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Utilitarianism, Punishment, and Ideal Proportionality in Penal Law: Punishment as an Intrinsic Evil

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Introduction

Punishment, according to Jeremy Bentham, ought to possess an attribute of proportionality. In fact, he offered thirteen rules for determining that proportion within *An Introduction to the Principles of Morals and Legislation*. Of those rules, two of them (rules five and six) specified that punishment should not be excessive and, by implication, should be proportional to the crime.¹ However, even those rules that provide for an increase in punishment in relation to the ‘profit’ of the crime² are based upon a reforming principle in opposition to excess in this area, though the relationship of punishment to crime continued to emphasize the negative effect of the crime, itself.³ Nonetheless, the treatment of this subject within that seminal work acknowledges the inevitability of crime, the necessity of punishment, and the assumption that punishment, as a matter of public policy, must be, inevitably and appropriately, enforced.

Punishment is regarded, within Bentham’s utilitarian thought, as an ‘evil’ because it causes pain. Traditionally, that utilitarian characterization is regarded as an extrinsic one because it is based upon its subjective affect upon people, rather than any inherent, internal quality that might be qualitatively claimed for it. However, in other examples of Bentham’s published writings on the subject, a subtly different tone appears to emerge. This essay will argue that there is a strain of thought, emerging in the later publications of Bentham (especially as modified by

¹ Jeremy Bentham, *The Principles of Morals and Legislation*, New York, 1988, p. 182. Rule 12 also suggests the ‘diminution’ of a punishment if it proves to be unprofitable, *Ibid*, p. 185.

² *Ibid*, pp. 179-181.

³ T. Draper, ‘An Introduction to Jeremy Bentham’s Theory of Punishment’, *Journal of Bentham Studies*, v (2008).

some of his immediate disciples) which increasingly characterizes punishment as an intrinsic evil that, in a hypothetical, ideal world, ought to be avoided, entirely. That ideal offers a theoretical basis for a stronger emphasis upon proportionality in penal law within early utilitarian thought that can have particular application for current penal policy.

Motivations and Characteristics of the Utilitarian Approach to Punishment

The adoption of ‘minimum sentencing laws’, especially during the 1980s and 1990s, was prompted by concerns over rising crime rates.⁴ Interestingly, rising crime rates in late eighteenth century Great Britain led to a similar response (especially under the influence of ‘whig liberalism’), culminating in the infamous ‘Black Acts’ that resulted in dozens of capital offenses and a multitude of petty criminals who were sentenced to death under them.⁵ The utilitarian movement was motivated, in large part, to finding a philosophical criticism of this excess that would offer an alternative without resorting to the sort of desert-oriented subjective moral standards that often had been used to justify these excessive punishments. Deterrence is the motive for punishment that has attracted the most attention in this respect; therefore, reference to a deterrent-based approach to punishment often receives overwhelming attention within scholarly treatments of utilitarian assessments of penal law and policy.⁶ This trend tends to persist, even though Bentham and other utilitarians have addressed other, reductionist purposes of punishment, including immediate protection of society and crime victims and the goal of rehabilitating criminals.⁷

The long-term attempt to replace a retributivist penal policy, based upon a subjective morality, with a reductionist (particularly a deterrence-oriented) policy that

⁴ B. Buchan, ‘Zero Tolerance, Mandatory Sentencing, and Early Liberal Arguments for Penal Reform’, *International Journal of the Sociology of Law*, xxx. (2002), pp. 201-218.

⁵ E. P. Thompson, *Whigs and Hunters*, New York, 1975, pp. 245-269.

⁶ J. Andenaes, ‘Does Punishment Deter Crime?’ in *Philosophical Perspectives on Punishment*, ed. G. Ezorsky, Albany, 1972, pp. 346-354, and G. Tullock, ‘Does Punishment Deter Crime?’, *The Public Interest*, xxxvi (1974), pp. 103-111.

