which the offence is committed, he advises that if this punishment were to be inflicted

> ...it ought to be confined to offences which in the highest degree shock the public feeling - for murders, accompanied with circumstances of aggravation, and particularly when their effect may be the destruction of numbers; and in these cases, expedients, by which it may be made to assume the most tragic appearance, may be safely resorted to, in the greatest extent possible, without recourse to complicated torments.[3]

In examining Bentham's view regarding the popularity of capital punishment, we have seen that although the notion of analogy justifies that every offence deserves punishment,

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[1] Ibid., p. 450.
[2] Ibid., p. 450.
[3] Ibid., p. 450.

nevertheless it fails to establish the popularity of the death penalty. We have also seen that capital punishment should be used for crimes that shock the public, but again we have failed to establish that it is popular.

How is capital punishment frugal, variable and remissible?

Frugality

Comparing capital punishment to hard labour, Bentham concludes that the former is neither profitable nor conforming to the purpose of compensation. He maintains that capital punishment may deprive the state of some wealth, as in the regrettable instance in which a person is chosen at random as culprit and sentenced, thus depriving the state of the annual income derived from the labour of an innocent citizen. Furthermore, the liberty of the person chosen at random has been irreparably infringed upon, while it should have been protected by the detention of the one who has already been proven guilty. Bentham's concern here is justice, and the benefit accrued to the state by safeguarding the rights of the people.

Variability

Capital punishment is more deficient than any other punishment because the quantity of evil can neither be increased nor lessened.

> It is peculiarly defective in the case of the greater part of the most malignant and formidable species of malefactors - that of professed robbers and highwaymen.[1]

[1] Ibid., p. 447.

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Remissibility[1]

Bentham thinks that capital punishment is irremissible simply because, once a criminal is killed, there may be compensation, but no remedy.

In our discussion we have seen how preoccupied Bentham is with the problem of death penalty. On the one hand he acknowledges the fact, obvious in itself, that this punishment would prevent further crimes from the same source; on the other he feels that capital punishment is a cruel punishment and if errors and injustices occur, it would be practically impossible to rectify them. Today, opinion on the matter is still divided.

Capital punishment involves crucial moral issues and it is difficult to reach a general consensus on whether it should be abolished or not. Some people argue, for example, that, even if a person is tried and found guilty of murder, capital punishment should not be applied because killing is wrong in itself. Others contend, however, that killing in self defence or for the protection of society is right and justified. It is also impossible to generalize or speculate adequately about such exceptions to transform them into moral laws, for the variety of morally relevant factors is infinite, and unimagined circumstances can arise unexpectedly. Each situation must be judged in itself because each one would be morally unique. Whether capital punishment is right or wrong depends upon the circumstances and the details of the case at hand.

Bentham's concern with the problem of the death penalty was

[1] Ibid., p. 447.

that, when a man commits a crime punishable by death, he should be sentenced only after a fair trial; Bentham justifies the death penalty on the grounds that it operates as self-defence, both for the victim's rights and the safeguard of the community, and not as a deterrent. In fact, it would be absurd for anyone to assert that capital punishment deters criminals when in reality more crimes are committed in those countries which have retained it. If anything, this would point to the failure of this kind of punishment to operate as a deterrent. By the same token, we cannot determine its success as such.

Both Bentham and Beccaria rejected capital punishment because it demoralized society. They believed that any human and moral society must be fully committed to the sanctity of human life, and its members must be deeply convinced that the life of every human being is inviolable. But when a government contravenes these rights by imposing the death penalty, the person condemned becomes the centre of attention overnight and, for some mysterious twist of the human psyche, many are attracted to such fame and sympathy, as the flood of false confessions that follow any capital crime bear witness. The same sinister attraction causes others to perform criminal acts themselves in the pathetic hope of gaining public recognition and even respect.

It is difficult to conclude from the statistics collected on the death penalty whether this kind of punishment lessens murder or any other kind of crimes; findings failed to prove that it deters. Perhaps the question of deterrence should focus on this type of offender and the circumstances under which particular

kinds of punishments have any or no effect at all. Policemen in the U.S.A. have argued for capital punishment to be retained in order to deter murderers. In fact, various studies have indicated that the states with no capital punishment have fewer murders than the retentionist states.

One of the factors that prompted Bentham to criticize the British legal system of his time was the economy of punishment. Today, we still have this problem. There are certain criminals whose nature is so morally corrupt that they cannot be reformed, and experience shows that they are always determined to follow the road of crime. The retentionists' argument is that it would be totally uneconomical to imprison such individuals for life at the expense of honest citizens, instead to execute them once and for all, since imprisonment has proved to be ineffective on them. It is also their argument that many criminals sentenced to death are known to have committed more than one murder, thus proving their recidivity, and that society should be allowed to free itself of such individuals.