⁷ H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Oxford, 1982, pp. 45-48, and David Wood, ‘Retribution, Crime Reduction, and the Justification of Punishment’, *Oxford Journal of Legal Studies*, xxii. (2002), pp. 301-321.

is claimed to be based upon ‘scientific’ evaluations of human motivations, has prompted critical responses. One of the most persistent criticisms of utilitarian approaches to punishment concern the relationship that is drawn by some commentators between the trade-off of ‘pain’ and ‘pleasure’. This criticism is particularly directed toward a ‘rule utilitarian’ perspective, as opposed to an ‘act utilitarian’ perspective that trusts the rational choices of individual agents to produce ‘best consequences’— though some scholars contend that the resort to personal moral values, as shaped by the subjective inclinations of society, make the introduction of these guiding principles into a utilitarian approach to public policy inescapable. Arguably, calculations of actual outcomes on the part of ‘reasonable’ and ‘well-informed’ individual agents are displaced by a subjective and, often, unsubstantiated anticipation of possible outcomes, making the imposition, by the state, of a rule-based system designed to produce predictable outcomes an inescapable requirement of a general utilitarian approach.⁸

This rule utilitarian approach is instrumentally oriented and attempts to arrive at a systemic arrangement of maximum good through institutional means that are imposed upon society. Conceivably, it is argued (though Bentham never explicitly makes this claim) that this utilitarian approach to penal law would tolerate the possibility of punishing an innocent person if the effect (in terms of promoting deterrence or increasing public feelings of security) produces a greater ‘good’.⁹ Indeed, it is argued that the utilitarian conceivably would approve of the punishment of a person who is known to be innocent as a calculated imposition of ‘pain’ to achieve a greater social ‘pleasure’.¹⁰ Nonetheless, the feasibility and desirability of an ‘act utilitarian’ approach to human behavior and social control arguably would not produce better results. That perspective contends that the reasonable capacity of individual agents to engage in a moral calculation of whether an action would yield as much

⁸ W.H. Shaw, *Contemporary Ethics: Taking Account of Utilitarianism* Malden, MA, 1999, pp. 29-30.

⁹ D.A.J. Richards, *The Moral Criticism of Law*, Encino and Belmont, 1977, pp. 232-33.

¹⁰ E. F. Carritt, *Ethical and Political Thinking*, Oxford, 1947, pp. 64-69. A more sophisticated evaluation of this utilitarian response that tends to deny this conclusion includes F. Rosen, ‘Utilitarianism and the Punishment of the Innocent: The Origins of a False Doctrine’, *Utilitas*, ix. (1997), pp. 23-37, D. Lyons, *The Forms and Limits of Utilitarianism*, Oxford, 1965, pp. 70-73, and J. Rawls, ‘Two Concepts of Rules’. *Philosophical Review*, lxiv. (1955), pp. 10-13.

‘net utility’ as any alternative action.¹¹

Another criticism leveled against the utilitarian approach to punishment (especially in terms of its seeming emphasis upon deterrence as a prime goal of penal policy) is its lack of a persuasive normative moral standard to counter the claims made by a retributivist approach. The argument that punishment is a response to a social judgment about the offense committed toward the individual victim or the community (particularly in terms of desert) can be a powerful one, especially on an emotional level. Communitarian defenses of retributive penal policies can be particularly ardent in this respect.¹² The contrast of crime retribution with the utilitarian emphasis upon crime reduction and its seemingly sterile calculations can make that utilitarian argument seem (especially from a communitarian perspective) unappealing, even if it is more satisfying from a purely intellectual position.¹³

Much of that criticism may be based upon a belief that the utilitarian vision of the human condition is grounded upon a form of relativism, especially in terms of the hedonistic approach most often associated with Bentham and later utilitarians, such as John Stuart Mill¹⁴ and Henry Sidgwick.¹⁵ It also may be prompted by a related caricature of utilitarian reasoning that would lead to logical conclusions that could seem highly objectionable. This caricature contrasts this approach with concerns for the value of truth regarding the committing of crimes and subsequent determinations of guilt, innocence, and the ultimate justification of any act of punishment. Granted, some counter-criticisms of utilitarian scholars against this claim are, arguably, weakened by the need for general knowledge of the actual innocence of a convicted

¹¹ D.E. Miller, ‘Actual-Consequence Act Utilitarianism and the Best Possible Humans’, *Ratio*, xvi. (2003), pp. 49-62.

¹² N. Lacey, *State Punishment: Political Principles and Community Values*, London, 1994, pp. 121-141, 151-155.

¹³ H.L.A. Hart, *Punishment and Responsibility*, New York, 1968, pp. 71-77. A discussion of retribution as not only a matter of desert but of equal treatment under the law is provided in T. Honderich, *Punishment: The Supposed Justifications*, Cambridge, 1989, pp. 35-44. It is given a spirited defense in H. J. McCloskey, ‘A Non-Utilitarian Approach to Punishment’, *Inquiry*, viii. (1965), pp. 260.

¹⁴ J.S. Mill, ‘On the Connection between Justice and Utility’, *Utilitarianism*, ed. J. Plamenatz, Oxford, 1949, pp. 226-28.

¹⁵ This understanding is addressed in Henry Sidgwick, *The Methods of Ethics*, London, 1962, Bk. i, Ch. iv.

person.¹⁶ Yet a response to that criticism raises a potential paradox, as the identification of a utilitarian principle that is grounded upon an intrinsic ‘higher morality’ may undermine the utilitarian claim that it avoids the subjective and, arguably, arbitrary standards that motivate retributive claims. Nonetheless, it is possible to claim that a state which is guided by the will of individual agents within a democratic system cannot escape the substitution of perceived outcomes that are evaluated by subject principles of a ‘higher morality’. This outcome may be especially true when subjective values are mistaken, in the popular mind, for rational and disinterested calculations of utility. That possibility is suggested by the acknowledgement of difficulties in this aspect of the application of utilitarian principles to penal policy.¹⁷

Contrasting Early Utilitarian Interpretations of the ‘Evil’ of Punishment

As previously indicated, popular perceptions of utilitarian approaches to punishment often emphasize the arguments presented within *An Introduction to the Principles of Morals and Legislation*. In that book, Bentham appears to assume that penal policies and punishments are necessary (or, at least, inevitable) so they should be created and applied only in the interest of advancing a greater ‘good’ through the maximization of total pleasure within society. But because Bentham is perceived to have embraced a hedonistic interpretation of pleasure (as prominent scholars such as G. E. Moore have contended¹⁸), his calculations also are perceived to have accepted the relativism of individual definitions of pleasure. This interpretation is based upon a further contention that pleasure, itself, is extrinsically good (even if different sensations of pleasure do not even feel alike)¹⁹, regardless of the motivation or form. These calculations could, legitimately (and admittedly within his own writings),

¹⁶ C. L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction*, Oxford, 1987), pp. 13-37.

¹⁷ D. Lyons, *In the Interest of the Governed: A Study in Bentham’s Philosophy of Utility and Law*, Oxford, 1991), pp. 69-74; Shaw, *Contemporary Ethics*, pp. 29-30; and J. C. C. Smart, ‘Extreme and Restricted Utilitarianism’, *Philosophical Quarterly*, vi. (1956), pp. 334-354.

¹⁸ G. E. Moore, ‘The Conception of Intrinsic Value’, *Philosophical Studies*, London, 1960, pp. 253-75. This perception as applied to Bentham is explained in Smart, ‘Extreme and Restricted Utilitarianism’, pp. 335-36.

¹⁹ R. Brandt, *Ethical Theory: The Problems of Normative and Critical Ethics*, Englewood Cliffs, NJ, 1959, pp. 303-307.

extend to punishment derived from motivations that a subjective moral appraisal might conclude to be 'base' or 'cruel', including in terms of the approval of certain severe types of punishment. That emphasis can, understandably, create the impression that punishment should be tolerated as a means for reaching this maximum pleasure and be justified solely upon that basis, rather than upon considerations of subjective and unproven 'higher truths', including, conceivably, matters of actual guilt or innocence and logical inconsistencies in its actual application.²⁰

However, within the later published and less well-known treatise, *The Rationale of Punishment*, Bentham makes reference to a more detailed treatment of this subject that would provide a more considered application of utility to penal law and practice. That book presents these ideas in a slightly different, but arguably more profound, manner. This subtle difference of approach between these two texts might offer a persuasive response to critics of the reductionistbased preferences of utilitarians. Furthermore, it might offer a way to address matters of guilt and innocence (and other 'moral' considerations) in a way that challenges the ethical claims of advocates of retributivist approaches to punishment. It also could undermine, simultaneously, the perception of Bentham's calculations of pain and pleasure as being based upon a strictly hedonistic appreciation of this central concept, though some critics would remain skeptical of any claims that Bentham, or any utilitarian, would be motivated by a desire to lessen or eliminate the pain of punishment as a primary objective. It has been argued, for example, that advocates of penal reform of the European Enlightenment merely sought to replace the brutality of medieval forms of punishment with a different, and more efficient, form of 'penal tyranny', based upon a rationality derived from the labor needs of the emerging market economy.²¹

The Rationale of Punishment is a collection of related manuscripts that were assembled and published in English only shortly before Bentham's death. Although many of the original manuscripts can be dated to the mid-1770s (around the same time as *An Introduction to the Principles of Morals and Legislation* was published), the first edition of *The Rationale of Punishment* was not published until a much later

²⁰ F. Feldman, 'On the Intrinsic Value of Pleasures', *Ethics*, cvii. (1997), pp. 448-466.