The abolitionists' argument, on the other hand, is based on the view that capital punishment is a barbaric relic of the past, that society has no right to play the role of supreme judge over human life, since society itself is imperfect. Also, the possibility of an innocent person being executed in error is reason enough for this punishment to be removed from any statutory law. Furthermore, they base the validity of their position on the lack of evidence that this punishment is in fact a deterrent.

CONCLUSION

Although the retentionists' argument concurs, in part, with Bentham's position that capital punishment should be used to prevent the worst offences, still they do not offer any evidence that this goal is successfully achieved.

And although the abolitionists agree with Bentham that the death penalty is a barbaric kind of punishment, they do not suggest any way that it can be applied fairly or justly to either the victim or the murderer. Both sides fall short. Bentham's solution, however, aimed at overcoming this impasse by considering first whether this punishment might prevent crimes and secondly whether it could be justly applied. Bentham's approach to the problem was legal, not sentimental. His concern with capital punishment is threefold: (i) can it prevent crimes; (ii) can this prevention be obtained without incurring injustices; (iii) can it be popular.

To the first question he might reply that a particular offender can be prevented from wrongdoing, but that capital punishment does not prevent others from committing crimes because it does not leave a lasting impression on the popular imagination. With regard to the second question, Bentham vehemently objects to capital punishment because of the horrors of the injustice it may give rise to and because he does not consider it sufficiently deterrent. To answer the third question, Bentham does not believe this punishment can ever be popular.

What is Bentham's view on capital punishment if no injustice is involved? Could he justify it then?

He would in a case in which there is an actual offence and an actual offender, since in this case capital punishment would be analogous to the offence, popular, and prevent mischief from the same source.

However the corruption of the judicial system of his time made Bentham very doubtful that it would be possible to avert judicial errors which would cause the punishment of the innocent. Therefore, he concludes that capital punishment serves no purpose because it makes perjury appear meritorious by founding it on humanity, produces contempt for unexecuted laws and renders convictions arbitrary, and pardons necessary.

In this chapter we have seen that Bentham objects to the application of capital punishment because of injustices, corruption of the judicial system of his time and judicial errors which led to the execution of innocent people. Recent examples prove that this problem still exists.

To illustrate Bentham's position, and how it is still reflected in nowadays miscarriages of justice, we shall cite a few examples.

Maximilien Flament[1] was a neighbour of the mayor of Noyelle in France, who had repeatedly voiced threats against the latter. When on January 31, 1811 the mayor's barn was destroyed by fire, Flament was immediately suspected of wrongdoing, especially when footprints around the area were found to match his.

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[1]Otto Pollack, "The Errors of Justice", The Annals of the American Academy, Vol. 284 (1952), pp. 115-123.

> He attempted to establish an alibi by only one witness, who first supported him but later showed uncertainty in his depositions. During the trial thirty-one witnesses testified against Flament; only the one produced by him in his defense supported him, and that one only weakly. On that basis he was found guilty, and sentenced to die. Clemency was denied him by the Emperor, and he was executed. Six years later his innocence became manifest in the following manner.
>
> On October 20, 1817, a certain Felix Moreau was executed for murder in the same place. Immediately before the dropping of the knife Moreau, who was attended by the same priest who had stood by Flament at his last hour, confessed having committed the arson for which Flament had been executed, and asked for forgiveness. In recognition of the error in judgment which had sent his father to the guillotine, the National Assembly of 1850 granted Flament's son a pension.[1]

In 1796 along the road between Paris and Melum a mail coach was attacked by robbers, and the coachman and his assistant killed. Four people were suspected of the murders, and a certain Lesurques was recognized by seven people as being one of the four. Lesurques brought fourteen witnesses to prove to the jury that he had spent the whole day in question in Paris. After the jury retired, a woman told the presiding judge that Lesurques closely resembled her lover, who was one of the criminals. Alas, it was too late, the jury had already retired. Nonetheless,

> After the verdict, Couriol, one of Lesurque's co-defendants, state repeatedly that Lesurques was innocent and asserted this even on his way to the place of execution. After Lesurques had been executed, two other persons, Laborde and Roussy, were found guilty of the crime in separate trials and both asserted the innocence of Lesurques. If some question could still be raised as to whether Couriol had not lied in order to save Lesurques, no such question can be raised with regard to the other two, who made the statements regarding his innocence years after he had been executed.[2]

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[1] Ibid., p. 117.

[2] Ibid., p. 119.

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In December 1982, Charles Brooks, Jr.,[1] one of two men convicted for the kidnapping and killing of David Gregory in Texas, was the first to be executed with an injection of sodium pentothal in his arm. The jury had been unable to establish which of the two men was indeed responsible for the killing.