²¹ M. Foucault, *Surveiller et punir: Naissance de la prison*, Paris, 1993, pp. 75-103.

date. During that interval, it appears to have undergone considerable editing and, arguably, revisions, initially resulting from the translation of these manuscripts into French and, eventually, back into English.²² That first edition, in French, was published under the supervision of Etienne Dumont in 1814 with another French edition published two years later and a third French edition published in 1818. This third French edition was, reportedly, retranslated into English and published (for the first time in that language) in 1830.²³

The fundamental premise of this book is provided by Bentham's re-articulation of the foundation for all calculations of the utilitarian tradition. The competition that really exists for members of society, according to this utilitarian premise, is between alternative perceptions of 'pleasure'. In other words, the competition is not between 'pain' and 'pleasure' but among a variety of 'pleasures', some of which may impose 'pain' upon other members of society or upon society as a whole. Bentham's utilitarian thought identified the most basic competitive conditions of human persons and, by extension, civil society as 'pleasure' and 'pain'—an approach that is consistent with an interpretation of pleasure as a 'common currency of advantage'.²⁴

Reconciling competing 'pleasures' is the key to public policy. The pursuit of pleasure by some persons can inflict pain upon other persons. A business transaction can result in a better deal (and more pleasure) for one participant than another one.²⁵ A crime can bring pleasure to the criminal but, also, can impose pain upon not only

²² A detailed comparison of the surviving manuscripts and the different published versions of this text provide much of the basis for this claim, as presented in the most recent published edition of this book, Jeremy Bentham (with Etienne Dumont and Richard Smith), *The Rationale of Punishment*, ed. J.T. McHugh, New York, 2008, introduction. Subsequent citations of this text will refer to the previous 'classic' English edition that was published under the supervision of Richard Smith, Jeremy Bentham, *The Rationale of Punishment*, London, 1830.

²³ An account of this process is provided in Etienne Dumont, 'Advertisement', in Bentham, *Rationale of Punishment*, pp. iii-xi. Dumont has been criticized for having allegedly conflated Bentham's 'egoistic hedonism' into a 'universalistic hedonism' (see Henry Sidgwick, *Essays on Ethics and Method*, ed. M. G. Singer, Oxford, 2000, p. 80 n. 1). Dumont identified Bentham's understanding of self-interested pleasure as inevitable and, thus, a 'right and proper end of action', Sidgwick, *Essays on Ethics and Method*, pp. 80-81.

²⁴ R. Sugden, 'Harsanyi, Rawls, and the Search for a Common Currency of Advantage', *Justice, Political Liberalism, and Utilitarianism: Themes from Harsanyi and Rawls*, ed. M. Fleurbaey, M. Salles, and J.A. Weymark, Cambridge, 2008, pp. 239-262.

²⁵ M. J. McNamee, H. Sheridan, and J. Buswell, 'The Limits of Utilitarianism as a Professional Ethic in Public Sector Leisure Policy and Provision', *Leisure Studies*, xx (2001), pp. 173-197.

the immediate victims but to society (especially in terms of feelings of fear and insecurity), in general. Therefore, the state has a responsibility to prevent the greater pain to individual and societal victims of crime by imposing the pain of punishment upon the people who commit these acts. However, that necessary imposition of pain should not be excessive; it should alleviate the pain that the initial act (or the potential of a repeat of that act) imposes but it should not be more painful than necessary because maximizing pleasure for as many persons as possible is the ultimate responsibility and goal of the state—an interpretation that is essential to Henry Sidgwick’s seminal analysis of utilitarian thought²⁶ and that offers an underlying theme of Bentham’s evaluation of cases that are not suitable for punishment.²⁷

Therefore, punishment should be ‘proportional’ to the crime. ‘Proportionality’ is, by definition, the establishment of a proper relationship between two or more competing conditions or goals. It involves a trade-off for the utilitarian that should result, ultimately, in more ‘pleasure’ than ‘pain’, both quantitatively and qualitatively. It should provide pleasure for the greater number of people but it also should provide the greatest possible quality of pleasure. By Bentham’s own admission, this calculation of the quality of pain and pleasure is not an easy one.²⁸ A qualitative evaluation became, of course, even more essential to the later utilitarianism of John Stuart Mill, though it was no less simple to assess, precisely.²⁹ Nonetheless, it is one that must be applied to each agent who is included in these calculations.

But Bentham appears to have treated the state, as an agent that also participates in this process, very differently. This distinction between the agents who commit crimes and the agent that punishes them is made apparent through the general way in which Bentham addressed his subjects. That approach includes the greater emphasis he appeared to place upon the need for justification that he applied to acts of the state in relation to actions of the sum of individual members of society who are governed by

²⁶ Sidgwick, *Essays on Ethics and Methods*, pp. 5-7.

²⁷ Bentham, *Rationale of Punishment*, pp. 23-26.

²⁸ *Ibid.*, pp. 32-41.

²⁹ J. S. Mill, *Utilitarianism*, ed. George Sher, Indianapolis, 2001, pp. 27-34. That approach and its challenges are assessed in W. Donner, ‘Mill’s Theory of Value’, *The Blackwell Guide to Mill’s Utilitarianism*, ed. H. West, Oxford, 2006, pp. 117-138.

that state. Thus the state is, arguably, held to a 'higher standard'. Its monopoly of legitimate violence is not only necessarily constrained but it actually constitutes a pursuit of 'pleasure', on behalf of society, in general (through penal imposition of pain), that is ethically inferior to the pursuit of pleasure by individual subjects of the law.³⁰

Bentham expressed this distinction within the first paragraph of *The Rationale of Punishment* when he declared that '[p]unishment, whatever shape it may assume, is an *evil*'.³¹ The use of this word, assuming that it appears that way in the original manuscript, is particularly significant when contrasted with the emphasis that Bentham chose to employ in other references to penal law and policy within his writings.³²

The fact that he was so emphatic in designating punishment in this way may be very significant. Bentham also used the word 'evil' in reference to punishment in other sources, most notably in *IPML*.³³ However, his use of this word within *The Rationale of Punishment* was more pointed and consistent. A footnote near the beginning of chapter XIII of *The Principles of Morals and Legislation* (at the precise point at which he refers to punishment as 'evil')³⁴ indicates Bentham's intention to clarify this distinction. That footnote also indicates his intention to address, eventually, this general topic in much greater length and detail as well as the subsequent publishing of these manuscripts under the direction of Etienne Dumont. This fact, and the tone of those subsequent manuscripts and book that were promised, might reveal the eventual intent, on Bentham's part, to treat punishment not only as a different category of pain but, perhaps, a qualitatively different *kind* of pain.

³⁰ An example of that tone can be found within the evaluation of the formal ends of punishment, Bentham, *Rationale of Punishment*, pp. 19-22.

³¹ Jeremy Bentham, *Ibid*, p. 1. The emphasis upon the word 'evil' is added for this sentence, although the emphasis upon the exact same word in the very next sentence (and some subsequent sentences) is found within the original published text *and* within the manuscript.

³² As previously noted, the 1830 version of this book is based upon the 1818 French version, published under the direction of Etienne Dumont. One concern regarding the accuracy of this translation (especially regarding this particular sentence) is the tendency of Dumont to idolize and, thus, idealize Bentham's ideas, as posed in Sidgwick, *Essays on Ethics and Methods*, pp. 197-198, 201.

³³ Bentham, *IPML*, chs. XIII-XV.

³⁴ *Ibid.*, pp. 170-171.

Proportionality and an ‘Absolute’ Utilitarian Standard

Bentham, in using this word ‘evil’, might not have been designating pain as being, merely, instrumentally bad. This possibility exists, even though the explanation of this ‘evil’ as ‘resulting to an individual from the direct intention of another, on account of some act that appears to have been done, or omitted’³⁵ appears to confirm that instrumentalist application, while a more predominant interpretation of a utilitarian definition of punishment remains dependent upon ‘concrete circumstances or consequences’.³⁶ Nonetheless, Bentham’s use of that word also may, arguably, connote an *intrinsic* valuation and designation of punishment as a condition that transcends a conventional understanding of ‘pain’. Under that circumstance, its complete elimination (and not merely its reduction in relationship to various pleasures or its role in advancing certain types of societal pleasures) would constitute an ideal goal, in itself, even if its implementation or the threat of its implementation ultimately could result in an instrumental good. That intrinsic (in addition to the instrumentalist) designation offers a more profound meaning to Bentham’s claim that ‘[a]ll punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil’.³⁷ A belief that Bentham’s intent was to treat punishment as intrinsically evil may have prompted Dumont’s note at the end of the chapter regarding the analogy between crime and punishment. This note suggests that the articulation of these analogous punishments (including horrific forms of torture, dismemberment, abuse, and execution) was intended to be merely instructional of the repugnance of punishment, generally, and, perhaps, ‘only as fit subjects for ridicule and caricature’.³⁸

So, it is possible to argue that the *ideal* utilitarian society, from this perspective and calculation, is one in which this state-produced ‘pain’ is *entirely* eliminated. Therefore, the government of such a perfect society is one that has conceived of a means to promote ‘pleasure’ in a way that not only eliminates causes and

³⁵ Bentham, *Rationale of Punishment*, p. 2.