In response to Brooks' execution, the victim's mother said: "Now there is some hope in this society for victims". However Jack Strickland, the former prosecutor who persuaded the jurors to sentence Brooks to death, said in a televised interview that he does not think the state will ever know whether the man executed was in fact the one who fired the shot.

Charles Brooks' accomplice, Woody Laudres, will be eligible for parole in seven years.

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[1] The Citizen (Ottawa), December 12, 1982, p. 2.

CONCLUSION

Bentham is too often identified solely with the utilitarian school of thought, and his theory of punishment is dismissed as aiming only at deterrence and reformation. This thesis demonstrates that this view is misleading: Bentham does not fit adequately into either the retributive or utilitarian school. He certainly does not fit solely in the latter, given his interpretation of the terms "deter" and "reform", and his position on capital punishment. Rather, his theory of punishment comprises both retributive and utilitarian principles: the guilt of the offender can be established according to the former's, while punishment is administered according to the latter's.

Bentham's concept of punishment emerged out of his criticism of Blackstone's definition of municipal law as a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong. He rejected this definition because he saw no connection between municipal law and the power that makes it. Also, in rejectint Blackstone's notion of common law, Bentham advocated instead what he saw as the only possible alternative: legislative law, which he felt would be more just, being the expression of the will of the legislator.

Conclusion

For Bentham, the purpose of punishment is to prevent crime without bringing injustice. For this reason he rejected the New South Wales project because he thought it was a mockery of justice, as people who had served their sentences were kept in New South Wales for the rest of their life without any form of compensation. He also regretted misapplied punishments because longer sentences than those authorized by law were meted out without actually preventing crime, as, in most instances, these punishments were administered as a form of social control, and not to punish the actual offender.

Bentham realized that one of the reasons for the failure of the New South Wales project was the total lack of moral consciousness in the convicts. In an attempt to overcome this obstacle he suggested the adoption of moral sanctions as a form of punishment, which he thought might instill in the mind of the offender that kind of awareness that would make him conscious of his wrongdoing and prevent him from repeating it.

According to Bentham torture is also related to punishment in that it too prevents crime.

Imprisonment, solitary confinement, darkness and hard diet induce a criminal to realize his wrongdoing, and remorse is an incentive to obey the law in the same way that conscience prevents breaking it.

Even though Bentham acknowledged that capital punishment prevents criminals from repeating their offence, he doubted whether it would have the same effect on others, as this kind

of punishment does not leave a lasting impression on the popular imagination. He ended up rejecting the death penalty altogether on the grounds that it did not prevent crime and entailed horrors and irrevocable injustices.

Bentham knew that the judicial system of his time was corrupt and that judicial errors often caused the punishment of the innocent. For this reason he saw that capital punishment served no purpose. Rather, it made perjury appear meritorious by founding it on humanity, by causing contempt for unexecuted laws and rendering convictions arbitrary and pardons necessary.

It becomes evident, after his rejection of transportation punishment, misapplied punishments and capital punishment, that Bentham was preoccupied with the injustices involved in them, and not with their justification on the grounds of deterrence. For he did not consider deterrence and reformation to be, in themselves, the basis for the justification of punishment, but the basis for what should be implied in justified punishments.

For Bentham, the aim of punishment is to punish only an offender for an actual offence, and to prevent law-breaking through fear of it. Reformation is attained when this is achieved. Thus, Bentham's concept allows that retribution is the imposing of punishment as a consequence of law-breaking; deterrence is the hoped for result of punishment, which should be the prevention of further misdeeds; and reformation is the

offender's realization of his wrongdoing through punishment and his refraining from future crime.

Bentham interpreted "deterrence" as a moral stigma derived from wrongdoing, whose consequence is fear of law, while he saw "reformation" as the self-realization of wrongdoing. He used these words in a different sense from that which Mabbott and McCloskey have attributed to him.

We have seen how adequate Bentham's notion of moral sanctions is, and how it could be, for example, extended and applied in some African cultures.

Also, we wish to point out how novel his approach to capital punishment is, and how still relevant in contemporary proposals.

It is clear that Bentham's contribution to the problem of punishment has been grossly overlooked. For example, in Britain in 1868 and 1956 the House of Commons and the House of Lords debated, inconclusively, the abolition of capital punishment. Bentham's position, if properly understood, would have offered a middle-of-the-road solution. Indeed, the arguments presented in those debates repeated Bentham's arguments.

In concluding, it might be suggested that Bentham's contribution offers us a new and more compassionate perspective on the problem of punishment, than the one suggested by contemporary writers.

For this reason, re-reading Bentham's work is not only required, but also necessary.

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