³⁶ C. J. Ducasse, ‘Scientific Method in Ethics’, *Philosophy and Phenomenological Research*, xiv. (1953), pp. 83-85.

³⁷ Bentham, *Rationale of Punishment*, p. 23.

³⁸ *Ibid.*, pp. 62-63.

consequences of ‘pain’ but, also, avoids, if at all possible, inflicting *any* ‘pain’ as an end in itself. That goal is, of course, practically unattainable. But it does serve as the measurement of relative success in terms of applying utilitarian principles regarding matters of public policy, including penal policy. The government that is able to promote more pleasure and less pain than another government is, therefore, superior in this respect and comes closest to achieving this utilitarian ideal. This overall approach conceivably could be compared to the interpretation known as ‘negative utilitarianism’, which stresses the promotion of the minimization of pain over the maximization of pleasure. Theoretically, that negative utilitarian interpretation could lead to certain extreme conclusions, such as the elimination of all life in order to avoid any pain that would inevitably accompany human existence. That comparison could be understandable, especially given the sort of description of this interpretation of utilitarian thought provided.³⁹ However, the argument of this essay emphasizes an absolute standard that is based upon the ultimate practical acceptance of the imposition of pain (in the form of punishment) as an unavoidable and, thus, acceptable (though undesirable and imperfect) necessity of penal policy. Therefore, in this particular context, this essay is not advancing a negative utilitarian thesis, despite any superficial resemblance.

A logical conclusion can be drawn, in this respect, concerning the ideal goal of utilitarian philosophy. This conclusion could be reached, analogously, through an external, non-utilitarian philosophical appeal to the ancient Platonic conceptualization of ‘forms’. This unarticulated suggestion of the theoretical possibility of an abstract, ideal utilitarian society, free from *any* punishment, is, admittedly, unattainable in the ‘real’ world of Plato’s ‘shadows’. But it *is* attainable to the philosopher as a rationally conceived ‘form’ that serves as a measurement of relative success or failure to achieve certain values. Plato’s normative quest for an ideal republic that cannot be experienced but only perceived through a superior application of reason, offers a potentially appropriate model for understanding Bentham’s apparent, though unstated, allusion to this modern version of an unattainable philosophical and political goal,

³⁹ J. C. C. Smart, ‘An Outline of a System of Utilitarian Ethics’ in *Utilitarianism: For and Against*, eds. J. C. C. Smart and B. Williams, Cambridge, 1973, pp. 28-30, and R. N. Smart, ‘Negative Utilitarianism’, *Mind*, lxxvii. (1958), pp. 542-543.

especially as revealed through the ‘metaphor of the cave’.⁴⁰ Hypothetically, a state that can promote pleasure in a manner that avoids *ever* imposing pain arguably offers a similar standard for evaluating the ultimate ethical appropriateness of all penal actions of government.

Arguably, this approach to the interpretation of utilitarianism also offers a potential Aristotelian dimension. ‘Pleasure’ can be identified as the ultimate end, or *telos*, of a modern government. If the utilitarian conceptualization of a state’s *telos* is the promotion of pleasure, then the best possible government is one that achieves that end as perfectly as possible, thus avoiding the imposition of any pain. Even if no state is capable of attaining that abstract end, perfectly, it can be judged to be better than another state if it can promote the pleasure of society through the application of less pain than another state can achieve, consistent with an Aristotelian approach.⁴¹ The state that advances the pleasure of a crime-free society while imposing the least possible pain through punishment is, therefore, superior to the state that achieves a similar result but inflicts a greater proportion of punishment.

Penal law rests upon the assumption that certain persons will seek their particular ‘pleasures’ in a manner that will inflict various types of ‘pain’ upon other persons and, indirectly, upon the general society. It also assumes that the only effective way to eliminate the ‘pain’ that these persons will inflict in the course of this pursuit of their own criminal ‘pleasure’ is for that government to counter that ‘pain’ with its own infliction of penal ‘pain’. Because inflicting ‘pain’ is, theoretically, anathema to the government that faithfully observes the utilitarian model, it is an action that is made necessary only because failure to inflict that ‘pain’ upon the criminal will result in even greater ‘pain’ to that person’s victims and the general well-being of society.⁴²

Avoiding Punishment as an Intrinsic Ideal

⁴⁰ Plato, *The Republic*, trans. G. M. A. Grube, Indianapolis, 1974, bk. vii, and J. Wild, *Plato’s Modern Enemies and the Theory of Natural Law*, Chicago, 1968, pp. 138-150.

⁴¹ Aristotle, *The Politics*, trans. T. A. Sinclair, Baltimore, 1972, pp. 25-29; Aristotle, *Nicomachean Ethics*, trans. M. Ostwald, Indianapolis, 1962, pp. 4-18; and T. Irwin, *Aristotle’s First Principle*, Oxford, 1988, pp. 94-116

⁴² F. Rosen, ‘Crime, Punishment, and Liberty’, *History of Political Thought*, xx. (1999), 173-85.

Punishment is, therefore, a ‘necessary’ yet ‘undesirable’ ‘evil’ because it imposes ‘pain’, ironically, as a means of eliminating ‘pain’ and, thus, increasing the capacity for the greatest number of persons to pursue ‘pleasure’. Consequently, the logical result of this utilitarian conceptualization of penal law and policy is an approach that is both constrained and *absolutely* reluctant. If punishment is, indeed, ‘evil’, then the ability of the state to advance pleasure for society without any recourse to it at all constitutes an ideal—perhaps, even, a ‘moral’ ideal. That approach arguably constitutes, in turn, a Platonic ‘form’ or, perhaps, even a pre-Socratic notion of an ultimate ‘virtue’, signified by the ideal of *archē* (a concept that also is conceived as an appeal to ‘first principles’) from which all other moral concepts can be derived.⁴³

These themes of ‘constraint’ and ‘reluctance’ lie, by implication, at the core of the utilitarian principle of proportionality of punishment, even though it is not explicitly identified or acknowledged in those terms. Ideally, no punishment should be inflicted upon anyone. If, however, that ideal is unattainable, then only the absolute least amount of ‘pain’ (in the form of punishment) must be imposed in order to achieve the greater pleasure that this action seeks to achieve. In that way, the ‘pain’ of punishment becomes proportional to the ‘pleasure’ that it produces: minimal ‘pain’ results in ‘maximum pleasure so the utilitarian ideal is realized.’⁴⁴

Bentham distinguished different types of ‘pleasure’ and assigned a hierarchy of preferential status regarding them. Interestingly, this approach appears to deviate from the more rigidly empirical emphasis that generally defines utilitarian thought. Rather than relying upon the initial *ontological* premise that all humans avoid pain and seek pleasure, regardless of qualitative differences in defining the conditions that constitute ‘pain’ and ‘pleasure’ for each person, Bentham appears to have attempted to offer a homogeneous categorization of ‘pleasures’. Some types of pleasure are alleged to be more useful than other types and, thus, preferential as a basis for determining the sorts of ‘pleasure’ that a government generally should

⁴³ E. Barker, *Greek Political Theory: Plato and His Predecessors*, London, 1961, pp. 52-54; E. Hussey, *The Presocratics*, London, 1974), pp. 69-73; G. S. Kirk and J. E. Raven, *The Presocratic Philosophers*, Cambridge, 1957); and P.E. Sigmund, *Natural Law in Political Thought*, Cambridge, MA, 1971, pp. 1-3.

⁴⁴ Miller, ‘Actual-Consequence Act Utilitarianism’, pp. 49-62.

promote for society. These pleasures include ones that are achieved through the necessary imposition of ‘pain’ upon persons whose actions would interfere with the experience of ‘pleasures’ for other persons.⁴⁵

Punishment, itself, can be used as a means of promoting a more useful ‘pleasure’ for the persons upon whom it is imposed. But it is the actual calculation of appropriate, or proportional, punishment that becomes the core of the thesis of *The Rationale of Punishment*. Bentham places particular emphasis upon the quantification of this process, especially in terms of the varying, contributory sources of pleasure and pain that are considered. The pain of the offense must be weighed against the pain of the punishment, while the pleasure of the offender in committing the relevant offense is weighed against the pleasure of the public in preventing the crime or ameliorating its effects.⁴⁶

This last category can be most significant. Bentham noted that the public desire to advance its ‘pleasure’ in terms of strict proportionality might not be precisely attainable. Bentham acknowledged that ‘an error on the minimum side’, in this respect, constitutes the ‘greatest danger’ because it would render a punishment ineffective.⁴⁷ But Bentham then minimized the likelihood that this error will occur. Thus it appears that it is the possibility of punishing too severely that actually constituted, for him, the outcome that should be most carefully avoided.⁴⁸ So it can be argued that the lack of strict proportionality ought to favor, from Bentham’s perspective, the offender—again implying not just a pragmatic concern but suggesting that the pain of punishment must be avoided as much as possible, if not entirely.

An error on the maximum side [of punishment], on the contrary, is that to which the legislators and men in general are naturally inclined—antipathy, or a want of compassion for individuals who are represented

⁴⁵ Bentham, *Rationale of Punishment*, bk. ii.

⁴⁶ *Ibid.*, pp. 32-41.

⁴⁷ *Ibid.*, p. 38.

⁴⁸ H. Bedau, ‘Bentham’s Theory of Punishment: Origin and Content’, *Journal of Bentham Studies*, vii (2004).

as dangerous or vile, pushes them onward to an undue severity. It is on this side, therefore, that we should take the most precautions, as on this side there has been shewn [sic] the greatest disposition to err.⁴⁹

Despite his pragmatic calculations, Bentham displayed a tendency to minimize punishment that suggests the possibility of characterizing this area of law and public policy as truly constituting an intrinsic, rather than merely an instrumental, evil. Granted, a few utilitarian commentators also have used the term ‘intrinsic evil’ in reference to the general concept of punishment. However, their actual application of the concept generally has been directed toward a description its instrumental or extrinsic effect.⁵⁰ They have not treated it as an evil in itself.

Conclusion

Of course, it is far from clear that Bentham contemplated the possibility of regarding punishment as a truly *intrinsic* evil. But it may be extremely useful to ‘tease’ such an understanding out of his analysis, especially as it is presented within *The Rationale of Punishment*. That understanding could overcome the unfortunately-persistent and misplaced criticism that a utilitarian scheme of penal law and policy regards punishment as merely a competing form of pain and an instrument to maximize pleasure that could justify the punishment of an innocent person. That conclusion clearly seems to be contrary to the spirit of this book and Bentham’s entire intent regarding the reform of penal law. Despite reevaluations in this area, the commitment of Bentham, James Mill, and other early utilitarians, in particular, to the cause of penal reform and the elimination of a vindictive and harsh political environment regarding law and punishment is well established, even if subject to some criticism and

⁴⁹ Bentham, *Rationale of Punishment*, p. 38.

⁵⁰ References to this specific philosophical mis-designation of ‘intrinsic’ evil can be found in J. Hospers, *Human Conduct: An Introduction to the Problems of Ethics*, Belmont, CA, 1995, pp. 289-293, 302-304, and (especially in reference to later utilitarians) Edward W. Strong, ‘Justification of Juridical Punishment’, *Ethics*, lxxix. (1969), pp. 188-189. References to this misconception and the proper understanding of ‘intrinsic’ evil as being independent of circumstance and consequence can be found in V. Haksar, ‘Coercive Proposals’, *Political Theory*, iv. (1976), pp. 73-74, and, especially, A. Kolnai, ‘The Thematic Primacy of Moral Evil’, *The Philosophical Quarterly*, vi. (1956), pp. 37-38.

modification.⁵¹

Furthermore, this understanding could provide a clearer standard. By establishing the intrinsic evil of punishment as a means of using its complete elimination as the ideal against which all penal law and policy can be measured, the proper proportionality of specific acts of punishment can be more readily evaluated. If punishment is intrinsically evil (so that it should be avoided as much as absolutely possible), then the imposition of any punishment can be assessed in terms of whether or not a lesser punishment can achieve the same effect. Also, this approach could gain the moral advantage that retributivist approaches to punishment enjoy in terms of an appeal to a higher ethical ideal (punishment as an *absolute* evil) that can counter subjective claims that punishment is a moral consequence of desert.

Utilitarian critiques of penal law and policy would not be perceived, from this perspective, as calculations of sterile, rationally-derived trade-offs of relative causes and consequences of pain and pleasure. Instead, utilitarianism can gain the dimension of appealing to a (admittedly utopian) desire to attain a higher goal (akin to a Platonic form) in which all pleasure can be advanced and all pain can be abolished. Therefore, from this vantage, proportionality is not only a guideline but an imperfect consequence of an inability to achieve a perfect standard by avoiding the imposition of an intrinsic 'evil' as much as possible. Potentially, the philosophical implications of this approach could be instructive and the policy implications could be considerable.⁵²

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⁵¹ J. E. Crimmins, 'Bentham's Philosophical Politics', *Harvard Review of Philosophy*, iii. (1993), pp. 18-22.

⁵² This relationship and potentiality is suggested in Keally McBride, *Punishment and Political Order*, Ann Arbor, MI, 2007, pp. 103-126, especially pp. 118-119.